HOGAN VS. GAWKER II: A STATUTORY SOLUTION TO FRAUDULENT JOINDER

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INTRODUCTION

In 2012, Gawker Media, LLC[1] anonymously received a video that showed Hulk Hogan[2] engaging in private sexual conduct with a woman named Heather Clem.[3] Gawker then published a brief excerpt from the video with an accompanying piece written by Gawker's editor. Hogan subsequently brought an action against Clem, a resident of Florida, and Gawker Media, LLC, a resident of New York, in Florida state court,[4] arguing that Gawker violated his privacy in publishing the excerpt and that Clem violated his privacy in taping the encounter without his permission.[5] Gawker immediately removed the case to federal court, premising jurisdiction on diversity and arguing that Hogan had fraudulently joined Heather Clem, also a Florida resident, to defeat diversity jurisdiction.[6] The federal court remanded the case back to Florida state court, finding that that the plaintiff only had to show that there was the possibility he could state a valid cause of action against the non-diverse defendant in order to demonstrate that the joinder was not fraudulent.[7]

Media reports commented on how this decision would affect the narrative of the case. Politico reported:

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[1] At the time of the lawsuit, Gawker had more than 250 employees across seven different internet sites, which were dedicated to sports, feminism, politics, and gadgets, among other things. It had a track record of producing controversial scoops. It was majority owned by Mr. Denton, its founder, and took outside investment for the first time specifically to secure funds for this lawsuit. Ravi Somaiya, *Hulk Hogan v. Gawker: A Guide to the Trial for the Perplexed*, N.Y. TIMES (March 17, 2016), www.nytimes.com/2016/03/18/business/media/hulk-hogan-v-gawker-a-guide-to-the-trial-for-the-perplexed.html.

[2] Hulk Hogan, whose real name is Terry Bollea, is a professional wrestling champion, actor, and television personality. *Id.*

[3] Heather Clem was married to Bollea's best friend, Todd Clem, a radio "shock-jock" who legally changed his name to "Bubba the Love Sponge." Gawker Media, LLC. v. Bollea, 170 So. 3d 125, 127 (Fla. Dist. Ct. App. 2015); Somaiya, *supra* note 1.

[4] Bollea initially included Mr. Clem in the lawsuit on the grounds that Mr. Clem had secretly filmed him. Mr. Clem was dropped from the lawsuit when he and Bollea settled for a sum of $5,000 and Mr. Clem allegedly promised to testify for Bollea. Tom Kludt, *Why Hulk Hogan Settled for $5,000 with the Man Who Made His Sex Tape*, CNN (Mar. 12, 2016), www.money.cnn.com/2016/03/12/media/hulk-hogan-gawker-settlement/index.html; Somaiya, *supra* note 1.

[5] Bollea asserted five causes of action against Heather Clem: (1) invasion of privacy by intrusion upon seclusion; (2) publication of private facts; (3) intentional infliction of emotional distress; (4) negligent infliction of emotional distress; and (5) violation of Section 934.10 of the Florida statutes. Bollea v. Clem, 937 F. Supp. 2d 1344, 1349 (M.D. Fla. 2013).

[6] *Id.* at 1348.

[7] *Id.* at 1350.

> There's a very real possibility that Gawker will lose the jury trial. The jury, drawn from Hogan's hometown, will likely be more sympathetic to the wrestler than to a Manhattan media gossip blog. Gawker . . . writes for open-minded, media-savvy millennials. The Pinellas County, Fla., jury is not the site's target audience.[8]

And that was completely right—on March 18, 2016, the Florida state court jury found Gawker liable to Hulk Hogan for $115 million in compensatory damages, and $25 million more in punitive damages.[9] Ultimately Gawker had to dissolve in order to pay the damages.[10]

As every first-year law student learns, the plaintiff is the master of her complaint.[11] She chooses the cause(s) of action, the forum, the timing of the litigation, and the parties involved. One of those decisions can be the choice between the federal and state courts. Despite the deference given to the plaintiff in making this decision, if the plaintiff chooses state court, a defendant retains the right to remove the case to federal court if it could have been brought there initially.[12]

Once a plaintiff has decided to bring her case in state court, she has an incentive to ensure that the lawsuit stays in state court. At the very least, empirical studies have shown that plaintiffs suffer a drop in win rates after a case has been removed to federal court.[13] Because of the strict requirements

[8] Peter Sterne, *Gawker in the Fight of its Life with Hulk Hogan Sex-Tape Suit*, POLITICO (June 12, 2015), www.politico.com/media/story/2015/06/gawker-in-the-fight-of-its-life-with-hulk-hogan-sex-tape-suit-004004.

[9] Bollea v. Gawker Media, LLC, No. 522012CA012447, 2016 WL 4073660 (Fla. Cir. Ct. June 8, 2016); Nick Madigan, *Jury Tacks on $25 Million to Gawker's Bill in Hulk Hogan Case*, N.Y. TIMES (Mar. 21, 2016), www.nytimes.com/2016/03/22/business/media/hulk-hogan-damages-25-million-gawker-case.html.

[10] Sydney Ember, *Gawker.com to Shut Down Next Week*, N.Y. TIMES (Aug. 18, 2016), www.nytimes.com/2016/08/19/business/media/gawkercom-to-shut-down-next-week.html.

[11] Jeffrey L. Roether, *Interpreting Congressional Silence: CAFA Jurisdictional Burden of Proof in Post-Removal Remand Proceedings*, 75 FORDHAM L. REV. 2745, 2748 (2007).

[12] 28 U.S.C. § 1441(a) (2012) ("[A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.").

[13] Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581, 593 (1998) ("Plaintiffs' win rates in removed cases are very low, compared to cases brought originally in federal

of diversity jurisdiction and removal, a plaintiff has various ways to appropriately prevent removal. The plaintiff can choose to bring the action against a non-diverse defendant, or can file the action in the defendant's home state. The plaintiff can also join with another plaintiff who shares citizenship with the defendant.[14]

What happens, however, if a plaintiff goes beyond her permitted discretion and joins parties who lack a stake in the suit specifically in order to prevent removal? While the Federal Rules of Civil Procedure allow a federal court to sever dispensable, non-diverse parties to preserve diversity jurisdiction in some circumstances, it is discretionary, and courts generally only look at the plaintiff's complaint to determine if severability is warranted.[15] In addition, severing non-diverse parties does not address the situation where a plaintiff initially joins a sham party to destroy diversity and, therefore, defeat removal.

The court-created fraudulent joinder doctrine permits the federal court to ignore the inclusion of a non-diverse party who would otherwise destroy federal diversity jurisdiction when the court concludes that the party's joinder is a sham.[16] The doctrine is typically applied in cases where the removing diverse defendant accuses the plaintiff of fraudulently joining a non-diverse co-defendant, as in the situation where Gawker accused Hogan of fraudulently adding Heather Clem as a defendant.[17] The doctrine was originally discussed in a series of Supreme Court opinions, but has not been addressed by the Court in many years. As a result, the lower courts have

court and to state cases. For example, our data reveal that the win rate in original diversity cases is 71%, but in removed diversity cases it is only 34%.").

[14] 28 U.S.C. § 1332(a)(1) (2012).

[15] FED. R. CIV. P. 21 ("[T]he court *may* at any time, on just terms, add or drop a party. The court *may* also sever any claim against a party." (emphasis added)). Under Rule 21, federal courts have immense discretion to either sever dispensable non-diverse parties to preserve diversity jurisdiction or to allow the lawsuit to continue. Under the fraudulent joinder doctrine, federal courts may "ignore the presence of a diversity-destroying defendant if the plaintiff has no legitimate cause of action against the defendant." Matthew C. Monahan, *De-Frauding the System: Sham Plaintiffs and the Fraudulent Joinder Doctrine*, 110 MICH. L. REV. 1341, 1343–44 (2012).

[16] For other articles discussing this issue, *see generally* E. Farish Percy, *Making a Federal Case of It: Removing Civil Cases to Federal Court Based on Fraudulent Joinder*, 91 IOWA L. REV. 189 (2005) [hereinafter Percy, *Federal Case*]. *See also* James M. Underwood, *From Proxy to Principle: Fraudulent Joinder Reconsidered*, 69 ALB. L. REV. 1013, 1025 (2006) [hereinafter Underwood, *Proxy to Principle*]; Walter Simons, Comment, *Choice of Law in Fraudulent Joinder Litigation*, 163 U. PA. L. REV. 603, 609 (2015).

[17] Bollea v. Clem, 937 F. Supp. 2d 1344, 1348 (M.D. Fla. 2013).

developed different standards to determine whether a defendant has been fraudulently joined.[18]

This has led to several problems. First, the various standards lead to inconsistent results, and none of the tests address the possible fraudulent joinder of a co-plaintiff.[19] Second, while the various tests reaffirm that the presence of a non-diverse party eliminates the local bias that is the primary rationale for diversity jurisdiction, they ignore the risk of prejudice against the outsider defendant, like Gawker, which is not eliminated by the presence of a local co-party. In remanding the *Gawker* case back to state court, the federal court emphasized the purpose of diversity jurisdiction, which is to protect the plaintiff from local favoritism towards the defendant.[20] It pointed out that because Clem was a local Florida resident as well and was on the defendant's side of the "v," that would balance any favoritism off.[21] That conclusion ignores the risk of prejudice against the defendant outsider (Gawker) as opposed to bias towards the local plaintiff (Hogan), which is not eliminated by the presence of a local co-party. The potential prejudice to the outsider defendant is exacerbated when there is a disparity in the regard in which locals are held in the community, such as the situation where one side is more famous and "local" than the other. And it is exacerbated when the outsider-defendant is the real target of the action, the deep pocket.

This Article will first review the intersection of federal jurisdiction and litigation strategy by examining the requirements for diversity jurisdiction in federal court as well as the circumstances that must be present to allow a defendant to remove a case from state court to federal court. The Article will then review the history of the court-created doctrine of fraudulent joinder, and will examine the various tests currently in use by the lower federal courts. The Article will then address whether it makes more sense to create a statutory solution, and will examine and analyze the Fraudulent Joinder Prevention Act of 2016, which was recently passed by the House of Representatives.[22] After analyzing the Act, this Article will conclude that,

[18] *See infra* notes 79–81.

[19] For an in-depth discussion of the joinder of sham co-plaintiffs as opposed to sham defendants, see Monahan, *supra* note 15, at 1341.

[20] *See Bollea*, 937 F. Supp. 2d at 1349.

[21] *Id.*

[22] For a recent article that also critiques the Fraudulent Joinder Prevention Act, *see* Percy, *Fraudulent Joinder Prevention Act*, *infra* note 142, at 218–19. For an article in favor of the Act, *see* Arthur D. Hellman, *The Fraudulent Joinder Prevention Act of 2016: A New Standard and a New Rationale for an Old Doctrine*, 17 FEDERALIST SOC'Y. REV. 34, 43 (2016).

while a statutory solution to this issue is appropriate, the current proposal needs to be adjusted in various ways.

I. THE INTERSECTION OF FEDERAL JURISDICTION AND LITIGATION STRATEGY

A. Diversity Jurisdiction

The grant of subject matter jurisdiction of the federal courts is found in the Constitution, which provides that "[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution [and] . . . between Citizens of different states . . . ."[23] Congress has the constitutional authority to decide by statute how much of the federal subject matter jurisdiction under Article III shall be vested in the lower courts.[24] Congress cannot give the lower courts more subject matter jurisdiction than the Constitution allows, but it can give them less. The federal question statute, 28 U.S.C. § 1331, provides that the district courts shall have original jurisdiction of all civil actions that involve a federal question,[25] while the diversity statute, 28 U.S.C. § 1332, provides that the district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum of $75,000 and where the lawsuit is between citizens of different states.[26] The Supreme Court has held that this diversity requirement must be construed as complete diversity, meaning that that no party may share citizenship with any opposing party.[27]

There has been a continued debate over the continued need for diversity jurisdiction. Traditionally, the arguments in favor of diversity are that it protects out-of-state litigants from local bias, it motivates judicial reform, and it allows cross pollination between the federal courts and the state courts.[28]

[23] U.S. CONST. art. III, § 2.

[24] U.S. CONST. art. III, § 1.

[25] 28 U.S.C. § 1331 (2012).

[26] *Id.* § 1332(a)(1).

[27] Strawbridge v. Curtiss, 7 U.S. 267, 267 (1806) (announcing the requirement of complete diversity).

[28] *See* Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 553–54 (2005) ("[T]he purpose of the diversity requirement . . . is to provide a federal forum for important disputes where state courts might favor, or be perceived as favoring, home-state litigants."); *see also* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 74 (1938) ("Diversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the state."); JOHN J. COUND ET AL., CIVIL PROCEDURE CASES AND MATERIALS 260, 261 (8th ed. 2001) ("The most

There have been many proposals to abolish or curtail diversity jurisdiction on the basis that it creates docket congestion, there is no longer local prejudice against out-of-state defendants, and because there is no longer a difference in the law being applied[29] in the state and federal courts, the risk of different outcomes no longer exists.[30] While it continues to exist, there are more and more limits to its use.[31]

common explanation for the creation of diversity jurisdiction was a fear that state courts would be prejudiced against out-of-state parties."); Graham C. Lilly, *Making Sense of Nonsense: Reforming Supplemental Jurisdiction*, 74 IND. L.J. 181, 190 (1998) ("The principal argument for diversity jurisdiction is to protect out of state litigants from local prejudice.").

