Defendants may attempt to remove state law actions to federal court by arguing that non-diverse defendants are improperly joined. Counter this by preparing early and often for the possibility.

By || **Brenda M. Johnson**

REBOUNDING FROM FRAUDULENT

A defendant normally cannot remove a state law action to federal court based on diversity unless it satisfies the statutory requirements: Namely, in addition to meeting the requisite amount in controversy ($75,000), there must be complete diversity between the plaintiffs and the defendants, and no defendant may be a citizen of the state in which the action has been brought.[1]

Under the judge-made doctrine of fraudulent joinder, however, a case that does not meet this standard still can be removed if the diverse defendants convince the federal court that the plaintiff has no possible claim against the non-diverse defendant. But you can counter fraudulent joinder by anticipating these arguments and handling your case with the possibility of removal in mind.

Fraudulent joinder (also referred to as "improper joinder") "effectively permits a district court to disregard, for jurisdictional purposes, the citizenship of certain nondiverse defendants, assume jurisdiction over a case, dismiss the nondiverse defendants, and thereby retain jurisdiction."[2] The removing defendant must show that there is no possibility of recovery, whether legally or factually, against the non-diverse defendant, and the burden of proof to show no possibility of recovery should be high. As the Fifth Circuit has framed it: "[T]he test for fraudulent joinder is whether the defendant has demonstrated that there is no possibility of recovery by the plaintiff against an in-state defendant, which stated differently means that there is no reasonable basis for the district court to

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predict that the plaintiff might be able to recover against an in-state defendant."[3] In addition, defendants challenging fraudulent joinder must satisfy the procedural requirements for removal, including doing so within the deadlines set forth in the federal removal statutes.[4]

At first glance, the fraudulent joinder standard appears favorable to plaintiffs. Courts, for instance, routinely describe the removing defendant's burden as a heavy one.[5] Courts also generally agree that the standard should be "less probing" than the standard for deciding a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss[6] and that all questions of law and fact should be construed in favor of the plaintiff.[7]

At the same time, however, the procedure for raising fraudulent joinder arguments is more similar to moving for summary judgment under Rule 56(b), as it permits the removing defendant to present affidavits, deposition transcripts, and other evidence to support removal.[8] Because of this, as one commentator has noted, "defendants can subtly, but improperly, lessen the burden, or even shift the burden back to the plaintiffs, through a combination of

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argument and affidavits . . . [that] might blur the line between jurisdictional facts and facts relating to the merits of the plaintiff's claims."[9] And while plaintiffs are entitled to present their own evidence in support of a motion to remand, they may find themselves having to do so long before any discovery has been conducted—and with only a limited right to conduct it, if necessary.[10]

Other risks for plaintiffs exist as well. Recent trends in case law have expanded the reach of the fraudulent joinder doctrine to include challenges to claims against diverse forum defendants and to otherwise meritorious claims that may not satisfy a state's permissive joinder rules. Also, 28 U.S.C. §1446(c)(1), which was amended in 2012,[11] has been used to allow removal when a plaintiff dismisses a defendant after the one-year limit period has elapsed.[12]

Ascertain which fact witnesses will be able to support your claims, and determine whether you will be able to obtain affidavits from them. If deposition testimony from other cases supports your claims, be prepared to submit it.

Frame Your Complaint

District courts are split as to whether the state pleading standards or the heightened "plausibility" standard for notice pleading set forth in *Bell Atlantic Corp. v. Twombly*[13] and *Ashcroft v. Iqbal*[14] should set the bar when evaluating the sufficiency of a plaintiff's allegations under a fraudulent joinder analysis.[15] The better legal argument is that *Iqbal/Twombly* should not apply, as a Rule 12(b)(6) analysis should have no application to the threshold jurisdictional questions posed by a fraudulent joinder argument—but be aware that more than one district court has held otherwise.[16]

The best practice is to draft your complaint with an eye to meeting federal pleading requirements and to be detailed in your factual allegations. Also, be prepared to present supporting evidence. Ascertain which fact witnesses will be able to support your claims, and determine whether you will be able to obtain affidavits from them. If deposition testimony from other cases supports your claims, be prepared to submit it.

If expert testimony will be necessary or helpful, be prepared to submit expert affidavits too. For instance, if you have named a non-diverse entity, individual employee, or sales representative as a defendant, be prepared to offer evidence of that person's involvement in the sale or marketing of the product that is sufficient to suggest that a claim may exist against the defendant under applicable state law.[17] If you have a claim against a non-diverse defendant that may have liability not specifically tied to a products liability theory (such as a treating physician), be prepared to offer expert or other evidence as necessary in support of those claims as well.

