Removal Jurisdiction: A Tool in Combating Forum Manipulation through Improper (or Fraudulent) Joinder

(Part 2 of 3)

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It is well settled that a plaintiff, within the bounds of the venue statutes, has a right to pick the forum in which he will pursue his claims. With few exceptions, a defendant will not be heard on the issue. An exception does exist, though, in cases that are filed in state court, but which could have been filed in federal court. In such cases the defendant has a statutorily-created voice: removal. (The previous article in this series, "*Removal Jurisdiction: A Primer and Refresher,*" *The MDLA Quarterly*, Summer 2009, discussed the various instances in which a defendant can exercise that voice by removing a case properly filed and pending in state court.) Too often, however, a plaintiff, whether intentionally or unintentionally, will attempt to silence the defendant's voice by improperly joining defendants or claims that defeat, or at least appear to defeat, federal diversity jurisdiction. This article, while it cannot cover every nuance of the improper joinder doctrine, is intended as a primer and refresher on how this particular brand of forum manipulation can be effectively combated through the exercise of removal jurisdiction.

Creation of the Fraudulent Joinder Doctrine

The fraudulent joinder doctrine, as it is historically known, was judicially created to remedy various abuses allowed by an ever-changing statutory scheme. Indeed, although Congress first established the inferior federal courts and dictated, through the Judiciary Act of 1789, 1 Stat. 73, 79, that they would have original jurisdiction over those matters arising between citizens of different states, Congress supplemented, amended, revised and/or rewrote the statutes governing the jurisdiction of the inferior federal courts six times between 1789 until 1911. *See* 14 State. 306 (1866); 14 Stat. 558 (1867); 18 Stat. 470 (1875); 24 Stat. 552 (1887); 25 Stat. 433 (1888); Chapter 89, Section 28 of the Judicial Code of 1911. The Supreme Court, faced with those fluxing statutory dictates and recognizing that certain abuses were occurring, established the doctrine of fraudulent joinder to guard against misstatements of fact and misjoinders of parties and causes of action made for the purpose of defeating federal diversity jurisdiction. *See Bentley v. Halliburton Oil Well Cementing Co.*, 174 F. 2d 788 (5th Cir. 1949); *Parks v. New York Times Co.*, 308 F.2d 474, 478 (5th Cir. 1962). In fact, as early as 1913, only two years after the seventh revision to the governing statutes, the Supreme Court stated that a court need not determine more than "whether there was a colorable ground for [the plaintiff's cause of action against the non-diverse defendant]" before it could determine whether a non-diverse defendant had been fraudulently joined to defeat federal diversity jurisdiction. *See Chicago, Rock Island & Pacific R.R. Co. v. Schwyhart*, 227 U.S. 184, 194 (1913).

Since its enactment of the Judiciary Code of 1911 (and the judicial creation of the fraudulent joinder doctrine), Congress has seen fit to completely rewrite the jurisdictional mandate of the inferior federal courts only once. That dictate, Title 28 of the United States Code, went into effect on September 1, 1948, and remains in effect and substantially unchanged to date. Pursuant to Title 28, Section 1441, if a case that could be filed in federal court pursuant to 28 U.S.C. § 1332 (diversity) is brought in a state court, the same may be removed to the district court embracing the place where the action is pending, "if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." *See* 28 U.S.C. § 1441(a) and (b). Consequently, when an action arises in which there is complete diversity, except for the presence of a non-diverse defendant, diversity jurisdiction will not be defeated unless the non-diverse defendant is "properly joined and served."

The "properly joined and served" language utilized in section 1441(b) appears to be a partial codification of the judicially-created doctrine of fraudulent joinder. *See Smallwood v. Illinois Central R.R. Co.*, 385 F. 3d 568, 573-74 (5th Cir. 2004). Indeed, the phrase "properly joined and served" is conspicuously absent from Congress' first legislative dictate. *See* 1 Stat. 73, 79. Moreover, the Fifth Circuit has recognized, relatively recently, that the doctrine should more properly be referred to as the "improper joinder"

doctrine, as opposed to the "fraudulent joinder" doctrine, as the phrase "improper joinder" more closely reflects the underlying purpose of the doctrine, *i.e.*, to ensure the defendants and claims joinded in the suit are "properly joined." *See Smallwood*, 385 F. 3d at 568. The change in nomenclature, obviously, more closely tracks the "properly joinded and served" language used in 28 U.S.C. § 1441(b) as well.