[29] *Erie R.R. Co. v. Tompkins* abolished general federal common law. 304 U.S. at 78 ("Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State . . . [t]here is no federal general common law."). Under the *Erie* doctrine, if there is no federal directive on point, the federal court must determine if the issue is substantive or procedural. If the issue is substantive, the federal court will use the law of the state in which the federal court sits. If the issue is procedural, the federal court will use federal law. Because cases dealing with a substantive issue use the law of the state in which the federal court sits, rather than a federal common law, the courts are able to achieve equitable results and avoid forum shopping. *See id.* at 64. When the *Erie* doctrine abolished federal common law in 1938, disparate treatment of out-of-state litigants largely diminished. Because of this, many people wish to abolish diversity jurisdiction. *See* James M. Underwood, *The Late, Great Diversity Jurisdiction*, 57 CASE W. RES. L. REV. 179, 198 (2006) ("This Court will not conceal its disaffection for the notion that federal jurisdiction over disputes between citizens of different States is necessary to protect out-of-State parties from local prejudice. State judges, no less than federal judges are obligated to provide a neutral forum. Moreover, State judges, in comparison to federal judges, are more likely to have competence, experience, and expertise in tort, contract, and real estate litigation . . . ." (quoting Thompson v. Gillen, 491 F. Supp. 24, 26 n.1 (E.D. Va. 1980))); *see also* Larry Kramer, *Diversity Jurisdiction*, 1990 BYU L. REV. 97, 98 (1990).

[30] Debra Lyn Bassett, *The Hidden Bias in Diversity Jurisdiction*, 81 WASH. U.L.Q. 119, 120 n.5, 143 (2003) ("Every administration since President Carter's, the Judicial Conference, the American Law Institute, state courts, numerous public interest and legal aid organizations, and most scholars support the abolition or curtailment of diversity." (quoting Kramer, *supra* note 29, at 98); Paul Rosenthal, *Improper Joinder: Confronting Plaintiffs' Attempts to Destroy Federal Subject Matter Jurisdiction*, 59 AM. U. L. REV. 49, 57 (2009) ("In reality, a case does not receive the same treatment or have the same chance of success in federal court as it does in state court, especially when local plaintiffs sue large, out-of-state corporations.") (citing Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677, 1677–78 (1990)).

[31] For example, the amount in controversy continues to increase, the requirements of citizenship require that a person be both a citizen of a state and of the United States, and the requirements of domicile. *See Jurisdiction: Diversity*, Federal Judicial Center, https://www.fjc.gov/history/courts/jurisdiction-diversity (last visited Dec. 1, 2017).

B. Removal

Even if a plaintiff has chosen to bring the action in a competent state court, removal allows a defendant to elect to remove the case to federal court.[32] The concept of removal is a bit anomalous because it gives the defendant, already sued in a court of competent jurisdiction, the right to elect his own forum. While the Constitution does not expressly authorize removal jurisdiction, it has existed since the Judiciary Act of 1789.[33] In *Martin v. Hunter's Lessee*, the Court upheld the constitutionality of removal jurisdiction, finding that the judicial power of the United States was not intended to be "exercised exclusively for the benefit of parties who might be plaintiffs," but was also for the protection of defendants who might want to appear before a federal forum.[34]

In order for the defendant to be able to remove, the federal court must have had original jurisdiction over the case had it initially been filed in federal court.[35] While a case can be removed if the federal court has original jurisdiction either through federal question or through diversity, the cases involving fraudulent joinder generally involve diversity.[36] If original jurisdiction is based on diversity, there can be no removal if any of the defendants are citizens of the state where the lawsuit has been brought.[37] The rationale for that is that there is no potential prejudice against that defendant in the state court forum.[38]

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[32] 28 U.S.C. § 1441(a) (2012).

[33] *See* Akhil Reed Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499, 1518 (1990) (quoting Judiciary Act of 1789, ch. 20, §§ 9–13, 1 Stat. 73).

[34] 14 U.S. 304, 348 (1816).

[35] 28 U.S.C. § 1441(a) (2012).

[36] E. Farish Percy, *Defining the Contours of the Emerging Fraudulent Misjoinder Doctrine*, 29 HARV. J.L. & PUB. POL'Y 569, 606 (2006) [hereinafter Percy, *Defining the Contours*] ("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.").

[37] 28 U.S.C. § 1441(b)(2) (2012) ("A civil action otherwise removable solely on the basis of the jurisdiction under [S]ection 1332(a) of this title may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.").

[38] GE Betz, Inc. v. Zee Co., 718 F.3d 615, 625 (7th Cir. 2013) ("Codified under 28 U.S.C. § 1441(b)(2), the forum defendant rule prohibits removal 'if any parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.' The purpose of this rule is 'to preserve the plaintiff's choice of a (state) forum, under circumstances where it is arguably less urgent to provide a federal forum to prevent prejudice against an out-of-state party.'" (quoting Hurley v. Motor Coach Indus., 222 F.3d 377, 380 (7th Cir. 2000))); Reimold v. Gokaslan,

The process for removal is controlled by the federal court.[39] The defendant files a petition for removal with the federal court. The case is then removed. If one of the parties believes that the case was improperly removed, she can move to remand the case back to state court.[40] There is no appeal from the federal court's decision to remand the case back to state court.[41]

C. Litigation Strategy

In many cases, determining the appropriate forum for a lawsuit is "the most important strategic decision a party makes in a lawsuit."[42] Both plaintiffs and defendants recognize the importance of these rules to litigation strategy. Generally, plaintiffs prefer to litigate in state court and defendants prefer to litigate in federal court for a variety of reasons, including differences in procedural rules and the general perception among litigants that state court judges are more favorable to plaintiffs and federal judges are more favorable to defendants.[43] In one study, the authors found that the plaintiff had a 71% chance of winning a case brought in state court, and if a case was removed to federal court, that rate decreased to 34%.[44] As a result, many plaintiffs file in state court and fight removal, while many defendants have a strong incentive to try to remove the case to federal court.

The doctrine of fraudulent joinder involves the intersection of litigation strategy and jurisdictional rules. For example, a plaintiff-oriented practice guide states that a creative counsel can attempt to state a tenable claim against

110 F. Supp. 3d 641, 642–43 (D. Md. 2015) ("[The forum defendant rule] recognizes that there is no need to protect out-of-state defendants from local prejudice 'where the defendant is a citizen of the state in which the case is brought.'" (quoting Lively v. Wild Oats Mkts., Inc., 456 F.3d 933, 940 (9th Cir. 2006))).

[39] *See* 28 U.S.C. § 1441(a) (2012).

[40] *Id.* § 1447(c) ("If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.").

[41] If the district court erroneously remands a case on the ground that there was no fraudulent joinder, the error cannot be corrected because 28 U.S.C. § 1447(d) prohibits the review of remand orders. Hellman, *supra* note 22, at 36.

[42] Rosenthal, *supra* note 30, at 55; Simons, *supra* note 16, at 608.

[43] Simons, *supra* note 16, at 608 n.21 (quoting Percy, *Federal Case*, *supra* note 16, at 205–06 & n.110); Heather R. Barber, *Developments in the Law: Federal Jurisdiction and Forum Selection: Removal and Remand*, 37 LOY. L.A. L. REV. 1555, 1558 (2004).

[44] Clermont & Eisenberg, *supra* note 13, at 593. The availability of summary judgment, the possibility of separating the trial into liability and damages phases, the increased role of the federal judge in the discovery process, and the federal evidentiary rules may all be more favorable to defendants.

a non-diverse defendant in order to defeat diversity jurisdiction.[45] A defense-oriented practice guide warns that fighting fraudulent joinder requires substantial preparation and can seriously raise litigation costs.[46] A plaintiff's incentive to "fraudulently join" a non-diverse defendant or co-plaintiff is clear—that party destroys complete diversity and ensures that the lawsuit will stay in state court. The development of the fraudulent joinder doctrine is a court-created response to this kind of strategy—it allows the diverse defendant to remove by enabling the federal court to ignore the non-diverse defendant when the court determines that the joinder of that non-diverse defendant was a sham.[47]

In the Hulk Hogan case, the plaintiff, Hulk Hogan (Bollea), originally brought a lawsuit against Gawker for invasion of privacy in federal court, seeking an injunction to stop Gawker from publishing excerpts of the video and the accompanying article.[48] That injunction was ultimately denied on the grounds that Gawker was protected under the First Amendment.[49] Simultaneously, Bollea brought an action for defamation against Bubba Clem and Heather Clem in Florida state court.[50] Shortly after the injunction was denied, the plaintiff filed an amended complaint, dropping Bubba Clem and adding Gawker Media, LLC.[51]

Bollea was well-known in the area where the lawsuit was filed; he grew up in Tampa and then moved to Clearwater, which was only a few miles from St. Petersburg.[52] As stated in one news article, "Gawker's brand of New York media snark [was] mostly unknown in St. Petersburg, a small city on the Gulf

[45] Hellman, *supra* note 22, at 36 (quoting DAVID S. CASEY, JR. & JEREMY ROBINSON, LITIGATING TORT CASES § 7.7 (2014)).

[46] *Id.* (quoting Jay S. Blumenkopf et al., *Fighting Fraudulent Joinder: Proving the Impossible and Preserving Your Corporate Client's Right to a Federal Forum*, 24 AM. J. TRIAL ADVOC. 297, 310 (2000)).

[47] Underwood, *Proxy to Principle*, *supra* note 16, at 1018.

[48] Nathaniel McAlone, *Everything You Need to Know About the Hulk Hogan Sex-Tape Lawsuit That Could Cost Gawker over $115 Million*, BUS. INSIDER (Mar. 20, 2016), http://www.businessinsider.com/hulk-hogan-versus-gawker-lawsuit-explained-2016-3; Bollea v. Gawker, No. 8:12-cv-02348-T-27TBM, 2012 WL 5509624, at *1 (M.D. Fla. Nov. 14, 2012).

[49] *Bollea*, 2012 WL 5509624, at *5.

[50] Complaint & Demand for Jury Trial at 1, 3, Bollea v. Clem, No. 12012447CI-011, 2012 WL 4887744 (Fla. Cir. Ct. Oct. 15, 2012).

[51] First Amended Complaint & Demand for Jury Trial at 1, Bollea v. Clem, No. 12012447, 2012 WL 10731694 (Fla. Cir. Ct. Dec. 28, 2012).

[52] HULK HOGAN, MY LIFE OUTSIDE THE RING 11 (St. Martin's Press ed., 2009), https://www.biography.com/people/hulk-hogan-9542305.

Coast across the bay from Tampa."[53] During voir dire, the vast majority of potential jurors stated that they had not heard of Gawker.[54] In the plaintiff's closing arguments, Bollea's attorney reminded the jurors that Gawker's offices are located on "Fifth Avenue" and that its benefactors are "in New York sitting behind a computer and playing God with other people's lives."[55] In a recent documentary on the case, a journalist stated:

> You have a Florida jury that's more accustomed to Terry Bollea, [who] we know as Hulk Hogan, as a hometown star. And a kind of disdain for these guys tromping in from the media capital of the world, thinking they can just play with someone's life as though he's just a character on the screen.[56]

And finally, the judge in the case, appointed by Jeb Bush, had previously been the lawyer for the parents of Terri Schiavo, who refused to allow Schiavo's feeding tube to be removed.[57] As the trial began, the judge commented to the jury that she was unhappy with the state of journalism, and especially online journalism.[58]

Clearly, Bollea strategically chose state court—and a specific state court—for his lawsuit. He was well known there; the jury was sympathetic towards him and suspicious of the media and Manhattan. Similarly, Gawker had a strong incentive to try to remove the case to federal court, as it faced a judge and jury who distrusted online journalism and northern "big city" corporations. The issue to be explored is how the federal court should determine whether Heather Clem was a sham defendant whose sole purpose was to defeat removal jurisdiction.

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[53] Peter Sterne, *Jury Awards Hulk Hogan $115 Million as Gawker Looks to Appeal*, POLITICO (Mar. 18, 2016), www.politico.com/media/story/2016/03/jury-awards-hulk-hogan-115-million-as-gawker-looks-to-appeal-004433.

[54] *Id.*

[55] *Id.*

[56] NOBODY SPEAK: TRIALS OF FREE PRESS (Luminant Media 2017).

[57] *Id.*

[58] *Id.*

II. THE FRAUDULENT JOINDER STANDARD

A. The Supreme Court

The Supreme Court first articulated the idea of fraudulent joinder in the early 1900s and has not revisited the doctrine since the Federal Rules of Civil Procedure were adopted in 1938.[59] It is not surprising, therefore, that the lower courts have grappled with the concept, creating conflicts among the circuits with respect to both the standard for determining when a claim is fraudulently joined and the process for evaluating whether fraudulent joinder exists.[60] Nevertheless, the early Supreme Court decisions provide the basis for those various interpretations and assist in understanding and evaluating the modern approaches to the issue.

The Supreme Court has generally been resistant to the defendant's attempts to alter the structure of the plaintiff's lawsuit.[61] In *Plymouth Gold Mining Co. v. Amador & Sacramento Canal Co.*, the defendants argued that removal to federal court was proper because their non-diverse co-parties were "sham defendants" whose only purpose was to defeat removal.[62] The Court found that because the complaint alleged a facially legitimate cause of action against all of the defendants, the complaining defendant bore the burden of

[59] The last case where the Supreme Court addressed allegations of fraudulent joinder is *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92 (1921).

[60] *See infra* notes 80–87.