The Forum Defendant Rule

Cases typically cannot be removed to federal court based on diversity if at least one of the defendants is a citizen of the forum state.[18] Courts, however, are also divided on whether fraudulent joinder arguments can be used to challenge a diverse resident defendant whose presence would otherwise prevent removal.

Many of the concerns posed by expanding the doctrine in this manner were articulated by the Seventh Circuit in *Morris v. Nuzzo*.[19] Without deciding whether to adopt or reject it, the court noted that "extending the fraudulent joinder doctrine to diverse resident defendants would constitute a nontrivial expansion of the removal right" and could lead to an undue increase in the number of cases removed to federal courts.[20] But district courts in several circuits have held that this doctrine can be applied to defeat the resident defendant rule, adding another issue to consider when preparing to file suit in state court.[21] If you may face removal to a federal court that has been open to this argument, be prepared to defend the viability of your claims against the resident defendant just as you would with respect to non-diverse defendants.

Fraudulent (or Procedural) Misjoinder

Certain federal courts, most notably in the Eleventh Circuit, have held that non-diverse defendants may be ignored for removal purposes if it appears that there has been an intentional attempt to defeat removal by joining claims against diverse and non-diverse defendants that lack the factual nexus required for permissive joinder. The Eleventh Circuit first addressed this doctrine, known as "fraudulent" or "procedural misjoinder," in *Tapscott v. MS Dealer Service Corp.*,[22] and district courts in the Second,[23] Fourth,[24] and Fifth Circuits have applied it since.[25]

Other courts, however, have been critical of the doctrine and have declined

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to adopt it, including district courts in the First,[26] Third,[27] Sixth,[28] and Seventh Circuits.[29] The Eighth and Ninth Circuits have recognized the existence of the doctrine but neither has applied it,[30] and the district courts in those circuits have been disinclined to allow removal based on the doctrine.[31] The Tenth Circuit also has declined to endorse it, and the district courts in that circuit are split in its application.[32] Courts that have adopted the fraudulent misjoinder doctrine will look to state joinder rules to determine whether joinder was appropriate.[33]

Whether mere misjoinder is sufficient to warrant remand or whether a higher standard should apply has also split courts. Many that recognize the doctrine apply a standard similar to that for fraudulent joinder: They require the removing defendant to demonstrate either "outright fraud" 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."[34] Others have rejected this standard and look only at whether the appropriate joinder rule is satisfied.[35] Either way, be aware of fraudulent misjoinder arguments when crafting your initial complaint, especially if you are combining claims that arise from distinct factual scenarios.

Look for Procedural Defects

If your case is removed, carefully examine the defendant's notice of removal and the record in your case immediately because you may have certain time-sensitive arguments for remand. A motion to remand that challenges a fraudulent joinder claim can be made "at any time before final judgment"[36] because fraudulent joinder is a jurisdictional inquiry. But challenges based on procedural defects must be made within 30 days of filing the notice of removal.[37]

For example, in cases with multiple defendants, the removal statute requires that "all defendants who have been properly joined and served must join in or consent to the removal."[38] If the removing defendant failed to obtain this consent, you may be successful in obtaining remand based on this technical defect. But be aware that this rule

(known as the "rule of unanimity") does not require the removing defendant to obtain consent from the defendant that it claims was fraudulently joined.[39] A close examination of the case status and of the defendants' removal papers may provide you with a basis for remand, but do it quickly.

The best defense against removal based on fraudulent joinder is diligently working up your case, to the best of your ability, before the complaint is filed and drafting your complaint with the possibility of removal in mind.