The Improper Joinder Doctrine in the Fifth Circuit

The improper joinder doctrine has long been recognized in the Fifth Circuit. *See Bentley*, 174 F. 2d at 788. Indeed, the Fifth Circuit has long held that "if the plaintiff's petition fails to state a cause of action against the resident defendant" the joinder "will be regarded as a fraudulent joinder for the purpose of defeating the jurisdiction of the federal court, and . . . will be ineffective to prevent the removal of a case otherwise removable upon the ground of diversity jurisdiction." *See Covington v. Indemnity Ins. Co. of North American*, 251 F.2d 930, 934 (5th Cir. 1958) (citing *Wecker v. National Enameling & Stamping Co.*, 203 U.S. 176 (1907)). The Fifth Circuit has continually and properly recognized and refined the doctrine and its contours creating the current removal rules. *See e.g., Smallwood*, 385 F.3d at 568; *Travis v. Irby*, 326 F.3d 644, 648-49 (5th Cir. 2003); *Badon v. RJR Nabisco, Inc.*, 236 F.3d 282 (5th Cir. 2000); *Carriere v. Sears, Roebuck and Co.*, 893 F.2d 98, 100-01 (5th Cir. 1990); *B., Inc. v. Miller Brewing Co.*, 663 F.2d 545, 548-49 (5th Cir. 1981); *Keating v. Shell Chemical Co.*, 610 F.2d 328 (5th Cir. 1980); *Bobby Jones Garden Apartments, Inc. v. Suleski*, 391 F.2d 172, 176-77 (5th Cir. 1968); *Parks*, 308 F.2d at 477-78.

Today, it is well settled that an improper or fraudulent joinder can be established in either of two ways. An improper joinder can be established by showing that there is outright fraud in the pleading of jurisdictional facts. *See e.g., Ross v. Citifinancial*, 344 F.3d 458 (5th Cir. 2003) (citing *Travis*, 326 F. 3d at 648-49; *Griggs v. State Farm Lloyds*, 181 F.3d 694, 699 (5th Cir. 1999)). Or, more commonly, an improper joinder can be established by showing that the plaintiff has no possibility of establishing a cause of action against the non-diverse defendant in state court. *See e.g., Ross*, 344 F.3d at 458; *Travis*, 326 F.3d at 648-49; *Griggs*, 181 F. 3d at 699. Regardless of which method is used, the basis for the claim must be proven by clear and convincing evidence. *See Grassi v. Ciba-Geigy, Ltd.*, 894 F.2d 181 (5th Cir. 1990); *Parks*, 308 F. 2d at 478; *Rogers v. Modern Woodmen of America*, 1997 WL 206757, *2 (N.D. Miss. 1997).

- **Fraud in the Pleading of Jurisdictional Facts**

The first, but far more uncommon, way to prove a fraudulent joinder is to establish fraud in the pleading of jurisdictional facts. *See e.g., Ross*, 344 F.3d at 458; *Travis*, 326 F.3d at 648-49; *Griggs*, 181 F.3d at 699. "Jurisdictional facts" are those facts that affect the jurisdiction of the federal court, including, for example, the residence of the parties. A fraudulent joinder can be shown "by proving that the plaintiff stated the facts knowing them to be false, or with enough information within reach so that he should have known them to be false." *See Parks*, 308 F. 2d at 478. If it is established that the jurisdictional facts give rise to diversity jurisdiction, *e.g.*, if there is complete diversity among the parties, then the plaintiff's improper pleading of those facts cannot extinguish the federal court's jurisdiction.