[61] During this same period of time, the Supreme Court also developed the "voluntary/involuntary rule," an important corollary to fraudulent joinder. Underwood, *Proxy to Principle*, *supra* note 16, at 1021 n.36. The Supreme Court held that if a plaintiff voluntarily discontinues her action against a non-diverse defendant (through, for example, a settlement or a decision not to pursue that defendant), the remaining diverse defendant may then remove the case. *See* Powers v. Chesapeake & Ohio Ry. Co., 169 U.S. 92, 100–01 (1898). If there is an involuntary dismissal of a non-diverse party (through, for example, the court's action against the wish of the plaintiff), the case cannot be removed by the remaining diverse defendant. *See* Whitcomb v. Smithson, 175 U.S. 635, 638 (1900). Over the next several years, the Court repeatedly applied this rule. *See* Great N. Ry. Co. v. Alexander, 246 U.S. 276, 281 (1918); Am. Car & Foundry Co. v. Kettelhake, 236 U.S. 311, 317 (1915); Lathrop, Shea & Henwood Co. v. Interior Constr. & Improvement Co., 215 U. S. 246, 251 (1909); Kan. City Suburban Belt Ry. Co. v. Herman, 187 U. S. 63, 70 (1902). While the Court did not clearly articulate the rationale behind the rule, one rationale is that it furthers judicial economy because if the case is reversed on appeal, it does not have to be sent back to state court because of lack of subject matter jurisdiction. The other rationale, which is more applicable to the fraudulent joinder rule, is that it supports the Court's view that the plaintiff has great deference in choosing the forum and in preventing removal to federal court.

[62] 118 U.S. 264, 268 (1886).

establishing that the cause of action was fraudulent—a burden it was unable to satisfy.[63] In *Alabama Great Southern Railway Co. v. Thompson*,[64] the Court reiterated that the question of removability must be decided based on the plaintiff's pleadings at the time of removal and that a defendant's argument that liability is several does not alter the plaintiff's case.[65] The plaintiff has the right to pursue the defendants jointly even if the defendants could have been sued separately.[66] The Court did recognize, however, that if a plaintiff "attempts to commit a fraud upon the jurisdiction of the Federal courts . . . the Federal courts may and should take such action as will defeat attempts to wrongfully deprive parties entitled to sue in the Federal courts of the protection of their rights in those tribunals."[67]

In 1907, a resident of Missouri brought an action against his diverse employer and two non-diverse employees in state court.[68] The defendant employer filed to remove the case to federal court, alleging that one co-defendant was actually diverse from the plaintiff and that the other was fraudulently joined.[69] Relying on affidavits, the Supreme Court determined that there was fraudulent joinder and allowed the removal.[70] The Court further established that a defendant could defeat a remand motion by claiming that a party was fraudulently joined in *Wilson v. Republic Iron & Steel Co.*, when it held that "[a defendant's] right of removal cannot be defeated by a fraudulent joinder of a resident defendant having no real connection with the controversy."[71] Thus, the Court clearly recognized the doctrine of fraudulent joinder.

Two years later, in *Illinois Central Railroad Co. v. Sheegog*, the plaintiff brought a wrongful death action against one diverse and one non-diverse

[63] *Id.* at 270–71.

[64] *See* Simons, *supra* note 16, at 610, 610 n.28 (citing Ala. Great S. Ry. Co. v. Thompson, 200 U.S. 206, 215 (1906)) (plaintiff has the right to choose who to sue, but the courts may address allegations of bad faith by the plaintiff).

[65] *Ala. Great S. Ry. Co.*, 200 U.S. at 216; Simons, *supra* note 16, at 610 ("The Court explained that the question of removability must be decided based on the plaintiff's pleadings at the time of removal . . . .").

[66] *Ala. Great S. Ry. Co.*, 200 U.S. at 214–15.

[67] *Id.* at 218.

[68] Wecker v. Nat'l Enameling & Stamping Co., 204 U.S. 176, 178 (1907). This is the first case where the actual issue involved fraudulent joinder.

[69] *Id.* at 180.

[70] *Id.* at 186.

[71] 257 U.S. 92, 97 (1921).

defendant.[72] The diverse defendant argued that the plaintiff had fraudulently joined the other defendant to defeat removal.[73] Because state law imposed joint liability on the non-diverse defendant for the liability of the diverse defendant, the Court held that the plaintiff had the right to bring the action against both defendants.[74] The Court reiterated that where there is a reasonable basis for the plaintiff's joinder, it does not matter what the plaintiff's actual motive was,[75] and that allegations of fraudulent joinder without proper support do not establish fraudulent joinder.[76] Thus, while the Supreme Court's guidance on this issue ended almost 100 years ago,[77] we know that the basis of the inquiry begins with the assumption that the plaintiff's joinder of the non-diverse defendant is legitimate, and the burden of proving fraudulent joinder is on the removing defendant. "Merely to traverse the allegations upon which the liability of the resident defendant is rested, or to apply the epithet 'fraudulent' to the joinder, will not suffice: the showing must be such as compels the conclusion that the joinder is without right and made in bad faith."[78]

B. The Lower Courts

1. The Standard

All of the lower courts agree that the party (who is usually the co-defendant) asserting fraudulent joinder bears the burden of proof,[79] and that

[72] 215 U.S. 308, 315 (1909).

[73] *Id.*

[74] *Id.* at 318.

[75] *Id.*

[76] *Id.* at 316.

[77] Wilson v. Republic Iron & Steel Co., 257 U.S. 92, 97 (1921) (the Court stated that the removing defendant has the burden to prove that the plaintiff fraudulently joined the co-defendant).

[78] *See* Simons, *supra* note 16, at 611–12 (discussing Chesapeake & Ohio Ry. Co. v. Cockrell, 232 U.S. 146, 152 (1914)).

[79] Stillwell v. Allstate Ins. Co., 663 F.3d 1329, 1332 (11th Cir. 2011) ("To establish fraudulent joinder, the removing party has the burden of proving that either: (1) there is no possibility the plaintiff can establish a cause of action against the resident defendant; or (2) the plaintiff has fraudulently pled jurisdictional facts to bring the resident defendant into state court." (quoting Crowe v. Coleman, 113 F.3d 1536, 1538 (11th Cir. 1997))); Samanta v. Harwer, 226 F. App'x 775, 776 (9th Cir. 2007) ("The removing defendant bears the burden of proving that removal is appropriate and is entitled to present facts showing that the joinder is fraudulent."); Nerad v. AstraZeneca Pharms., Inc., 203 F. App'x 911, 912 (10th Cir. 2006) ("[Defendant] failed to carry its 'heavy' burden of demonstrating fraudulent joinder."); Godsey v. Miller, 9 F. App'x 380, 383 (6th

actual fraud—e.g., a plaintiff colluding with a non-diverse defendant to defeat removal—is sufficient to demonstrate fraudulent joinder.[80]

The more difficult and common basis for fraudulent joinder is the scenario that was presented in the Hulk Hogan case, when the diverse defendant is asserting that no cause of action exists against the non-diverse defendant and that the only reason that the plaintiff brought an action against that non-diverse defendant is to defeat removal. The lower courts have developed different articulations of what the removing party's burden of proof is.[81] Under the most stringent test, the removing party must

Cir. 2001) ("[T]he removing defendant may avoid remand only by demonstrating that the non-diverse party was fraudulently joined."); Hart v. Bayer Corp., 199 F.3d 239, 246 (5th Cir. 2000) ("The removing party has the burden of proving the claimed fraud." (quoting Dodson v. Spiliada Maritime Corp., 951 F.2d 40, 42 (5th Cir. 1992))); Batoff v. State Farm Ins. Co., 977 F.2d 848, 851 (3d Cir. 1992) ("The removing party carries a 'heavy burden of persuasion.'"); Poulos v. Naas Foods, Inc., 959 F.2d 69, 73 (7th Cir. 1992) ("An out-of-state defendant who wants to remove must bear a heavy burden to establish fraudulent joinder."); Leonard v. St. Joseph Lead Co., 75 F.2d 390, 395 (8th Cir. 1935) ("The burden of showing fraudulent joinder is on the party who relies on the existence of such joinder to support the removal of the action."); Simons, *supra* note 16, at 614 n.53 ("The defendant seeking removal bears a heavy burden of proving fraudulent joinder." (quoting Pampillonia v. RJR Nabisco, Inc., 138 F.3d 459, 461 (2d Cir. 1998))); *id.* at 614 ("The party alleging fraudulent joinder bears a heavy burden—it must show that the plaintiff cannot establish a claim even after resolving all issues of law and fact in plaintiff's favor." (quoting Hartley v. CSX Transp., 187 F.3d 422, 424 (4th Cir. 1999))).

[80] Dutcher v. Matheson, 733 F.3d 980, 988 (10th Cir. 2013) ("To establish fraudulent joinder, the removing party must demonstrate either: (1) actual fraud in the pleading of jurisdictional facts, or (2) inability of the plaintiff to establish a cause of action against the non-diverse party in state court."); Bounds v. Pine Belt Mental Health Care Res., 593 F.3d 209, 213 (2d Cir. 2010) ("[T]here is improper joinder where (1) there is actual fraud in pleading jurisdictional facts . . . ."); Hunter v. Philip Morris USA, 582 F.3d 1039, 1044 (9th Cir. 2009) ("The court explained that there are 'two ways to establish improper joinder: (1) actual fraud in the pleading of jurisdictional facts, or (2) inability of the plaintiff to establish a cause of action against the non-diverse party in state court.'" (quoting Travis v. Irby, 326 F.3d 644, 646–47 (5th Cir. 2003))); Schur v. L.A. Weight Loss Ctrs., Inc., 577 F.3d 752, 763 n.9 (7th Cir. 2009) ("Actual fraud in alleging jurisdictional facts will suffice to invoke the doctrine."); *Travis*, 326 F.3d at 647 ("Fraudulent joinder can be established [by] actual fraud in the pleading of jurisdictional facts."); *Batoff*, 977 F.2d at 851 ("Joinder is fraudulent 'where there is no reasonable basis in fact or colorable ground supporting the claim against the joined defendant, or no real intention in good faith to prosecute the action against the defendants or seek a joint judgement.'" (quoting Boyer v. Snap-On Tools Corp., 913 F.2d 108, 111 (3d Cir. 1990))).

[81] There are variations within all of these tests, and some commentators have determined there are four or even five tests. *See* Matthew J. Richardson, *Clarifying and Limiting Fraudulent Joinder*, 58 FLA. L. REV. 119, 146–47 (2006) (two standards); Underwood, *Proxy to Principle*, *supra* note

demonstrate that there is no possibility that the plaintiff would be able to establish a cause of action against the non-diverse party in state court.[82] The Tenth Circuit has stated that "this standard is more exacting than that for dismissing a claim under Fed. R. Civ. P. 12(b)(6); indeed, the latter entails the kind of merits determination that, absent fraudulent joinder, should be left to the state court where the action was commenced."[83] Similarly, the Third Circuit has stated that "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."[84]

In *Nerad v. AstraZeneca Pharmaceuticals*, the Tenth Circuit articulated a different burden of proof, stating that the court must decide whether there is a reasonable basis to believe that the plaintiff might succeed in at least one claim against the non-diverse defendant.[85] The court explained that reasonable basis does not mean a sure thing, but there must be a basis in the alleged facts and the applicable law.[86] The Fifth Circuit recognized the inconsistencies, stating that "neither our circuit nor other circuits have been clear in describing the fraudulent joinder standard. The test has been stated by this court in various terms, even within the same opinion."[87] Some

16, at 1013, 1022 (three standards); Percy, *Defining the Contours*, *supra* note 36, at 609 (four standards).

[82] Rosenthal, *supra* note 30, at 66 n.80 (noting that "[t]he United States Courts of Appeal for the Second, Third, Fourth, Fifth, Sixth, Seventh, Tenth, and Eleventh Circuits have all adopted the 'No Possibility' Test" (citing Whitaker v. Am. Telecasting, Inc., 261 F.3d 196, 207 (2d Cir. 2001))); Montano v. Allstate Indemn., No. 99-2225, 2000 WL 525592, at *4–5 (10th Cir. April 14, 2000); *Crowe*, 113 F.3d at 1538; Alexander v. Elec. Data Sys. Corp., 13 F.3d 940, 949 (6th Cir. 1994); Gottlieb v. Westin Hotel Co., 990 F.2d 323, 327 (7th Cir. 1993); *Boyer*, 913 F.2d at 111; AIDS Counseling & Testing Ctrs. v. Group W Television, Inc., 903 F.2d 1000, 1003 (4th Cir. 1990); B., Inc. v. Miller Brewing Co., 663 F.2d 545, 549 (5th Cir. 1981); *see also* Simons, *supra* note 16, at 613–14; *Hartley*, 187 F.3d at 424 ("To show fraudulent joinder, the removing party must demonstrate either 'outright fraud in the plaintiff's pleading of jurisdictional facts' or that 'there is no possibility that the plaintiff would be able to establish a cause of action against the in-state defendant in state court.'" (quoting *Marshall*, 6 F.3d at 232)); Whitaker v. Am. Telecasting, Inc., 261 F.3d 196, 207 (2d Cir. 2001); *Hart*, 199 F.3d at 246 ("To prove fraudulent joinder [removing parties] must demonstrate that there is no possibility that [plaintiff] would be able to establish a cause of action against them in state court.").

[83] *Montano*, 2000 WL 525592, at *2.

[84] *Batoff*, 977 F.2d at 853.

[85] 203 F. App'x 911, 913 (10th Cir. 2006).