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Notes

1. *See* 28 U.S.C. §1441(b) (2018).
2. *Mayes v. Rapoport*, 198 F.3d 457, 461 (4th Cir. 1999) (citing *Cobb v. Delta Exports, Inc.*, 186 F.3d 675, 677–78 (5th Cir. 1999)); *see also Smallwood v. Ill. Cent. R.R. Co.*, 385 F.3d 568 (5th Cir. 2004) (en banc).
3. *Smallwood*, 385 F.3d at 573.
4. 28 U.S.C. §1446 (2018).
5. *See, e.g.*, *Hartley v CSX Transp., Inc.*, 187 F.3d 422, 424 (4th Cir. 1999) ("The party alleging fraudulent joinder . . . must show that the plaintiff cannot establish a claim even after resolving all issues of law and fact in the party's favor."); *Crowe v. Coleman*, 113 F.3d 1536, 1538 (11th Cir. 1997).
6. *Boomerang Recoveries, LLC v. Guy Carpenter & Co., LLC*, 182 F. Supp. 3d 212, 218 (E.D. Pa. 2016) (citing *Batoff v. State Farm Ins. Co.*, 977 F.2d 848, 852 (3d Cir. 1992)); *Boyer v. Snap-On Tools Corp.*, 913 F.2d 108, 112 (3d Cir. 1990); *see also Hartley*, 187 F.3d at 424; *Poulos v. Naas Foods, Inc.*, 959 F.2d 69, 73 (7th Cir. 1992).
7. *Pamillonia v. RJR Nabisco, Inc.*, 138 F.3d 459, 461 (2d Cir. 1998).
8. *See, e.g.*, *B., Inc. v. Miller Brewing Co.*, 663 F.2d 545, 549 n.9 (5th Cir. 1981). Notably, however, courts generally agree that any piercing of the pleadings must be limited in scope and not an evaluation of the merits of the claim. *See, e.g.*, *Boyer*, 913 F.2d at 112; *Smallwood*, 385 F.3d at 573–74; *B., Inc.*, 663 F.2d at 551.
9. Matthew J. Richardson, *Clarifying and Limiting Fraudulent Joinder*, 58 Fla. L. Rev. 119, 123 (2006).
10. *See id.* at 139–40; *see also Smallwood*, 385 F.3d at 574.
11. 28 U.S.C. §1446(c)(1).
12. *See Hiser v. Seay*, 2014 WL 6885433 (W.D. Ky. Dec. 5, 2014); *Comer v. Schmitt*, 2015 WL 5954589 (S.D. Ohio Oct. 14, 2015). If an alternative explanation for an intentional delay exists, however, removal still may be defeated. *See, e.g.*, *Plaxe v. Fiegura*, 2018 WL 2010025 (E.D. Pa. Apr. 27, 2018). For a two-step test for determining whether the "bad faith" exception should apply, see

Aguayo v. AMCO Ins. Co., 59 F. Supp. 3d 1225, 1262–63 (D.N.M. 2014). Make sure your litigation strategies don't lend credence to claims that non-diverse defendants were added with no certain intention of pursuing a recovery against them. *See D.B. v. Pfizer, Inc. (In re Zoloft Prods. Liab. Litig.)*, 257 F. Supp. 3d 717 (E.D. Pa. 2017); *Bentley v. Merck & Co.*, 2017 WL 2311299 (E.D. Pa. May 26, 2017).