A more egregious form of fraud in the pleading of jurisdictional facts occurs when there is collusion between the plaintiff and a non-diverse defendant. *See e.g., Joe v. Minnesota Life Ins. Co.*, 272 F. Supp. 2d 603 (S.D. Miss. 2003). For example, in *Joe*, the court found that the plaintiff had no real intention of prosecuting a claim against the non-diverse defendant, but joined the non-diverse defendant anyway to defeat diversity jurisdiction. *Id.* Moreover, the court found that the plaintiff and the non-diverse defendant colluded to ensure that federal jurisdiction was thwarted. *Id.* Specifically, the court found that the non-diverse defendant intentionally failed to assert the statute of limitations as a defense (which would have barred the plaintiff's claims against him), thereby allowing a claim to be stated against him in return for the plaintiff's agreement not to prosecute the action or attempt a recovery against him. *Id.*

If the non-diverse defendant in *Joe* had pled the statute of limitations defense, the issue would have been whether there was a possibility of recovery against the non-diverse defendant in state court, *i.e.*, the analysis would have been whether the second basis for proving a fraudulent joinder had been shown. However, as the statute of limitations defense was not pled (and could be waived), the issue revolved around whether the plaintiff and defendant had colluded with each other to defeat federal jurisdiction and whether the plaintiff, as a result of their agreement, had any intention of pursuing a claim against the non-diverse defendant. In other words, because the statute of limitations was not pled (and, thus, there was a possibility of recovery against the non-diverse defendant in state court) the issue became whether or not the plaintiff acted fraudulently in pleading his claims against the non-diverse defendant at the outset to defeat jurisdiction. The court held that he did and, as a result, denied the plaintiff's motion to remand. *Id.*

- **No Possibility of Recovery against the Non-Diverse Defendant**

The far more common way of establishing an improper or fraudulent

joinder is by showing that the plaintiff has no possibility of establishing a cause of action against the non-diverse (or resident) defendant in state court. *See Griggs*, 181 F. 3d at 699; *B., Inc.*, 663 F. 2d at 549.

◦ **Well-Pleaded Complaint Rule**

The determination of whether a plaintiff can recover against a non-diverse defendant is determined by reference to the "well-pleaded complaint rule." *See Merkel v. Federal Exp. Corp*, 886 F. Supp. 561, 564 (N.D. Miss. 1995); *Gray v. Murphy Oil USA, Inc.*, 874 F. Supp. 748, 751 (S.D. Miss. 1994). The well-pleaded complaint rule states that the court shall look to the substance of the plaintiff's complaint to determine whether federal jurisdiction exists. *See Eitmann v. New Orleans Public Serv., Inc.*, 730 F.2d 359, 365 (5th Cir. 1984). Importantly, federal removal jurisdiction must be determined on the basis of claims made in the state court complaint as it exists at the time of removal. *See Manguno v. Prudential Property and Cas. Ins. Co.*, 276 F. 3d 720, 723 (5th Cir. 2002); *Allen v. R & H Oil & Gas Co.*, 63 F. 3d 1326, 1335 (5th Cir. 1995); *Cavallini v. State Farm Mutual Auto Insurance Co.*, 44 F.3d 256, 264 (5th Cir. 1995). As such, additional claims that may exist, but which are unpled or only pled after the case has been removed, do not affect jurisdiction and should not be factored into the determination of whether a defendant has been improperly joined. *Id.*

◦ **The Standard**

To determine if a non-diverse defendant has been fraudulently joinded, it must be proven that, when accepting the law and facts in the light most favorable to the plaintiff, there is no possibility of recovery against the defendant under state law. *See Travis*, 326 F. 3d at 644. The "no possibility of recovery" standard has been cited by the courts numerous times. Unfortunately, however, in citing to the standard and attempting to describe and apply it, a divide developed. *See Travis*, 326 F.3d at 644 (citing *Griggs*, 181 F.3d at 699; *Green v. Armerad Hess*, 707 F. 2d 201, 205 (5th Cir. 1983); *B., Inc.*, 663 F. 2d at 549; *Bobby Jones Garden Apartments,* 391 F. 2d at 176; *Parks*, 308 F. 2d at 476). On one hand, a number of opinions described the standard as requiring a defendant to prove that the plaintiff had "absolutely no possibility" of recovery against the resident defendant. *See e.g., Griggs*, 181 F.3d at 699; *Green*, 707 F. 2d at 205. Other opinions, however, indicated that the defendant need only to prove that the plaintiff has no "reasonable basis" for recovery against the resident defendants. *See Griggs*, 181 F.3d at 699; *B., Inc.*, 663 F. 2d at 549; *Suleski*, 391 F. 2d at 176; *Parks*, 308 F. 2d at 476. For obvious reasons, the plaintiff's bar generally preferred and cited to the former recitation of the standard, while the defense bar generally preferred and cited to the later, thereby creating additional confusion.