[86] *Id.*

[87] *See* Rosenthal, *supra* note 30, at 64 n.73 ("The test has been stated by this court in various terms, even within the same opinion." (quoting Travis v. Irby, 326 F.3d 644, 647 (5th Cir. 2003))).

commentators have opined that while "absolutely no possibility" and "no reasonable basis" appear to be different tests, they are meant to be equivalent because each is presented as a restatement of the other.[88]

It can be argued, however, that those two tests are quite different. If the removing defendant must prove that there was no reasonable basis at the time the complaint was filed for the plaintiff's claim against the non-diverse defendant, the test is focusing on the plaintiff's ability to state a cause of action.[89] If the test is "absolutely no possibility," the removing defendant must prove that there is no possible way for the plaintiff to recover from the non-diverse defendant.[90] This standard focuses on the likelihood that the plaintiff can ultimately recover, rather than the plaintiff's ability to state a

In *Griggs v. State Farm Lloyds*, 181 F.3d 694, 699 (5th Cir. 1999), the court stated that "the removing party must prove . . . that there is absolutely no possibility that the plaintiff will be able to establish a cause of action against the non-diverse defendant in state court." Later on in the opinion, the court stated, "stated differently, we must determine whether there is any reasonable basis for predicting that [the plaintiff] might be able to establish the [non-diverse defendant's] liability on the pleaded claims in state court." *Id.*

[88] *Travis*, 326 F.3d at 647. Under either test, the sole concern is whether, as a matter of law, the plaintiff has alleged a valid state law cause of action against the non-diverse defendant. Thus, in a fraudulent joinder inquiry, federal courts do not weigh the merits of the plaintiff's claim beyond determining whether the claim is arguable under state law. 16 James Wm. Moore, Moore's Federal Practice § 107.14[2][c][iv][A] (3d ed. 2011); De La Rosa v. Reliable, Inc., 113 F. Supp. 3d 1135, 1161 (D.N.M. 2015).

[89] *See* Boyer v. Snap-On Tools, Corp., 913 F. 2d 108, 110 (3d Cir. 1990); Smoot v. Chi., Rock Island & Pac. R.R. Co., 378 F.2d 879, 882 (10th Cir. 1967) (court uses "allegations are without factual basis and a complete sham" instead of reasonable cause of action); Percy, *Federal Case*, *supra* note 16, at 216–19; *see also* Underwood, *Proxy to Principle*, *supra* note 16, at 1066–67 (court uses "colorable cause of action" instead of reasonable cause of action (quoting Jerome-Duncan, Inc. v. Auto-by-Tel, LLC, 176 F.3d 904, 907 (6th Cir. 1999))); Monahan, *supra* note 15, at 1361 n.131 ("Looking to the pleadings to determine if there is no 'reasonable basis in fact and law supporting a claim.'" (quoting Filla v. Norfolk & S. Ry. Co., 336 F.3d 806, 810 (8th Cir. 2003))).

[90] *See* Sanchez v. Lane Bryant, Inc., 123 F. Supp. 3d 1238, 1241 (C.D. Cal. 2015) ("[T]he removing party must prove that there is absolutely no possibility that the plaintiff will be able to establish a cause of action against the in-state defendant in state court . . . ." (quoting Green v. Amerada Hess Corp., 707 F.2d 201, 205 (5th Cir. 1983))); Aguayo v. AMCO Ins. Co., 59 F. Supp. 3d 1225, 1253 (D.N.M. 2014) ("To establish that a non-diverse defendant has been fraudulently joined to defeat diversity, the removing party must prove that there is absolutely no possibility that the plaintiff will be able to establish a cause of action against the non-diverse defendant in state." (emphasis omitted) (quoting Burden v. Gen. Dynamics Corp., 60 F.3d 213, 217 (5th Cir. 1995))); *see also* Hartley v. CSX Transp., 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).

claim.[91] It is a difficult standard for the removing defendant to overcome; she must demonstrate that there is no possibility that the plaintiff can ultimately recover from the non-diverse defendant even after resolving all issues of law and fact in the plaintiff's favor.[92]

There are some courts that state that the removing defendant must prove that there is no reasonable possibility that the plaintiff will recover from the non-diverse defendant.[93] While this test uses the reasonable language instead of no possibility, it also arguably involves an analysis of the plaintiff's ultimate recovery from the non-diverse defendant.[94] Of the three tests, this is the one that is the most generous to the removing defendant; the defendant has to demonstrate that the possibility of the plaintiff ultimately recovering is not reasonable, rather than having to show that there is no possibility of recovery.[95]

In the Hulk Hogan case, the district court held that "to establish fraudulent joinder, Gawker ha[d] the 'heavy' burden of 'proving by clear and convincing evidence' that (1) there [was] no possibility that Bollea [could]

[91] *See Sanchez*, 123 F. Supp. 3d at 1241; *Aguayo*, 59 F. Supp. 3d at 1253; Gray v. Beverly Enters. Miss., Inc., 390 F.3d 400, 409 (5th Cir. 2004) ("[I]n the context of fraudulent joinder analysis a party may not rely on the allegations in his pleadings on their face, but must show that there is, at minimum, some reasonable dispute of a fact that, if established, would demonstrate a reasonable possibility of recovery."); Great Plains Trust Co., v. Morgan Stanley Dean Witter & Co., 313 F.3d 305, 312 (5th Cir. 2002) ("[T]he Court determines whether that party has any possibility of recovery against the party whose joinder is questioned. If there is 'arguably any reasonable basis for predicting that the state law might impose liability on the facts involved', then there is no fraudulent joinder." (citation omitted)); Parks v. New York Times Co., 308 F.2d 474, 478 (5th Cir. 1962) ("[W]e take the rule to be that there can be no fraudulent joinder unless it be clear that there can be no recovery under the law of the state on the cause alleged, or on the facts in view of the law as they exist when the petition to remand is heard.").

[92] *Hartley*, 187 F.3d at 424.

[93] *See* Thompson v. R.J. Reynolds Tobacco Co., 760 F.3d 913, 915 (8th Cir. 2014); Universal Truck & Equip. Co. v. Southworth-Milton, Inc. 765 F.3d 103, 108 (1st Cir. 2014); *Gray*, 390 F.3d at 405; Sea World, LLC v. Seafarers, Inc., 191 F. Supp. 3d 167, 171 (D.P.R. 2016) (quoting Poulos v. Naas Foods, Inc., 959 F.2d 69, 74 (7th Cir. 1992)); Rosbeck v. Corin Grp., PLC, 140 F. Supp. 3d 197, 201 (D. Mass. 2015); Mihok v. Medtronic, Inc., 119 F. Supp. 3d 22, 34, 34 n.7 (D. Conn. 2015); *In re* Fresenius Granuflo/Naturalyte Dialysate Prods. Liab. Litig., 111 F. Supp. 3d 79, 83 (D. Mass. 2015).

[94] *See* Percy, *Defining the Contours*, *supra* note 36, at 580 n.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."); Hellman, *supra* note 22, at 43 ("If the court says the plaintiff has 'no possibility' of recovery from the in-state defendant, that is addressing the merits of the claim.").

[95] *Gray*, 390 F.3d at 405.

establish a cause of action against Heather Clem . . . ."[96] Gawker argued that Hogan could not establish a cause of action against Clem because each of the five claims was barred by the applicable statute of limitations.[97] The court rejected this argument, finding that there were not enough facts alleged in the complaint to evaluate whether one of the claims, publication of the video, was time-barred.[98] The court stated that "if one of Bollea's claims [withstood] the statute of limitations inquiry, then Gawker's first argument for fraudulent joinder [would] fail[]."[99] Gawker also argued that the causes of action against Heather Clem were without merit and so egregious that they constituted fraudulent joinder.[100] The court found that the plaintiff does not have to have a winning case against the allegedly fraudulent defendant, just a possibility of stating a valid cause of action.[101] Thus, the court used the standard that was the most difficult for Gawker to satisfy. [102] It also determined that joinder was appropriate under Rule 20(a)(2), as there were questions of law and fact common to both Clem and Gawker, including questions about the video's chain of custody, Hogan's privacy rights, and the interpretation of Florida's tort law.[103] Therefore, the case was remanded back to state court.[104]

[96] Bollea v. Clem, 937 F. Supp. 1344, 1349 (M.D. Fla. 2013).

[97] *Id.* at 1349–50.

[98] *Id. See* Bhd. of Locomotive Eng'rs. & Trainmen Gen. Comm. of Adjustment CSX Transp. N. Lines v. CSX Transp. Inc., 522 F.3d 1190, 1194 (11th Cir. 2008) (dismissal based on statute of limitations is appropriate only if it is apparent from the face of the complaint that the claim is time-barred).

[99] *Bollea*, 937 F. Supp. 2d. at 1349.

[100] *Id.*

[101] *Id.* at 1350. Gawker also argued that joinder was inappropriate under Federal Rule of Civil Procedure 20(a)(2), but the court found that there were questions of law and fact common to Heather Clem and Gawker, thus joinder was appropriate. Finally, Gawker argued jurisdiction based on federal question, which the court also rejected.

[102] *Id.*

[103] *Id.* at 1351; *see also id.* at 1351–55 (Unable to establish diversity jurisdiction by fraudulent joinder, Gawker had to prove federal question jurisdiction under 28 U.S.C. § 1331. Gawker argued two bases for federal question jurisdiction. First, Bollea's claims of invasion of privacy arose under the United States Constitution. Second, Bollea's request for transferring to Plaintiff all of Defendant's right, title and interest in and to the video were governed by the United States Copyright Act. The Court held that no federal questions appeared on the face of the complaint because Bollea's claims did not arise under the United States Constitution, and his claims were qualitatively different than claims for copyright infringement.).

[104] *Id.* at 1356.

2. Application of the Standard

No matter what standard a circuit uses, the larger problem arises when the lower courts attempt to apply the standard. Almost all courts examine the factual allegations in the light most favorable to the plaintiff and resolve any uncertainties in the substantive law in favor of the plaintiff.[105] While most courts have found the analysis similar to the analysis used when ruling on a Federal Rule of Civil Procedure 12(b)(6) motion,[106] others have stated that "the proceeding appropriate for resolving a claim of fraudulent joinder is similar to that used for ruling on a motion for summary judgment under Fed. R. Civ. P. 56(b)."[107] Some courts caution that while it is up to the district court to determine the procedure, piercing the pleadings is only appropriate to identify the presence of discrete facts that would preclude plaintiff's recovery against the in-state defendant.[108] As a result, while all courts seem to allow some extrinsic evidence to determine whether the plaintiff's claim is legitimate, some only allow the court to examine the pleadings,[109] and others will also look at supporting affidavits.[110] The Fifth Circuit has

[105] *See* Crowe v. Coleman, 113 F.3d 1536, 1538 (11th Cir. 1997).

[106] Batoff v. State Farm Ins. Co., 977 F.2d 848, 852 (3d Cir. 1992) (fraudulent joinder inquiry is less exacting than 12(b)(6)); Balboa v. Turismo Americanos, LLC, No. EP-03-CA-533(KC), 2004 WL 569521, at *1 (W.D. Tex. Feb. 19, 2004) (fraudulent joinder inquiry is more exacting than 12(b)(6)); *see also* Rosenthal, *supra* note 30, at 71 n.108 (stating that "while courts have attempted to clearly restate the fraudulent joinder standard . . . [i]t is difficult to identify the distinction between the standard under Rule 12(b)(6) and some of the earlier-cited formulations of the fraudulent-joinder inquiry" (citing Davis v. Prentiss Prop. Ltd., 66 F. Supp. 2d 1112, 1115–16 (C.D. Cal. 1999))); Underwood, *Proxy to Principle*, *supra* note 16, at 1081 n.349 (a fraudulent joinder analysis is "similar to that employed in deciding motions to dismiss under Rule 12(b)(6)" (citing Archuleta v. Am. Airlines, Inc., No. CV 00-1286 MMM (SHX), 2000 WL 656808, at *1, *11 (C.D. Cal. May 12, 2000))).

[107] *Crowe*, 113 F.3d at 1538 (citation omitted). While this inquiry resembles the standard used for summary judgment, courts have been careful to note that the standard applied to the fraudulent joinder question should be closer to the Rule 12(b)(6) standard. *Balboa*, 2004 WL 569521, at *4.

[108] Smallwood v. Ill. Cent. R.R. Co., 385 F.3d 568, 573 (5th Cir. 2004).

[109] Lynch Ford, Inc. v. Ford Motor Co., 934 F. Supp. 1005, 1007 (N.D. Ill. 1996); Simons, *supra* note 16, at 615 ("All circuit courts allow district courts to look at extrinsic evidence to decide the fraudulent joinder issue. However, courts disagree on the extent to which this evidence can be used. Although the law allows district courts to consider extrinsic evidence, some will nonetheless confine their review to the plaintiff's complaint at the time of removal. Other courts will review the plaintiff's complaint first, and then look to relevant affidavits to determine if there exist[s] sufficient facts suggesting a possibility of recovery against the alleged fraudulently joined defendant.").

[110] Pampillonia v. RJR Nabisco, Inc., 138 F.3d 459, 461 (2d Cir. 1998).

permitted review of the pleadings, affidavits, and deposition testimony.[111] Again, courts have cautioned that proceeding beyond this summary process carries the risk of moving the court beyond jurisdiction and into a resolution of the merits of the case.[112] No court has adopted a test that analyzes plaintiff's subjective motive. This is consistent with the Supreme Court's initial guidance that a plaintiff's motive in joining a non-diverse defendant is irrelevant.[113]

Each of these methods has its own issues. Fraudulent joinder is uniquely problematic because, while its analysis involves a determination of subject matter jurisdiction, it also requires courts to examine the merits of the claim.[114] There is a tension between protecting diverse defendants' right to remove and ensuring that the federal courts do not exceed their statutory jurisdiction.[115] If the allegation is that the plaintiff has no reasonable factual basis for the claim against the non-diverse defendant, then the federal court must confront the balance between determining jurisdiction and resolving the case on its merits.[116]

As a result, federal courts may not weigh the merits of a plaintiff's claim beyond deciding whether it is possible under state law.[117] Whether the allegation is that the plaintiff's cause of action against the non-diverse defendant does not exist under state law, or that plaintiff's complaint does not contain the facts necessary to support a cause of action, the federal court must confront issues of conflict of laws and substantive state law.[118] Those

[111] B., Inc. v. Miller Brewing Co., 663 F.2d 545, 549 (5th Cir. 1981).