13. 550 U.S. 544 (2007).
14. 556 U.S. 662 (2009).
15. *See Simmerman v. Ace Bayou Corp.*, 304 F.R.D. 516, 518–19 (E.D. Ky. 2015) (citing Fed. R. Civ. P. 81(c)(1)). *Compare Lujan v. Girardi/Keese*, 2009 WL 5216906, at *6 (D. Guam Dec. 29, 2009), *with Jackson v. Cooper Tire & Rubber Co.*, 57 F. Supp. 3d 863, 868–69 (M.D. Tenn. 2014).
16. *See, e.g.*, *Simmerman*, 304 F.R.D at 518–19 (applying federal pleading standards, citing Fed. R. Civ. P. 81(c)(1)); *Jackson*, 57 F. Supp. 3d at 868 (noting that district courts in the Sixth Circuit are split). Congress has recently attempted to codify the "plausibility" standard of *Iqbal/Twombly* into the fraudulent joinder rule. *See* "Fraudulent Joinder Prevention Act of 2016," H.R. 3624, 114th Cong. (2016); "The Innocent Party Protection Act of 2017," H.R. 725, 115th Cong. (2017). The bills have been subject to criticism, even from scholars aligned with the defense bar. *See* E. Farish Percy, *The Fraudulent Joinder Prevention Act of 2016: Moving the Law in the Wrong Direction*, 62 Vill. L. Rev. 213 (2017).
17. *See Culpepper v. Stryker Corp.*, 968 F. Supp. 2d 1144, 1153–55 (M.D. Ala. 2013) (motion to remand denied when the plaintiff could not refute evidence indicating resident sales representative did not constitute a "seller" for purposes of state products liability laws); *see also In re Rezulin Prods. Liab. Litig.*, 133 F. Supp. 2d 272 (S.D.N.Y. 2001) (remand denied when plaintiffs did not refute affidavits from non-diverse sales representatives who denied key facts and when allegations against non-diverse defendants failed to state a claim under relevant state law).
18. 28 U.S.C. §1441(b)(2).
19. 718 F.3d 660 (7th Cir. 2013). The Tenth Circuit has addressed, but not formally adopted, the expansion of the doctrine as well. *See Brazell v. Waite*, 525 Fed. App'x 878 (10th Cir. 2013).
20. 718 F.3d at 668–70.
21. *See, e.g.*, *Mallek v. Allstate Indem. Co.*, 2018 WL 3635060 (E.D.N.Y. Mar. 12, 2018), *adopted by Mallek v. Allstate Indem. Co.*, 2018 WL 3629596 (E.D.N.Y. July 31, 2018).
22. 77 F.3d 1353 (11th Cir. 1996), *abrogated on other grounds by Cohen v. Office Depot, Inc.*, 204 F.3d 1069 (11th Cir. 2000) (applying fraudulent joinder rule to resident defendant). *See generally Boomerang Recoveries*, 182 F. Supp. at 217–18 and cases cited therein (noting split).
23. *See Kips Bay Endoscopy Ctr., PLLC v. Travelers Indem. Co.*, 2015 WL 4508739, at *6–7 (S.D.N.Y. July 24, 2015).
24. *See Brooke Cnty. Comm'n v. Purdue Pharma L.P.*, No. 5:18-cv-00009 (N.D. W. Va. Feb. 23, 2018); *Hoffman v. Pfizer, Inc. (In re Lipitor (Atorvastatin Calcium) Mktg., Sales Practices & Prods. Liab. Litig.)*, 2016 WL 7339811 (D.S.C. Oct. 24, 2016).
25. *See Boddie v. Walker*, 312 F. Supp. 3d 541 (N.D. Miss. 2018).
26. *See Palmer v. Davol, Inc.*, 2008 WL 5377991, at *2–4 (D.R.I. Dec. 23, 2008).
27. *See Saviour v. Stavropoulos*, 2015 WL 6810856, at *6 (E.D. Pa. Nov. 5, 2015) (noting that the Third Circuit has not recognized the doctrine and that district courts in the circuit were "divided on whether to adopt the rule").
28. *See Cent. Bank v. Jerrolds*, 2015 WL 1486368, at *2–4 (W.D. Tenn. Mar. 31, 2015).
29. *See Livingston v. Hoffmann-La Roche Inc.*, 293 F. Supp. 3d 760, 765 (N.D. Ill. 2018).
30. *See In re Prempro Prods. Liab. Litig.*, 591 F.3d 613 (8th Cir. 2010); *Cal. Dump Truck Owners Ass'n v. Cummins Engine Co.*, 24 Fed. App'x 727 (9th Cir. 2001).
31. *See Heckemeyer v. Healea*, 2016 WL 6436572, at *3–5 (W.D. Mo. Oct. 31, 2016); *Tyson v. Fife*, 2018 WL 3377085, at *2–3 (D. Nev. July 11, 2018).
32. *See Lafalier v. State Farm Fire & Cas. Co.*, 391 Fed. App'x 732, 739–40 (10th Cir. 2010); *Premier Cmty. Servs., Inc. v. Goldesberry-VanMeter*, 2017 WL 2294678, at *4–5 (N.D. Okla. May 25, 2017).
33. *See, e.g.*, *Hoffman*, 2016 WL 7339811, at *4.
34. *Id.* at *5 (quoting *Johnson v. Am. Towers, LLC*, 781 F.3d 693, 704 (4th Cir. 2015)).
35. *See, e.g.*, *Stephens v. Kaiser Found. Health Plan of the Mid-Atlantic States, Inc.*, 807 F. Supp. 2d 375 (D. Md. 2011).
36. *See* 28 U.S.C. §1447(c) (2018); *see also Albert v. Smith's Food & Drug Ctrs., Inc.*, 356 F.3d 1242, 1247 (10th Cir. 2004).
37. 28 U.S.C. §1447(c).
38. 28 U.S.C. §1446(b)(2)(A).
39. *See, e.g.*, *Jernigan v. Ashland Oil Inc.*, 989 F.2d 812, 815 (5th Cir. 1993) (per curiam).