The Fifth Circuit narrowed, if it did not close, the apparent gap created by the differing descriptions of the standard in *Badon v. RJR Nabisco, Inc.*, 236 F. 3d 282 (5th Cir. 2000). First, the Court rejected the plaintiff's argument that "any mere theoretical possibility of recovery under local law – no matter how remote or fanciful – suffices to preclude removal," thereby rejecting the "absolutely no possibility" standard. *Id.* at 286 n. 4. Second, the Court held that "there must at least be arguably a reasonable basis for predicting that state law would allow recovery in order to preclude a finding of fraudulent joinder," thereby affirming the "reasonable basis" standard. *Id.* at 286 n. 4. Confusion, however, persisted. As such, the Fifth Circuit revisited the issue again in *Travis v. Irby*, 326 F.3d, 644 (5th Cir. 2003).

In *Travis v. Irby*, the Fifth Circuit analyzed the case law that devolved into the two differing descriptions of the fraudulent joinder standard and determined that "although [the two ways in which the standard has been described] appear dissimilar, 'absolutely no possibility' vs. 'reasonable basis,' we must assume that they are meant to be equivalent because each is presented as a restatement of the other." *Id.* at 648. The Court then went on to affirm its holding in *Badon* that "if there is arguably a reasonable basis for predicting that the state law might impose liability on the facts involved, then there is no fraudulent joinder. [But emphasized that] this possibility, however, must be reasonable, not merely theoretical." *Id.* (citing *Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 312 (5th Cir.2002)). Consequently, although the standard is phrased to require a showing that there is "no possibility" of recovery against the resident defendant, the "no possibility" language cannot be taken literally, as it is only reasonable bases for recovery that can defeat a claim of fraudulent joinder.

◦ **The Analysis**

There are two ways a court can apply the fraudulent joinder standard to determine if a plaintiff has a reasonable basis of recovery against a resident defendant under state law. *See Smallwood*, 385 F. 3d at 573. Generally, the courts will apply a 12(b)(6)-type analysis which focuses on the allegations of the complaint. *Id.* If the allegations of the complaint fail to state a claim against the non-diverse defendant then there is no possibility of recovery against that defendant and he is deemed to be improperly joined. *Id.* If, on the other hand, the allegations of the complaint do state a claim against the non-diverse defendant, then, at least typically, there is no improper joinder and the case is

subject to remand. *Id.* The fact that the complaint states a claim against the non-diverse defendant, however, is not necessarily the end of the inquiry. If the defendant can establish that the plaintiff has misstated or omitted discrete facts that affect his ability to recover against the non-diverse defendant, the court may apply the second analysis. Specifically, the court may "pierce the pleadings" and conduct a more in-depth summary judgment-type analysis to determine if the defendant was improperly joined. *Id.* (citing *Badon*, 224 F. 3d at 389 n. 10). *See also Ross*, 334 F. 3d at 458.

The determination of whether a 12(b)(6)-type analysis or a summary judgment-type analysis will be used lies within the discretion of the district court. *See Smallwood*, 385 F. 3d 573-74. As a practical matter, whatever evidence the defendant can garner to conclusively disprove liability against the non-diverse defendants, or conclusively prove specific facts stated in the complaint are incorrect, should generally be attached in response to the plaintiff's motion to remand, if not already attached to the notice of removal. Otherwise, the court will effectively be prevented from delving into the summary judgment-type analysis for lack of evidence. Care should be taken, however, to ensure the evidence relied upon conclusively establishes the fact at issue and does not simply create an issue of fact, as all ambiguities, whether in the law or the facts, must be construed in favor of remand. *See Griggs*, 181 F.3d at 699; *Dodson v. Spiliada Maritime Corp.*, 951 F.2d 40, 42 (5th Cir.1992); *B., Inc.*, 663 F.2d at 549. In other words, if evidence is relied upon which does not conclusively prove a specific fact, but simply creates an issue of fact on the matter, the evidence has no weight for purposes of defeating a remand motion.