[112] *Smallwood*, 385 F.3d at 574; Boyer v. Snap-On Tools Corp., 913 F.2d 108, 112 (3rd Cir. 1990); Percy, *Federal Case*, *supra* note 16, at 193 (noting that "federal courts evaluating allegations of fraudulent joinder must walk a fine line between appropriately exercising jurisdiction to determine jurisdiction and inappropriately determining the merits of a case which lacks complete diversity"); Richardson, *supra* note 81, at 143–44.

[113] Mecom v. Fitzsimmons Drilling Co., 284 U.S. 183, 189 (1931); Ill. Cent. R.R. Co. v. Sheegog, 215 U.S. 308, 315 (1909).

[114] *See* Percy, *Federal Case*, *supra* note 16, at 193 ("[F]ederal courts evaluating allegations of fraudulent joinder must walk a fine line between appropriately exercising jurisdiction to determine jurisdiction and inappropriately determining the merits of a case which lacks complete diversity.").

[115] *Id.*

[116] *Id.*

[117] *Id.* at 195.

[118] The involvement of the federal courts in predicting state law raises federalism concerns because it requires the federal courts to make policy considerations that the Constitution reserved to the states. *Id.* at 202. In order to keep federalism in check, the federal courts have the ongoing duty to inquire into the basis of their jurisdiction over the subject matter presented to them for

courts that have used the standard for motions to dismiss under 12(b)(6) must also consider the impact of the recent Supreme Court cases *Bell Atlantic Corp. v. Twombly*[119] and *Ashcroft v. Iqbal*.[120] Until 2007, the standard for a 12(b)(6) motion was that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief.[121] In 2007, the Supreme Court departed from that standard, requiring plaintiffs to plead facts with enough particularity that they give rise to a plausible theory of recovery.[122]

Courts that have analyzed fraudulent joinder since 2007 have not applied the heightened pleading standard.[123] While there are some courts that have used that standard when analyzing motions to dismiss on cases that were originally filed in state court and properly removed to federal court,[124] courts have not used that standard to analyze whether the case should be remanded back to state court. The courts' rationale for rejecting that standard is that the purpose of the fraudulent joinder standard is to determine whether the state

adjudication. Therefore, fraudulent joinder doctrines that allow federal courts to weigh the merits of the plaintiff's claim risk violating federalism by encouraging the district courts to review matters before they determine that they have subject matter jurisdiction. Richardson, *supra* note 81, at 174–75.

[119] *See* 550 U.S. 544, 547 (2007).

[120] *See* 556 U.S. 662, 687 (2009).

[121] Conley v. Gibson, 355 U.S. 41, 45 (1957).

[122] There is a substantial body of scholarship on the effect of *Twombly* and *Iqbal* on motions to dismiss. The results have been mixed. There is one study that found no significant change in the willingness of courts to dismiss cases after *Twombly*. William H.J. Hubbard, *Testing for Change in Procedural Standards, with Application to* Bell Atlantic v. Twombly, 42 J. LEGAL STUD. 35, 57 (2013). Another study found that there was a significant increase in dismissals of employment discrimination and civil rights cases after *Iqbal*. Alexander A. Reinert, *Measuring the Impact of Plausibility Pleading*, 101 VA. L. REV. 2117, 2122 (2015). It is important to note, however, that most civil rights and employment discrimination cases come into federal court through federal question subject matter jurisdiction, and therefore would not be privy to fraudulent joinder.

[123] *See* Murphy v. Aurora Loan Servs., LLC, No. 11-2750, 2012 WL 1045443, at *4 (D. Minn. Jan. 12, 2012), *rev'd*, 699 F.3d 1027, 1032 (8th Cir. 2012); *see also* Tofighbakhsh v. Wells Fargo & Co., No. 10-830 SC, 2010 WL 2486413, at *3 (N.D. Cal. June 16, 2010); Mendenall v. Walterboro Veneer Inc., No. 2:11-CV-01291-DCN, 2011 WL 6012415, at *1 (D.S.C. Dec. 1, 2011); Jordan v. Am. Suzuki Motor Corp., No. 2:07CV66KS-MTP, 2007 WL 1521521, at *2 (S.D. Miss. May 22, 2007); Solomon v. Sims, No. 4:07-CV-1324-RBH, 2007 WL 2080516, at *1 (D.S.C. July 16, 2007).

[124] Johnson v. Am. Towers, LLC, 781 F.3d 693, 704 (4th Cir. 2015); Casias v. Wal-Mart Stores, Inc., 695 F.3d 428, 433 (6th Cir. 2012).

court, and not the federal court, may permit the plaintiff to proceed with her claims against the non-diverse defendant.[125]

In the Hulk Hogan case, the court looked only at the complaint.[126] Citing *Stillwell v. Allstate Ins. Co.*, the court held that Gawker ha[d] the "heavy burden" of "proving by clear and convincing evidence" that there was no possibility that Bollea could establish a cause of action against Heather Clem.[127] Because the First Amended Complaint asserted a claim against Heather Clem for the publication of the video, and there were no allegations regarding the date of the publication, the court determined that there was at least a possibility that the claim fell within the statute of limitations.[128]

III. TIME FOR A STATUTE

A. Why a Statute and not Case Law

Despite the conflicts among the circuits regarding both the fraudulent joinder standard and the process of applying the standard, it is unlikely that the Supreme Court will ever address and clarify the law for several reasons. First, if the district court remands a case after removal, that determination is not reviewable under 28 U.S.C. § 1447(d).[129] Therefore, there is no direct way for the issue to get to the Supreme Court. If the district court denies the motion to remand and allows removal, appellate review is possible, but only once there is a final judgment.[130] And "after final judgment in a removed case that is not remanded, only the most disappointed and dogged of parties would have sufficient incentive to pursue this threshold issue."[131] At the same time, fraudulent joinder litigation has been increasing, and in many cases is a prominent part of complex tort litigation, especially in the areas of products liability and pharmaceutical litigation.[132] Thus, there continues to be a need for a consistent standard.

[125] Edwea, Inc. v. Allstate Ins. Co., No. H-10-2970, 2010 WL 5099607, at *5 (S.D. Tex. Dec. 8, 2010).

[126] Bollea v. Clem, 937 F. Supp. 2d 1344, 1351 (M.D. Fla. 2013).

[127] *Id.* at 1349.

[128] *Id.*

[129] Hellman, *supra* note 22, at 36.

[130] *Id.* at 39.

[131] Gentile v. Biogen Idec, Inc., 934 F. Supp. 2d 313, 316 n.3 (D. Mass. 2013).

[132] *See* Percy, *Federal Case*, *supra* note 16, at 192.

Over the last 25 years, there has been a significant statutory expansion of federal jurisdiction. In 1990, Congress codified supplemental jurisdiction;[133] in 2002 Congress passed the Multi-Party Jurisdiction Statute, which broadens diversity jurisdiction over mass tort state law claims that arise out of a single occurrence and result in the death of at least 75 people;[134] and in 2005, Congress passed the Class Action Fairness Act, which provides for diversity jurisdiction over state law class action claims with minimal diversity and an aggregate amount in controversy of at least $5 million.[135] Congress passed the Class Action Fairness Act because it believed that many state courts could not be trusted to fairly litigate national class actions.[136] Despite recommendations from the Federal Courts Study Committee, which recommended that Congress eliminate diversity jurisdiction completely,[137] this recent activity seems to demonstrate a willingness by Congress to expand diversity jurisdiction.

While the conflict could be resolved through the continued creation and revision of precedents, it makes more sense to resolve this issue through legislation. While there is certainly value in the efficiency and predictability of judge-made rules,[138] it is unlikely that the Supreme Court will reach this decision in the near future. Given the increase in fraudulent joinder litigation and the additional confusion as a result of the change in the standards for

[133] 28 U.S.C. § 1367(a) (2006) ("In any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy.").

[134] *Id.* § 1369(a) ("The district courts shall have original jurisdiction of any civil action involving minimal diversity between adverse parties that arises from a single accident, where at least 75 natural persons have died in the accident at a discrete location if: (1) a defendant resides in a State and a substantial part of the accident took place in another State or location, regardless of whether that defendant is also a resident of a resident of the State where a substantial part of the accident took place; (2) any two defendants reside in different States, regardless of such defendants are also resident of the same State or States; or (3) substantial part of the accident took place in different States.").

[135] *Id.* § 1332(d)(2)(a). The bill passed primarily down party lines, with a mainly democrat opposition.

[136] S. REP. NO. 109-14, at 24 (2005).

[137] *See* Judicial Conference of the U.S. Report of the Federal Courts Study Committee, at 39 (1990) (where the committee found that because of the changes in both commerce and the state court systems since the Judiciary Act of 1789, diversity jurisdiction should be either eliminated or substantially curtailed).

[138] Maimon Schwarzchild, *Keeping It Private*, 44 SAN DIEGO L. REV. 677, 686 (2007).

motions to dismiss, it makes more sense for the legislature to create a rule that resolves some of the uncertainty.

B. The Proposed Statute

Over the last two years, Congress had been considering an amendment to the removal statute that would address and clarify fraudulent joinder.[139] On February 25, 2016, the Fraudulent Joinder Prevention Act of 2015 was approved by the House of Representatives less than five months after it was introduced.[140] The vote was 229 to 189, with the split basically on party lines.[141] The bill was then referred to the Senate Judiciary Committee, and the Senate finished the year without voting.[142]

In the fall of 2016, an identical bill was again introduced in the House under the name of the Innocent Party Protection Act.[143] This bill was passed by the House without amendment on March 9, 2017, with a vote of 224 to 194.[144] Once again the bill was received by the Senate and referred to the Senate Judiciary Committee, which has yet to conduct a vote on it.[145]

The proposed bill would amend 28 U.S.C. § 1447[146] by adding a new subsection (f):

> (f) FRAUDULENT JOINDER.
>
> > (1) This subsection shall apply to any case in which—
> >
> > > (A) a civil action is removed solely on the basis of the jurisdiction conferred by section 1332(a);

[139] 162 CONG. REC. H913-15 (daily ed. Feb. 25, 2016) (considering an amendment to H.R. 3624).

[140] H.R. 3624, 114th Cong. (2016).

[141] *Id.*; Hellman, *supra* note 22, at 34.

[142] E. Farish Percy, *The Fraudulent Joinder Prevention Act of 2016: Moving the Law in the Wrong Direction*, 62 VILL. L. REV. 213, 214 n.8 (2017) [hereinafter Percy, *Fraudulent Joinder Prevention Act*]; Hellman, *supra* note 22, at 34.

[143] H.R. 725, 115th Cong. (2017).

[144] *Id.*

[145] *Id.*

[146] *Id.*

> (B) a motion to remand is made on the ground that—
>
> > (i) one or more defendants are citizens of the same State as one or more plaintiffs; or
> >
> > (ii) one or more defendants properly joined and served are citizens of the State in which the action was brought;[147] and
>
> (C) the motion is opposed on the ground that the joinder of the defendant or defendants described in subparagraph (B) is fraudulent.
>
> (2) The joinder of a defendant described in paragraph (1)(B) is fraudulent if the court finds that:
>
> > (A) there is actual fraud in the pleading of jurisdictional facts with respect to that defendant;
> >
> > (B) based on the complaint and the materials submitted under paragraph (3), it is not plausible to conclude that applicable State law would impose liability on that defendant;
> >
> > (C) State or Federal law clearly bars all claims in the complaint against that defendant; or
> >
> > (D) objective evidence clearly demonstrates that there is no good faith intention to prosecute the action against that defendant or to seek a joint judgment including that defendant.

[147] *Id.*; *see also* H.R. REP. NO. 115-17, at 7–8 (2017). This provision was added to ensure that fraudulent joinder is not used to exploit the requirement of § 1441(b)(2) that a case may not be removed if the defendant is a citizen of the forum state where the lawsuit is being brought.

> (3) In determining whether to grant or deny a motion under paragraph (1)(B) the court may permit the pleadings to be amended, and shall consider the pleadings, affidavits, and other evidence submitted by the parties.
>
> (4) If the court finds that all defendants described in paragraph (1)(B) have been fraudulently joined under paragraph (2), it shall dismiss without prejudice the claims against those defendants and shall deny the motion described in paragraph (1)(B).[148]

The arguments within the House for and against the bill fell into the basic rationales for either broadening or diminishing diversity jurisdiction. Supporters of the bill argued that it ensures that defendants are not deprived of their right to a non-biased federal forum and that it enables "our court system to operate with the impartiality Americans both expect and deserve."[149] In calling the present system both flawed and allowing for litigation abuse, one representative noted that the Fourth Circuit had "practically apologized" to a nominal party whose addition to the lawsuit prevented removal to federal court, explaining that the current fraudulent joinder standard made it impossible to remove the case despite the fact that the claims against the non-diverse party were practically certain to be dismissed in state court.[150] In addition, supporters of the bill emphasized that the current uncertainty about the standard negatively impacts small business who have "a target painted on their backs by lawyers who want to exploit them to avoid having their case heard in federal court."[151]

These non-diverse small business owners and other nominal parties are forced to spend money litigating when they are eventually dropped from the

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[148] *Id.*

[149] Press Release, Majority Leader Kevin McCarthy, House Passes Reforms for an Impartial Court System (Feb. 25, 2016).

[150] 162 CONG. REC. H909 (daily ed. Feb. 25, 2016) (quoting J. Harvie Wilkinson of the 4th Cir.) ("You have to establish that the joinder of a nondiverse defendant is totally ridiculous and that there's no possibility of ever recovering . . . . That is very hard to do. So I think that making the fraudulent joinder law a little bit more realistic appeals . . . to me because it seems to me the kind of intermediate step that addresses some real problems.").