In some instances, evidence may be available through discovery that will conclusively establish jurisdiction. In those instances, remand-related discovery may be utilized. In *Smallwood*, the majority cautioned that "[remand-related] discovery by the parties should not be allowed except on a tight judicial tether, sharply tailored to the question at hand, and only after a showing of its necessity." *See Smallwood*, 385 F. 3d at 574. Some have argued that these remarks in the majority opinion in *Smallwood* effectively disposed of remand-related discovery. As Judge Higginbotham, who wrote the majority opinion in *Smallwood*, and Judges Wiener and Dennis, who joined in the majority opinion in *Smallwood*, later made clear in *Guillory v. PPG Industries, Inc.*, however, that was not the intention. 434 F. 3d 303, 311 (5th Cir. 2005). Rather, the statements were meant to limit, not eliminate, remand-related discovery. *Id.* In fact, they recognized that "to [eliminate remand-related discovery] would deny all substance to the pierce-the-pleading option that [the Fifth Circuit] had repeatedly sanctioned." *Id.* (citing *Travis*, 326 F. 3d at 648-49; *Carriere*, 893 F.2d at 100; *Griggs*, F. 3d at 699-702). In also bears noting, that even the limiting effect of the majority's remarks in *Smallwood* are questionable given that the remarks are "pure dicta" and have "no precedential effect." *Id.* at 583 n.10.

In any case, if the court pierces the pleadings and the defendant can establish a fraudulent joinder, a plaintiff may not simply rest on the allegations in his complaint. *See Badon,* 224 F.3d at 389 & n.10. Indeed, once a showing of fraudulent joinder has been made "conclusory or generic allegations of wrongdoing on the part of [a] non-diverse defendant are not sufficient to show that [the] defendant was not fraudulently joined. Therefore, when responding to a charge of fraudulent joinder, a plaintiff must allege specific acts of wrongdoing on the part of the non-diverse defendant in the complaint and submit evidence to support those claims." *Ross v. Citifinancial, Inc.*, 2002 WL 461567, *3 (S.D. Miss. 2002). *See also Howard v. Citifinancial, Inc.*, 195 F. Supp. 2d 811 (S.D. Miss. 2002); *Strong v. First Family Financial Services, Inc.*, 202 F. Supp. 2d 536 (S.D. Miss. 2002); *Harrison v. Commercial Credit Corp.*, 2002 WL 548281 (S.D. Miss. 2002); *Crockett v. Citifinancial, Inc.*, 192 F. Supp. 2d 648 (N. D. Miss. 2002).

Stated otherwise, when a court pierces the pleadings and the defendant establishes the non-diverse defendant has been fraudulently joined, the general rule that all facts are to be automatically construed in favor of remand, *see e.g., B., Inc.*, 663 F.2d at 549, ceases to be applicable. For, "while [the summary judgment procedure] requires that 'all disputed questions of fact' be 'resolved in favor of the non-removing party, [a] s with a summary judgment motion, in determining diversity the mere assertion of 'metaphysical doubt as to the material facts' is insufficient to create an issue if there is no basis for those facts.' So also as with a summary judgment motion: '[W]e resolve factual controversies in favor of the non-moving party, but only when there is an actual controversy, that is, when both parties submitted evidence of contradictory facts. We do not, however, in the absence of proof, assume that the nonmoving party could or would prove the necessary facts.'" *See Badon*, 224 F.3d at 393-94.

- **The Common Defense Rule**

The plaintiff's improper joinder of a non-diverse defendant can be established through application of an affirmative defense or other rule of law that precludes recovery against the non-diverse defendant. An improper joinder may not, however, be based on any defense that bars the plaintiff's claims against both the non-diverse and diverse defendants alike, inasmuch as such "common defenses" run to the merits of the case as a whole rather than

simply to the joinder of the non-diverse defendant. *See Smallwood*, 385 F. 3d at 574.