[151] Jessica Karmasek, *U.S. House Panel Approves Fraudulent Joinder Bill*, LEGAL NEWS LINE (Feb. 3, 2016, 1:16 PM), http://legalnewsline.com/stories/510661439-u-s-house-panel-approves-fraudulent-joinder-bill.

lawsuit once it is argued on its merits.[152] This is a novel rationale that has not been part of the growing case law,[153] and it seems to be a way to counter the argument that a less stringent standard only supports big business.

Those opposed to the bill expressed concern that the amendment would clog the federal court docket by creating an overly complicated procedure to determine whether removal is proper.[154] The President of the American Association for Justice described the bill as "destroying 100 years of precedent for no reason" and warned that the Senate should "not grant corporations the right to forum shop when Americans seek to hold them accountable for wrongdoing."[155] There were also concerns about the financial impact on the federal courts and the lack of funding to support the changes.[156]

C. Analysis of the Proposed Statute

Whenever Congress seeks to codify a court-created doctrine, the legislation generally moves the law in one direction or another. This bill seeks to establish a somewhat more robust version of the fraudulent joinder doctrine than is generally applied by the majority of the courts,[157] generally making it easier for courts to find fraudulent joinder and not remand the case back to state court. The bill allows for greater discretion through the elimination of the "common defense" rule,[158] the use of the plausibility standard,[159] and the consideration of extrinsic evidence to determine whether a party has been joined in bad faith.[160]

As drafted, Section 1 of the bill specifies the class of cases in which courts can apply the standard discussed in the second paragraph.[161] The heart of the

[152] *See* Press Release, U.S. Congressman Ken Buck, Ken Buck's Bill to Protect Small Bus. Passes the House (Feb. 25, 2016) (on file with author).

[153] Hellman, *supra* note 22, at 23.

[154] Press Release, The Democratic Whip Steny Hoyer, H.R. 3624—Fraudulent Joinder Prevention Act of 2015 (Feb. 25, 2016).

[155] Press Release, American Association for Justice, AAJ Statement on House Passage of Corp. Forum Shopping Bill (Feb. 25, 2016) (on file with author).

[156] Letter from Center for Justice and Democracy, to Hon. Paul Ryan, Speaker, U.S. House of Representatives (Feb. 23, 2016) (on file with author).

[157] Percy, *Fraudulent Joinder Prevention Act*, *supra* note 142, at 214.

[158] *Id*. at 244; H.R. REP. NO. 114-422, at 14 (2016).

[159] Percy, *Fraudulent Joinder Prevention Act*, *supra* note 142, at 216; Hellman, *supra* note 22, at 42.

[160] Percy, *Fraudulent Joinder Prevention Act*, *supra* note 142, at 226.

[161] H.R. 3624, 114th Cong. § 2(f)(1) (2016).

bill is in Section 2, which sets forth four criteria that define fraudulent joinder.[162] Section 3 describes what evidence the court can use to analyze the issue, and Section 4 explains what the court should do once it finds fraudulent joinder.[163]

Specifically, Section 1 of the bill limits it to cases where removal is based on original diversity jurisdiction, the plaintiff moves to remand the case back to state court, and the diverse defendant objects to the remand on the grounds that the non-diverse defendant was fraudulently joined.[164] This defines the class of cases in which the courts should apply the standards outlined in Section 2 and codifies the class of cases that the courts have consistently analyzed.[165]

Section 2 of the bill sets forth the criteria that the federal court should use in order to determine if the removing defendant has satisfied her burden of demonstrating fraudulent joinder. Prongs (A) and (D) codify current case law.[166] Under prong (A), joinder is fraudulent if there is actual fraud in the pleading of jurisdictional facts.[167] This is a non-controversial rationale, although it is rarely the basis for finding fraudulent joinder.[168]

Under prong (D), joinder is fraudulent if objective evidence makes it clear that there is no good faith intent to seek a judgment against the defendant.[169] Again, this is taken directly from case law, and it is rarely the basis for finding

[162] *Id*. § 2(f)(2).

[163] Finally, under paragraph (4), the court is instructed to dismiss the fraudulently joined defendants without prejudice. Percy, *Fraudulent Joinder Prevention Act*, *supra* note 142, at 226–27. This is in line with all of the circuit courts except for the Seventh Circuit, which issued its ruling in a single sentence without explanation. Walton v. Bayer Corp., 643 F.3d 994, 1001 (7th Cir. 2011).

[164] H.R. 3624 § 2(f)(1).

[165] Percy, *Fraudulent Joinder Prevention Act*, *supra* note 142, at 224.

[166] *Id.* at 225, 249.

[167] *Id.* at 251.

[168] *Id.* at 251–52. Few courts have addressed fraudulent joinder based on actual fraud in the pleading of jurisdictional facts. The doctrine is typically referred to as an actual or outright fraud in the pleadings. Coffman v. Dole Fresh Fruit Co., 927 F. Supp. 2d 427, 434–35 (E.D. Tex. 2013). *See* Cuevas v. BAC Home Loans Servicing, LP, 648 F.3d 242, 249 (5th Cir. 2011) (actual fraud); Smallwood v. Ill. Cent. R.R. Co., 385 F.3d 568, 573 (5th Cir. 2004) (actual fraud); Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co., 313 F.3d 305, 312 (5th Cir. 2002) (outright fraud); Delgado v. Shell Oil Co., 231 F.3d 165, 179 (5th Cir. 2000) (outright fraud); Jernigan v. Ashland Oil Inc., 989 F.2d 812, 815 (5th Cir. 1993) (outright fraud).

[169] H.R. REP. NO. 114-422, at 2 (2016).

fraudulent joinder.[170] For example, in *Faulk v. Husqvarna Consumer Outdoor Products N.A., Inc.*, the plaintiff brought an action in Alabama state court against Husqvarna (successor in interest to Electrolux and a citizen of Delaware and North Carolina) and his cousin (the non-diverse defendant, also a citizen of Alabama), alleging that a lawn mower that was manufactured by Electrolux and sold to him by his cousin was defective.[171] The defendant corporation removed the case almost nine months after it was served; at that time, the plaintiff had not yet served his cousin.[172] As a result, the defendant corporation alleged that his citizenship should be ignored because he was fraudulently joined.[173] The court agreed, holding that the plaintiff's course of conduct unequivocally demonstrated a voluntary abandonment of his claims against his cousin and that the plaintiff lacked a good faith intention to pursue his claims against his cousin.[174] As a result, the plaintiff's motion to remand the case back to state court was denied.[175]

Prong (C) represents a shift in the case law and addresses two different issues—whether courts can consider potential affirmative defenses, and whether the "common defense" rule should be abrogated. With respect to affirmative defenses, under that prong a court should find fraudulent joinder if either state or federal law bars all claims in the complaint against the non-diverse defendant. As a result, the court must consider a viable affirmative defense as a basis for finding fraudulent joinder.[176] While some courts have taken that position,[177] others have taken the position that affirmative defenses, especially federal ones, cannot be the basis for finding fraudulent joinder.[178] The courts that have rejected that view have done so on the basis that the determination of fraudulent joinder must be made on the basis of the

[170] *In re* Briscoe, 448 F.3d 201, 216 (3rd Cir. 2006) (citing Abels v. State Farm Fire & Cas. Co., 770 F.2d 26, 32 (3rd Cir. 1985)); *see also* Faulk v. Husqvarna Consumer Outdoor Prods., N.A., Inc., 849 F. Supp. 2d 1327, 1327 (M.D. Ala. 2012); *In re* Diet Drugs Prods. Liab. Litig., 220 F. Supp. 2d 414, 414 (E.D. Pa. 2002).

[171] 849 F. Supp. 2d at 1329.

[172] *Id.*

[173] *Id.*

[174] *Id*. at 1331.

[175] *Id*. at 1328.

[176] *See* H.R. 3624, 114th Cong. § 2(f)(2)(C) (2016).

[177] Johnson v. Am. Towers, LLC, 781 F.3d 693, 701 (4th Cir. 2015); *In re* Diet Drugs Prods. Liab. Litig., 905 F. Supp. 2d 644, 647 (E.D. Pa. 2012).

[178] City of Columbus v. Sunstar Columbus, Inc., No. 2:15-cv-1864, 2015 WL 5775532, at *5 (S.D. Ohio 2015); Vincent v. First Republic Bank, Inc., No. C 10-01212 WHA, 2010 WL 1980223, at *4 (N.D. Cal. May 17, 2010); Percy, *Fraudulent Joinder Prevention Act*, *supra* note 142, at 243.

plaintiff's complaint, and therefore potential affirmative defenses cannot be considered.[179]

So, for example, in *In re Briscoe,* the Third Circuit affirmed the district court's denial of the plaintiff's motion to remand the case back to state court because it was clear that the plaintiff's complaint against the non-diverse defendant was barred by the applicable statute of limitations.[180] Yet, in *Freitas v. McKesson Corp.,* the court would not consider whether the claims against the defendant were preempted by federal law because a preemption defense would go toward the merits of the claim, and ultimately remanded the case back to state court.[181] Prong (C) resolves the disagreement between the courts by expressly allowing the courts to consider affirmative defenses.[182] As the courts themselves have warned, however, "the district court must rule out any possibility that a state court would entertain the cause"[183] and make sure that it does not cross the line from a "threshold jurisdictional issue into a decision on the merits."[184]

The second thing that Prong (C) does is to abrogate the "common defense" rule by limiting the court's inquiry to the non-diverse defendant when determining whether a defense bars the claim.[185] In *Smallwood v. Illinois Central. Railroad Co.* the plaintiff brought an action for negligence in state court against both the railroad and the state agency that controlled the railroad crossing.[186] The railroad removed the case to federal court, alleging

[179] *City of Columbus*, 2015 WL 5775532, at *5 ("In deciding whether diversity jurisdiction exists here, the court's task is limited to determining whether the complaint states any claim that is even arguably permitted under state law.").

[180] *See* 448 F.3d 201, 219 (3rd Cir. 2006); *see also Johnson,* 781 F.3d at 693 (affirming district court's denial of plaintiff's motion to remand after determining that plaintiff's claim against the non-diverse defendant was preempted by the Communications Act); *In re Briscoe*, 448 F.3d at 218. Under the well-pleaded complaint rule, a determination of whether there is federal question jurisdiction is based on an examination of the well-pleaded complaint, and potential defenses cannot be taken into consideration. Since fraudulent joinder exists when a plaintiff fraudulently joins a co-citizen defendant, and therefore attempts to defeat diversity jurisdiction, this argument does not make sense.

[181] No. C 11-05967 JW, 2012 WL 161211, at *1, *16 (E.D. Ky. Jan. 10, 2012).

[182] Percy, *Fraudulent Joinder Prevention Act*, *supra* note 142, at 243.

[183] *In re Briscoe*, 448 F.3d at 219 (quoting Batoff v. State Farm Ins. Co., 977 F.2d 848, 851 (3d Cir. 1992)).

[184] *Id*. (quoting Boyer v. Snap-On Tools Corp., 913 F.2d 108, 112 (3d Cir. 1990)).

[185] H.R. REP. NO. 114-422, at 14 (2016); *see also* Percy, *Fraudulent Joinder Prevention Act*, *supra* note 142, at 247.

[186] 385 F.3d 568, 571–72 (5th Cir. 2004).

that the plaintiff's claims against the state agency were preempted and, therefore, the plaintiff could not recover against either defendant.[187] The district court agreed that the claims against the state agency were preempted, which effectively decided the whole case, and, therefore, did not remand the case back to state court.[188] The Fifth Circuit reversed en banc, holding that because the railroad did not demonstrate that the state agency's joinder was fraudulent, but only that the plaintiff could not recover against either defendant, the district court did not have the power to dismiss the case on its merits.[189] The court concluded that if the only justification for fraudulent joinder is that there is no reasonable basis for predicting recovery against the non-diverse defendant, and that showing is equally dispositive of all of the defendants rather than just the non-diverse defendant, then the defendant has not met its burden to show that the non-diverse defendant was fraudulently joined.[190] That analysis has come to be known as the "common defense" rule.

The *Smallwood* court itself noted the paradox created by the common defense rule.[191] To remain in the federal forum, as is their wish, the diverse defendants must effectively argue that the theory of liability that failed against the non-diverse defendant could work, at least in theory, against them. All the while, they must be careful not to preclude any later arguments they may want to make.[192] Conversely, the plaintiff must argue that his claims are equally meritless as to all defendants in order to convince the court to remand the case back to state court.[193] Ultimately, the court is forced to theorize a possible outcome based on hypothetical examples and incomplete evidence. And it puts all of the parties in the unenviable position of arguing contrary to their interests while running the risk of making judicial admissions that could haunt them later.[194]

Yet, the common defense rule has been consistently applied by the courts.[195] The rationale is that common defenses are actually attacks on the

[187] *Id*. at 572.

[188] *Id*.

[189] *Id*. at 571–72.

[190] *Id*. at 583 (Jolly, J., dissenting); *see also* Frisby v. Lumberman's Mut. Cas. Co., 500 F. Supp. 2d 697, 700 (S.D. Tex. 2007).

[191] *Frisby*, 500 F. Supp. 2d at 700.

[192] *Id*.

[193] *Id*.

[194] *Id*.