The "common defense rule," as it has become known, is narrow by its own terms. Indeed, when adopting the rule the *en banc* Fifth Circuit explicitly stated that its "holding [was] narrow. [And that the rule] applies only in that limited range of cases where the allegation of improper joinder rests only on a showing that there is no reasonable basis for predicting that state law would allow recovery against the in-state defendant and that showing is equally dispositive of all defendants." *Smallwood,* 385 F.3d at 576. The Court emphasized numerous times that the showing on which the allegation of improper joinder rests must "necessarily compel" a finding that "equally disposes of all defendants" and is "equally dispositive of all defendants." *See Id.* at 575.

Stated otherwise, the basis for alleging improper joinder must, for the common defense rule to apply, dictate that there is no reasonable possibility of recovery against any defendant on any claim, be they diverse or non-diverse. *Id.* If the basis for the defendants' claims of improper joinder do not mandate such a finding as to all of the defendants on all of the claims pled against them (as it must to each of the non-diverse defendants to render them improperly joined), then it cannot be said that the showing is "equally dispositive" of all the defendants or that it "equally disposes" of all the defendants. In such cases the common defense rule does not apply.

The narrow application of the common defense rule was further confirmed in *Rainwater v. Lamar Life Ins. Co.*, 391 F.3d 636 (5th Cir. 2004). In *Rainwater*, the "case turn[ed] . . . on whether the limitations defense that disposed of all claims against [the] in-state defendants in fact disposed of all claims against all defendants." *Id.* at 638. The Court noted, "*Smallwood* is triggered only when all defendants are reached" and the defense in question is dispositive of all claims against all defendants." *Id.* Thus, pursuant to *Rainwater's* interpretation of *Smallwood*, the existence of a single claim against a diverse defendant which is not likewise pled against the non-diverse defendant prevents the common defense rule from being applicable. *Id. See also Ameen v. Merck & Co., Inc.*, 226 Fed. Appx. 363, 370 (5th Cir. 2007); *Wingate v. Air Products Inc.*, 166 Fed. Appx. 98 (5th Cir. 2006); *Boone v. Citigroup, Inc.*, 416 F. 3d 382 (5th Cir. 2005).

The Effect of the Improper Joinder Doctrine on Various Rules

When removing a case it is important that the defendant take special care to ensure that all requirements for removal, both substantive and procedural, are fully and properly met no matter the grounds for removal. Thus, although an assertion that a non-diverse defendant has been improperly joined equates with an assertion that the substantive requirements for federal diversity removal jurisdiction are present, *i.e.*, that there is complete diversity between the plaintiffs and the properly joined and served defendants, the various procedural requirements to properly effectuate a removal remain. The improper joinder doctrine, though, because its roots are imbedded in the propriety of the plaintiff's claims against the non-diverse defendant, can affect the procedural requirements to effectuate a removal as well.

• 28 U.S.C. § 1441(b)

28 U.S.C. § 1441(b) states that an action based on diversity jurisdiction "shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." In other words, even if the plaintiffs and defendants are diverse in citizenship (such that, substantively, diversity jurisdiction exists under 28 U.S.C. § 1332), if one of the defendants is a resident of the forum state, the case cannot be removed. This rule, because it does not affect the district court's original jurisdiction under 28 U.S.C. § 1332, is procedural. *See Denman v. Snapper Div.*, 131 F.3d 546, 548 (5th Cir. 1998). The improper joinder doctrine, though, nullifies the effect of this procedural prohibition. Indeed, if the resident defendant (which renders the 1441(b) prohibition applicable) is improperly joined, his citizenship is disregarded and the case can be properly removed.

• The "Rule of Unanimity"

28 U.S.C. § 1446(a) states that the notice of removal should be "signed pursuant to Rule 11 of the Federal Rules of Civil Procedure." Case law has added to this provision through the "rule of unanimity." The rule of unanimity requires that all properly joined and served defendants sign the notice of removal or file a separate written joinder indicating their consent to removal. *See Chicago, Rock Island & Pac. Ry. v. Martin*, 178 U.S. 245, 248 (1900); *Gillis v. Louisiana*, 294 F.3d 755, 759 (5th Cir. 2002). The rule of unanimity, however, is limited to only those defendants "who are properly joined and served." *See Farias v. Bexar County Board of Trustess for Mental Health Mental Retardation Services*, 925 F.2d 866, 871 (5th Cir. 1991); *Johnson v. Helmerich & Payne, Inc.*, 892 F.2d 422, 423 (5th Cir. 1990); *Getty Oil Corp., Div. of Texaco, Inc. v. Insurance Co. of N. Am.*, 841 F.2d 1254, 1262 (5th Cir. 1988). "Nominal" or "formal" parties need not join. *See Farias*, 925 F.2d at 871; *Robinson v. National Cash Register Co.*, 808 F.2d 1119, 1123 (5th Cir. 1987); *B., Inc.*, 663 F.2d at 549-50; *Tri-Cities Newspapers,*

Inc. v. Tri-Cities Printing Pressmen and Assistants' Local 349, Int'l Printing Pressmen and Assistants' Union of N. Am., 427 F.2d 325, 327 (5th Cir. 1970).

Consequently, if the predicate of fraudulent joinder allegation is the plaintiff's inability to recover against the non-diverse defendant in state court, the non-diverse, fraudulently joinded defendant, need not join in the removal petition. This result is dictated by the applicable standards. In order "[t]o establish that non-removing parties are nominal parties [and, thus, need not join in the removal], 'the removing party must show . . . that there is no possibility that the plaintiff would be able to establish a cause of action against the non-removing defendants in state court.'" *Farias*, 925 F.2d at 871 (citing *B., Inc.*, 663 F.2d at 549). This is the same standard used in determining whether a party has been fraudulently joined. *See e.g., B., Inc.*, 663 F.2d at 549. In other words, in determining if a non-diverse defendant has been fraudulently joined, a court will also necessarily determine if the non-diverse defendants are "nominal" parties and, thus, whether they were required to join in the removal petition.

If, on the other hand, the fraudulent joinder claimed is based on fraud in the pleading of jurisdictional facts, the rule of unanimity may or may not be affected. If, for example, the "fraud" simply relates to the citizenship of the "non-diverse" defendant, the "fraudulent joinder" has nothing to do with the propriety of the claims asserted. Thus, if the fraudulent joinder is established, the "fraudulently joined" defendant will not be dismissed. Rather, it will simply be recognized that the jurisdictional facts the plaintiff pled in his complaint are incorrect and that the allegedly-non-diverse defendant is actually a diverse defendant. That being the case, the "fraudulently joinded" defendant should join in the petition for removal just like the balance of the defendants.

- **The One Year Limit of Diversity-Based Removals**

28 U.S.C. § 1446(b) consists of two paragraphs. The second paragraph of 28 U.S.C. § 1446(b) states that "if the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action."

The Fifth Circuit has recognized that "the first paragraph [of 28 U.S.C. § 1446(b)] applies only to civil actions in which the case stated by the initial pleading is removable. The second paragraph applies only to civil actions in which the initial pleading states a case that is not removable. The dependent phrase – 'except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action' – is incorporated into the second paragraph. Normally, one would read such a phrase as relating only to the sentence or paragraph of which it is a part." *See New York Life Ins. Co. v. Deshotel*, 142 F.3d 873, 886 (5th Cir. 1998). In other words, the one year limitation is not applicable to actions that were removable when filed. *Id. See also Johnson v. Heublein Inc.*, 227 F.3d 236, 241 (5th Cir. 2000); *Brown v. Ascent Assurance, Inc.*, 2001 WL 1530347, *2 (N.D. Miss. 2001).

In keeping with the Fifth Circuit's reasoning, several courts have noted that "[a] defendant, in charging that [a] plaintiff fraudulently joined non-diverse defendants to defeat removal, has essentially asserted that [the] cause was removable at the time of filing. Therefore, pursuant to *New York Life*, the one-year bar does not apply . . . if the defendant's fraudulent joinder argument is valid." *See Little v. New England Mutual Life Insurance Co.*, 1998 WL 527220, *4 (N.D. Miss. 1998). *See also Curry v. State Farm Mut. Auto. Ins. Co.*, 599 F. Supp. 2d 734, 740-41 (S.D. Miss. 2009). Other courts have reached this same conclusion. *See Miller v. BAS Technical Employment Placement Co.*, 130 F.Supp.2d 777 (S.D.W.Va. 2001); *Hardy v. Ajax Magnathermic Corp.*, 122 F.Supp.2d 757 (W.D. Ky. 2000).