[195] *See, e.g.*, *Smallwood*, 385 F.3d at 568 (5th Cir. 2004); Boyer v. Snap-On Tools Corp., 913 F.2d 108, 113 (3rd Cir. 1990); *see also* McKinnes v. Am. Int'l Grp., Inc., 420 F. Supp. 2d 1254,

merits of the case because they undermine the claims against the diverse and non-diverse defendants alike.[196] Put another way, because the common defenses are not unique to the non-diverse defendant, they do not support an argument that the non-diverse defendant was fraudulently joined.[197] The courts that have not used the common defense rule have not rejected it, but have found that it does not apply because the claim against the diverse defendant is analytically distinct from and in addition to the claims against the non-diverse defendant and, therefore, the failure of the claims against the non-diverse defendant does not necessarily cause the claims against the diverse defendant to fail.[198]

Under the proposed language of the bill, if there is no viable claim against the non-diverse defendant, the case should not be remanded to state court even if that same defense could be used against the removing defendant.[199] The possibility that the same arguments might bar the claims against the diverse defendant play no role at the jurisdictional stage. This position is a clear deviation from the common law.

Doing away with the common defense rule raises serious federalism concerns.[200] In every case in which a federal court is asked to find fraudulent joinder on grounds that are dispositive of the liability of diverse and non-diverse defendants alike, the court is being asked to exercise jurisdiction that it does not possess.[201]

1259 (M.D. Ala. Mar. 13, 2006); *In re* New Eng. Mut. Life Ins. Co. Sales Practices Litig., 324 F. Supp. 2d 288, 299 (D. Mass. 2004).

[196] *Smallwood*, 385 F.3d at 571.

[197] *McKinnes*, 420 F. Supp. 2d at 1258.

[198] *See* Boone v. Citigroup, Inc., 416 F.3d 382, 391–92 (5th Cir. 2005); *McKinnes*, 420 F. Supp. 2d at 1258; Rainwater v. Lamar Life Ins. Co., 391 F.3d 636, 638 (5th Cir. 2004); Hauck v. ConocoPhillips Co., No. 06-135-GPM, 2006 WL 1596826, at *9 (S.D. Ill. June 6, 2006).

[199] Hellman, *supra* note 22, at 38; Percy, *Fraudulent Joinder Prevention Act*, *supra* note 142, at 226.

[200] Percy, *Fraudulent Joinder Prevention Act*, *supra* note 142, at 246–47.

[201] *See also* Mannsfeld v. Evonik Degussa Corp., No. 10-0553-WS-M, 2011 WL 53098 at *2 (S.D. Ala. Jan. 5, 2011); Dominick's Finer Foods v. Nat. Const. Servs., Inc., No. CV 10-00836-SVW (PWJx), 2010 WL 891321, at *3 (C.D. Cal. Mar. 9, 2010) (where fraudulent joinder allegation is actually an attack on merits of plaintiff's entire case as to all defendants, a finding of fraudulent joinder for diversity purposes would be improper because it is a merits-based decision that effectively decides entire case); *In re* Yasmin and Yaz (Drospirenone) Mktg., Sales Practices and Prods. Liab. Litig., 692 F. Supp. 2d 1025, 1034 (S.D. Ill. 2010) ("[T]he common defense doctrine provides that when the same argument or defense defeats a plaintiff's claim against diverse and non-diverse defendants that argument or defense may not be the basis for a fraudulent joinder finding."); Feldman v. AXA Equitable Life Ins. Co., No. CV 409-004, 2009 WL 2486899, at *4 n.6 (S.D. Ga.

The diverse defendants really are just arguing that the suit has no merit, and that is not a ground for removal, but for asking the court in which the suit was filed—the state court—to dismiss the suit. While this shift makes it easier for the defendant to satisfy its burden of demonstrating fraudulent joinder, the federalism concerns outweigh the need for clarity.[202]

The most controversial change to the current case law is found in Prong (B) of the bill. Under that prong, in considering whether there is fraudulent joinder, the court must determine whether the plaintiff's cause of action against the non-diverse defendant is plausible.[203] In making that assessment, the court may pierce the pleadings and can consider amended pleadings, affidavits, and any other evidence submitted by the parties.[204] Therefore,

Aug. 10, 2009) (pursuant to common defense rule, declining to find fraudulent joinder based on statute of limitations defense that would bar claims against resident and non-resident defendants alike); Loop v. Allianz Life Ins. Co. of North Am., No. 09-0007-M, 2009 WL 981988, at *5 (S.D. Ala. Apr. 13, 2009) ("[W]hen a fraudulent joinder defense would eliminate not only the claims against a single defendant, but . . . all claims against all defendants, then the common defense rule requires that the federal court reject the fraudulent joinder arguments and remand the removed action back to the State courts for appropriate action."); Cherry v. AIG Sun Am. Life Assur. Co., No. 1:07-CV-923-MEF, 2008 WL 508428, at *2 (M.D. Ala. Feb. 21, 2008) ("The common defense rule provides that when a defense to liability is common to diverse and non-diverse defendants, fraudulent joinder cannot be found. . . . [T]hese attacks on the joinder of the non-diverse defendant are in reality attacks on the merits of the entire case because they undermine the claims against both the diverse and non-diverse defendants."); Poole v. Am. Int'l Grp., Inc., 414 F. Supp. 2d 1111, 1117 (M.D. Ala. 2006) (explaining that numerous courts "have applied a 'common defense rule' to fraudulent-joinder claims such that when a defense to liability is common to diverse and non-diverse defendants, fraudulent joinder is not found" for the reason that "common defenses are actually attacks on the merits of the entire case since they undermine the claims against the diverse and non-diverse defendants alike"); *Hauck*, 2006 WL 1596826 at *9 ("It is this Court's view that, in every case in which a federal court is asked to find fraudulent joinder on grounds dispositive of the liability of diverse and non-diverse defendants alike, the court is being asked to exercise jurisdiction it does not possess."); McGinty v. Player, 396 F. Supp. 2d 593, 601 (D. Md. 2005) (applying common defense rule to deem non-diverse defendant not fraudulently joined where limitations defense was equally applicable to claims against diverse defendant); *In re* New Eng. Mut. Life Ins. Co. Sales Practices Litig., 324 F. Supp. 2d 288, 306 (D. Mass. 2004) ("[I]f an argument offered to prove fraudulent joinder of non-diverse defendants also shows that no case exists against the diverse defendants, no legitimate reasons exist to set apart the non-diverse defendants as fraudulently joined.").

[202] Percy, *Defining the Contours*, *supra* note 36, at 621.

[203] *See* H.R. 725, 115th Cong. (2017).

[204] *See* Monahan, *supra* note 15, at 1350 (explaining that the federal courts may "pierce the pleadings to determine whether a plaintiff has a legitimate claim against the diversity-destroying defendant"); Ross v. Citifinancial, Inc., 344 F.3d 458, 462–63 (5th Cir. 2003) ("[D]istrict court may 'pierce the pleadings.'").

while the removing defendant still has the burden of proving fraudulent joinder by clear and convincing evidence, it only has to demonstrate that the plaintiff's cause of action against the non-diverse defendant is not plausible. Thus the statute replaces standards like "no possibility of recovery," "no reasonable basis," and "no reasonable possibility of recovery" with the standard of plausibility, drawing the language from the *Twombly* and *Iqbal* decisions under Rule 8 of the Federal Rules of Civil Procedure.[205]

The Supreme Court's decisions in *Twombly* and *Iqbal*[206] heightened the pleading standard from "no set of facts in support of his claim that would entitle him to relief"[207] to "facts that give rise to a plausible entitlement to relief" to defeat a motion to dismiss under Rule 12(b)(6).[208] These opinions have sparked debate and controversy throughout the legal community, with concerns that the new standard would undermine meritorious claims, especially for plaintiffs who frequently lack access to the courts or funds.[209] Over the years since the cases were decided, courts have continued to be confused over what the standard is and how and when it should be applied.[210] Therefore, while the advocates of the bill claim that the plausibility standard is "well understood by federal judges and will not create new litigation or confusion," this is not the case.[211]

Proponents of the bill also argue that requiring the plausibility standard is "a modest tweak to the standard for fraudulent joinder."[212] This is also not the case. While the language varies from circuit to circuit, almost all courts currently employ a more lax standard in assessing a plaintiff's complaint for the purposes of determining whether there is fraudulent joinder.[213] Courts

[205] H.R. REP. No. 114-422, at 12–13 (2016); Percy, *Federal Case*, *supra* note 16, at 216–17.

[206] Ashcroft v. Iqbal, 556 U.S. 662 (2009); Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).

[207] Conley v. Gibson, 355 U.S. 41, 45–46 (1957).

[208] *Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 557.

[209] *See* Brian T. Fitzpatrick, *Twombly and Iqbal Reconsidered*, 87 NOTRE DAME L. REV. 1621, 1627–28 (2012); Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L. J. 1, 16 (2010); Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1350–51 (2010).

[210] Steinman, *supra* note 209, at 1299.

[211] *Fraudulent Joinder Prevention Act of 2015: Hearing on H.R. 3621 Before the Subcomm. On the Constitution and Civil Justice of the H. Comm. On Judiciary*, 114th Cong. 46 (2015) (statement of Cary Silverman, partner at Shook, Hardy & Bacon, L.L.P.).

[212] *See id*. at 35 (statement of Cary Silverman).

[213] *See* Stillwell v. Allstate Ins. Co., 663 F.3d 1329, 1333 (11th Cir. 2011) ("The plausibility standard 'asks for more than a sheer possibility that a defendant has acted unlawfully.' In contrast,

that have considered fraudulent joinder since the Supreme Court's decision in *Twombly* and *Iqbal* have continued that trend. For example, in *Deweese v. Doran*, the court held that the pleading standard in deciding a charge of fraudulent joinder is different from the plausibility standard applicable to a 12(b)(6) motion to dismiss,[214] and that under its lesser standard "[i]f there is even a possibility that a state court would find that the complaint states a cause of action against any one of the resident defendants, the federal court must find that joinder was proper and remand the case to state court."[215]

Similarly, in determining whether the plaintiffs had established a cause of action against the non-diverse defendants, the removing defendants argued in *Bellman* that the court should consider the removal standard "in conjunction with the . . . Supreme Court's recent jurisprudence regarding the viability of complaints under a Rule 12(b)(6) analysis."[216] The defendants argued that the court should find fraudulent joinder if it concludes that the plaintiffs' claims against the non-diverse defendant do not "cross the line from conceivable to plausible," reasoning that, if a "'conceivable' claim is deemed insufficient under a Rule 12(b)(6) analysis, then a theoretically 'possible' claim should be equally infirm under a remand analysis."[217] The court disagreed, holding that the analysis for determining whether a motion

all that is required to defeat a fraudulent joinder claim is 'a possibility of stating a valid cause of action.'" (quoting Triggs v. John Crumo Toyota, Inc., 154 F.3d 1284, 1287 (11th Cir. 1998))); Watson v. Gish, No. C 10-03770 SBA, 2011 WL 2160924, at *3 (N.D. Cal. June 1, 2011); Tofighbakhsh v. Wells Fargo & Co., No. 10-830 SC, 2010 WL 2486412, at *1, 3 (N.D. Cal. June 16, 2010); Edwea, Inc. v. Allstate Ins. Co., No. CIV.A. H-10-2970, 2010 WL 5099607, at *1, 5 (S.D. Tex. Dec. 8, 2010).

[214] No. 3:15-cv-32-J-32JRK, 2015 WL 5772156, at *1–2 (M.D. Fla. Sept. 30, 2015) (citing *Stillwell*, 663 F.3d at 1332).

[215] *Id*. at *5 (citing Crowe v. Coleman, 113 F.3d 1536, 1538 (11th Cir. 1997)); s*ee also* Allard v. Laroya, 163 F. Supp. 3d 309, 311, 311 n.2 (E.D. Va. 2016) ("'The party alleging fraudulent joinder bears a heavy burden,' as it must show that there is 'no possibility' that the plaintiff would be able to establish a claim even after resolving all issues of law and fact in the plaintiff's favor. . . . 'This standard is even more favorable to the plaintiff than the standard for ruling on a motion to dismiss . . . . Once the court identifies a glimmer of hope for the plaintiff the jurisdictional inquiry ends.'" (quoting Hartley v. CSX Transp., 187 F.3d 422, 422 (4th Cir. 1999))). And as noted by the *Allard* court, at the time *Hartley* was decided, the standard had not yet been changed from possibility to plausibility, and the court still felt that the fraudulent joinder standard was more lenient than the old 12(b)(6) standard.

[216] Bellman v. NXP Semiconductors USA, Inc., 248 F. Supp. 3d 1081, 1096 (D.N.M. 2017).

[217] *Id*. at 1132.

to dismiss should be granted and whether a non-diverse defendant was fraudulently joined is not the same.[218]

In addition to going against established precedent, the proposed prong overlooks key distinctions between Rule 12(b)(6) and fraudulent joinder. First, even if a complaint fails to state a claim under Rule 12(b)(6), courts are not confined to the allegations that appear on a complaint's face when evaluating whether a plaintiff has fraudulently joined a non-diverse defendant to defeat removal.[219] Rather, "upon allegations of fraudulent joinder designed to prevent removal, [most courts] may look beyond the pleadings to determine if the joinder, although fair on its face, is a sham or fraudulent device to prevent removal."[220] The proposed prong itself allows the court to pierce the pleadings and consider amended pleadings, affidavits, and any other evidence submitted by the parties.[221] Thus, it is immaterial for fraudulent joinder purposes whether the complaint "sets forth a litany of labels, conclusions, and formulaic recitations,"[222] as the court is empowered to look beyond the complaint's face to determine whether the plaintiffs would be able to establish a cause of action against the non-diverse defendant.[223]

Second, the *Twombly*/*Iqbal* plausibility standard is inappropriate because it involves different burdens and requires a lesser quantum of proof than fraudulent joinder's no-possibility standard. The fraudulent joinder test "is more exacting than that for dismissing a claim under Fed. R. Civ. P. 12(b)(6)."[224] Under Rule 12(b)(6), a plaintiff must state a "plausible claim for relief," which is "more than a sheer possibility," but less than a "'probability requirement.'"[225] In evaluating plausibility, a court must construe the complaint's allegations in the light most favorable to the plaintiff and dismiss a claim "only if a reasonable person could not draw . . . an

[218] *Id*. at 1114.

[219] Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)).

[220] Brazell v. Waite, 525 F. App'x 878, 881 (10th Cir. 2013) (quoting Smoot v. Chi., Rock Island & Pac. R.R. Co., 378 F.2d 879, 881–82 (10th Cir. 1967)).

[221] *Bellman*, 248 F. Supp. 3d at 1112.

[222] *Id*. at 1132.

[223] Zufelt v. Isuzu Motors Am., L.C.C., 727 F. Supp. 2d 1117, 1122 (D.N.M. 2009) (emphasis added) (citation omitted).

[224] Montano v. Allstate Indemn., No. 99-2225, 2000 WL 525592, at *1 (10th Cir. April 14, 2000). See Tr. at 21:8-20 (Hardy) (agreeing that the cases involving fraudulent joinder hold that the standard is "higher than the standard on the motion to dismiss").

[225] Ashcroft v. Iqbal, 556 U.S. 678, 678 (2009).

inference [of plausibility] from the alleged facts."[226] Proving a "sheer possibility" is, of course, simpler than proving "plausibility." That, however, is the point. Fraudulent joinder requires that the defendant prove that "there is no possibility that the plaintiff would be able to establish a cause of action" against the non-diverse party.[227] The defendant therefore bears the "heavy burden" of demonstrating that the plaintiff's claims cannot meet the simpler "possibility" standard, while the court, as in the Rule 12(b)(6) context, must still resolve "all factual and legal issues . . . in favor of the plaintiff."[228] Moreover, in contrast with Rule 12(b)(6), the defendant must overcome a presumption against removal,[229] while the court may look beyond the pleadings to determine whether a "possibly viable" claim exists.[230] Finally, where the court should dismiss a claim under Rule 12(b)(6) "only if a reasonable person could not draw" an inference of plausibility,[231] a removing defendant must establish a claim's impossibility for fraudulent joinder purposes "with complete certainty upon undisputed evidence."[232]

Third, from a mechanical standpoint, the *Twombly*/*Iqbal* standard would not work well in the fraudulent joinder context. Many state courts have not adopted *Twombly*/*Iqbal's* heightened pleading standard.[233] Instead, many states continue to use notice pleading, which requires that plaintiffs allege facts sufficient only to put the defendant on fair notice of their claims.[234] A complaint filed in state court is thus subject to a relaxed pleading standard;

[226] Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 317 (2007).

[227] *Zufelt*, 727 F. Supp. 2d at 1125 (emphasis added) (citation omitted).

[228] Dutcher v. Matheson, 733 F.3d 980, 988 (10th Cir. 2013) (citation omitted); *Montano*, 2000 WL 525592, at *1 (stating that the court must "initially resolve all disputed questions of fact and all ambiguities in the controlling law in favor of the non-removing party") (citation omitted).

[229] *See* Laughlin v. Kmart Corp., 50 F.3d 871, 873 (10th Cir. 1995); *see also* Simons, *supra* note 16, at 625 n.139 (citing Balberdi v. Lewis, No.12-00582, 2013 WL 1296286, at *2 (D. Haw. Mar. 8, 2013) (noting the strong presumption against removal and against a finding of fraudulent joinder)).

[230] Archuleta v. Taos Living Ctr., LLC, 791 F. Supp. 2d 1066, 1076 (D.N.M. 2011); *Montano*, 2000 WL 525592, at *2.

[231] *Tellabs*, 551 U.S. at 317.

[232] Smoot v. Chi., Rock Island & Pac. R.R. Co., 378 F.2d 879, 882 (10th Cir., 1967).

[233] Isengard v. N.M. Pub. Educ. Dep't, No. CIV 08–0300 JB/RLP, 2009 WL 5220371, at *5 (D.N.M. 2009) ("Courts in New Mexico have not adopted the pleading requirements of the Federal Rules of Civil Procedure that the Supreme Court . . . enunciated in [*Twombly*/*Iqbal*.]").

[234] *See* Taylor v. L&P Bldg. Supply of Las Cruces, Inc., No. CIV 14–0989 JB/CG, 2015 WL 7803614, at *12 n.5 (D.N.M. Oct. 27, 2015) (citing Rule 1-008(A) NMRA); Schmitz v. Smentowski, 785 P.2d 726, 729–30 (N.M. 1990).

once the case is removed to federal court, however, the complaint is subject to the more rigorous *Twombly*/*Iqbal* standard.[235] Thus, while a complaint crafted to meet the state's notice pleading standard may survive a motion to dismiss in that forum, upon removal it might fail to state a claim under the more rigorous federal standard.

A solution proposed by the bill is that the complaint can be dismissed without prejudice to allow the plaintiffs an opportunity to amend their complaint to comply with *Twombly*/*Iqbal*.[236] This process, however, does not work in the fraudulent joinder context, where the central question is whether the case belongs in federal court in the first place. If the court's remand analysis is confined to the complaint's four corners, and a plaintiff had additional evidence to offer, fairness would require that the court allow amendment before determining whether the complaint—originally drafted to comply with state notice-pleading—met *Twombly*/*Iqbal's* heightened pleading standard. Such a process would waste judicial resources, unduly delay resolution of the matter, and incentivize formalistic pleading practice.

Thus, in addressing whether a non-diverse party was fraudulently joined, the federal court should not apply the same standard that it must apply in addressing a motion to dismiss. Plausibility should not be the test for fraudulent joinder. The plausibility standard itself is confusing, and the bill's proposal contravenes the courts' long-established conclusion that fraudulent joinder requires that there is "no possibility" of a claim against the non-diverse defendant. The "no possibility" test carries a heavier burden than Rule 12(b)(6)'s plausibility standard because a "possible" claim is simpler to establish than a "plausible" one. Finally, since many states continue to use notice pleading, it is not appropriate to subject the complaint to a plausibility analysis once it has been removed.[237]

Instead, when evaluating fraudulent joinder, the proper inquiry should be whether a plaintiff can state a "possibly viable" claim.[238] "A claim is

[235] *See Taylor*, 2015 WL 7803614 at *12 n.5 (citations omitted).

[236] *See* H.R. 725, 115th Cong. (2017); *see also* Archuleta v. Taos Living Ctr., LLC, 791 F. Supp. 2d 1066, 1076 (D.N.M. 2011).

[237] Paragraph (3) also allows the plaintiff to amend her pleadings. *See* H.R. 725, 115th Cong. (2017). As the House Report explains, that language is designed to address the concern that "the plaintiff, having filed a complaint in state court under state procedural rules, may not have anticipated application of a . . . federal standard." H.R. REP. NO. 115-17 (2017). If, however, the plausibility standard is no longer used, then there is no need for that particular language. *Id.*

[238] Montano v. Allstate Indemn., No. 99-2225, 2000 WL 525592, at *2 (10th Cir. April 14, 2000).

'possibly viable' if with amendment it would state a cause of action."[239] Thus, here, rather than requiring an amendment if the plaintiffs' claims against the non-diverse defendant are not facially "plausible," the court can more efficiently evaluate fraudulent joinder by inquiring whether there is a possibility that any of the plaintiffs' claims against the non-diverse defendant could be viable either in state court or in federal court under an amended complaint.[240] While the courts need flexibility, the rules for remand and not just the rules for fraudulent joinder dictate a more stringent standard.[241]

Paragraph (3) allows the court to pierce the pleadings and consider affidavits and other materials submitted by the parties.[242] According to the House Report, this bill anticipates a framework more similar to the one used for summary judgment under Federal Rule of Civil Procedure 56 than the framework used for motions to dismiss under Federal Rule of Civil Procedure 12(b)(6).[243] So while the bill advocates the same standard as a motion to dismiss, it allows the use of extrinsic evidence to determine whether there is fraudulent joinder. While some courts, such as the Eleventh Circuit, have embraced the broad piercing of the pleadings,[244] many other courts have determined that the court should go no further than the complaint.[245]

Allowing the court to look further than the pleadings makes sense. The federal court must make a jurisdictional determination while not crossing the threshold into a determination on the merits of the claim. Therefore, it is

[239] *Archuleta*, 791 F. Supp. 2d at 1076.

[240] *Id*. at 1076 ("The Court will thus determine whether there is a possibility that any of J. Archuleta's claims against Reid are viable, either in state court, or in federal court under an amended complaint.").

[241] *See* Pritchett v. Office Depot, Inc., 404 F.3d 1232, 1235 (10th Cir. 2005) ("[S]tatutes conferring jurisdiction upon the federal courts, and particularly removal statutes, are to be narrowly construed in light of our constitutional role as limited tribunals.").

[242] Percy, *Federal Case*, *supra* note 16, at 224.

[243] H.R. REP. No. 114-422, at 16 (2017); Percy, *Federal Case, supra* note 16, at 239.

[244] *See* Stillwell v. Allstate Ins. Co., 663 F.3d 1329, 1333 (11th Cir. 2011) (quoting Crowe v. Coleman, 113 F.3d 1536, 1538 (11th Cir. 1997)) ("To determine whether the case should be remanded the district court must evaluate the factual allegations in light most favorable to the plaintiff . . . . [T]he federal court makes these determinations based on the plaintiff's pleadings at the time of removal; but the court may consider affidavits and deposition transcripts submitted by the parties.").

[245] *See* Pampillonia v. RJR Nabisco, Inc., 138 F.3d 459, 461 (2nd Cir. 1998); *see also* Poulos v. NAAS Foods, Inc., 959 F.2d 69, 74 (7th Cir. 1992); Batoff v. State Farm Ins. Co., 977 F.2d 848, 851 (3rd Cir. 1992) ("In evaluating the alleged fraud, the district court must focus on the plaintiff's complaint at the time the petition for removal was filed.").

important for the court to have some flexibility with respect to the evidence that it can review, but the extent that the court can pierce the pleadings should be limited. As the Fifth Circuit stated, "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."[246] Therefore, this provision needs further clarification and some limitations in order to make sure that the fraudulent joinder analysis is balanced by the plaintiff's right to have a state court determine the merits of the claim.

CONCLUSION

While it is important to have a statutory solution to the problem of fraudulent joinder, the present bill needs some work. The partisan views of plaintiffs preferring state court and defendants preferring federal court are short-sighted and not helpful. The Hulk Hogan case is an example of a very wealthy plaintiff whose lawsuit was also bankrolled by Peter Theil, a Silicon Valley billionaire who had his own agenda against Gawker that was driven by revenge over being "outed" by the media company.[247] The underlying issues that exist because of the uncertainty of the law continue to create confusion and inconsistent results.

In addition, the rationale of the bill seems to rest on the unfairness to the non-diverse defendant in having to defend itself from frivolous claims so that the plaintiff can strategically avoid federal court, rather than the stated purpose of diversity jurisdiction, which is to make sure that the diverse defendant can litigate in a federal forum that is free from prejudice.[248] Even if this is true, there seems to be no federal interest in protecting an individual or small business from being sued by citizens of their own state in state court on a state law cause of action. While there certainly is an expense involved in defending itself, there is no empirical evidence to support the proposition that the non-diverse defendant is dismissed as soon as the case is remanded to state court.[249]

How does this leave Hulk Hogan?

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[246] Smallwood v. Ill. Cent. R.R Co., 385 F.3d 568, 574 (5th Cir. 2004).

[247] Andrew Ross Sorkin, *Peter Thiel, Tech Billionaire, Reveals Secret War with Gawker*, N.Y. TIMES (May 25, 2016), https://www.nytimes.com/2016/05/26/business/dealbook/peter-thiel-tech-billionaire-reveals-secret-war-with-gawker.html.

[248] Hellman, *supra* note 22, at 34–35.

[249] *Id*. at 42.

If the bill were enacted as written, there is a good chance that the lawsuit would not have been remanded to state court. Gawker was not asserting an affirmative defense and there was no potential common defense problem, so neither of those changes in the law would have impacted the result. The court would have had to analyze the allegation of fraudulent joinder through a plausibility standard, however, and would have been able to look beyond Bollea's complaint when assessing whether he had a plausible entitlement to relief from Heather Clem. It is possible that further information would have supported the contention that the statute of limitations had run for each of the five causes of action against Heather Clem. Or it is possible that other information that came out during discovery could have made an impact on the judge. Ultimately, while Bollea recovered $115 million from Gawker in compensatory damages, and over $25 million in punitive damages, Heather Clem was dropped from the lawsuit just before the damages were awarded.[250]

And if the case had proceeded in federal court, would the ultimate result have been different? The applicable law would have been the same, although Gawker would not have had to put up the whole amount of the award as bond while waiting for the appeal.[251] The jury would have been different, the judge would have been different, and it is very possible that even if Gawker was found to be liable, the award would not have been as large.[252] As a result, perhaps Gawker would still exist today.

[250] Anna Phillips (@annamphillips), TWITTER (July 1, 2015, 2:47 PM), http://live.tampabay.com/Event/HulkvsGawk_Live_Coverage_from_the_Hulk_Hogan_vs_Gawker_Trial?Page=0 (Tampa Bay Times writer Anna Phillips, tweeted "Attorney for Hulk Hogan says they . . . will drop her from the case against @Gawker."); Maria Bustillos, *Everything You Need to Know about Hulk Hogan v. Gawker*, MOTHERBOARD (July 1, 2015), https://motherboard.vice.com/en_us/article/mgbyd8/hulk-hogans-sex-tape-is-about-to-go-to-trial-gawker.

[251] *See* FED. R. CIV. P. 62; FLA. R. APP. P. 9.310

[252] "State courts have a history of offering really, shall we say, inflated judgments. This was one on steroids." John Cook, Former Executive Editor, Gawker Media Corp.