The logic behind the finding is sound. If the sole basis for removal is diversity jurisdiction, the same being reached via an allegation of fraudulent joinder, the court must first determine if the resident defendants were, in fact, fraudulently joined. If the resident defendants were not fraudulently joined, complete diversity would not be present and the case would be properly remanded, even if filed within one year of the filing of the complaint. If, however, the resident defendants were fraudulently joined for the sole purpose of defeating diversity jurisdiction, complete diversity would be present. Moreover, complete diversity would have been present, albeit undisclosed and undiscovered, from the outset. In other words, the action would have been removable upon filing and the one year limitation in the second paragraph of 28 U.S.C. § 1446(b) would be inapplicable.

The effects of the rulings in *New York Life*, *Little* and *Curry* must also be kept in mind when removing a case. Specifically, if the defendant was fraudulently joined and, thus, the case was removable when filed (such that the second paragraph of 1446(b) does not apply), then the first paragraph of 1446(b) must necessarily apply. The first paragraph states that if the case was removable when filed, the notice of removal must be filed within 30 days of the defendant's receipt, through service or otherwise, of the initial pleading. *See* 28 U.S.C. § 1446(b). If a case is removed

after the expiration of the one-year deadline found in the second paragraph of 28 U.S.C. § 1446(b), then, obviously, the removal will be effectuated after the expiration of the thirty-day deadline found in the first paragraph of 28 U.S.C. § 1446(b). Thus, other arguments, such as the equitable tolling of the other time limitations, should be considered.

• Other Time Limits

28 U.S.C. § 1446(b) contains two additional time limitations. The first paragraph of the statute states that the notice of removal should be filed within thirty days of the defendant's "receipt . . . through service or otherwise of a copy of the initial pleading." 28 U.S.C. § 1446(b). If the case stated by the initial pleading is not removable, the second paragraph of the statute states that the case may be removed within thirty days of the defendants "receipt . . . through service or otherwise of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable." *Id.*

The time limitations found in 28 U.S.C. § 1446(b) are "merely modal and formal and may be waived." *Tedford v. Warner Lambert*, 327 F.3d 423, 426 (5th Cir. 2003) (citing *Leininger v. Leininger*, 705 F.2d 727, 729 (5th Cir. 1983) (citing *Harris v. Edward Hyman Co.*, 664 F.2d 943 (5th Cir. 1981)); *London v. United States Fire Ins. Co.*, 531 F.2d 257 (5th Cir. 1976); *Weeks v. Fidelity & Cas. Co.*, 218 F.2d 503 (5th Cir. 1955)); *Barnes v. Westinghouse Elec. Corp.*, 962 F.2d 513, 516 (5th Cir. 1992); *Nolan v. Boeing Co.*, 919 F.2d 1058, 1063 ftnt. 6 (5th Cir. 1990). Accordingly, the conduct of the parties may affect whether it is equitable to strictly apply them. *See Tedford*, 327 F.3d at 426 (citing *Brown v. Demco, Inc.*, 792 F.2d 478, 481 (5th Cir. 1986); *Doe v. Kerwood*, 969 F.2d 165, 169 (5th Cir. 1992)).

Although the equitable exception recognized by the Fifth Circuit for purposes of tolling the time limitations of 28 U.S.C. § 1446(b) are not based on the improper joinder doctrine, if a plaintiff fraudulently joins a defendant solely to defeat federal diversity jurisdiction, an argument can be made that the plaintiff's conduct effects the equities of the situation and, thus, it is inequitable to strictly apply the time limitations to effect a remand.

Summary

The improper joinder doctrine has been modified, amended and clarified multiple times since its creation almost 100 years ago. At its core, however, the doctrine was created, and its purpose remains, to protect federal removal jurisdiction. Properly used, the improper joinder doctrine can be a powerful tool to combat forum manipulation. ■