A First Look at the Proposed 'Fraudulent Joinder Prevention Act of 2015'

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“Fraudulent Joinder Prevention Act of 2015”

Written Testimony of

Arthur D. Hellman

Hearing Before the
House Committee on the Judiciary
Subcommittee on the Constitution and Civil Justice
September 29, 2015

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Abstract

Almost half a century ago, the American Law Institute observed, “The most marked abuse has been joinder of a party of the same citizenship as plaintiff in order to defeat removal on the basis of diversity jurisdiction. Such tactics have led to much litigation, largely futile, on the question of fraudulent joinder.” Over the last half century, the volume of litigation on this question has only increased. In response, Congress is now actively considering legislation to address the problem of fraudulent joinder.

The bill is H.R. 3624, the “Fraudulent Joinder Prevention Act of 2015” (FJPA). The FJPA seeks to prevent fraudulent joinder by requiring the district court to deny a motion to remand a removed case under two circumstances: first, “if the complaint does not state a plausible claim for relief against a nondiverse defendant under applicable state law,” and second, if “there is no good faith intention to prosecute the action against a nondiverse defendant or to seek a joint judgment.” The bill also makes clear that in considering a motion to remand, the district court may consider affidavits and other evidence in addition to the pleadings.

On September 29, 2015, a subcommittee of the House Judiciary Committee held a hearing on the FJPA. This statement was submitted for the record of that hearing. The statement is in five parts. Part I sketches the background: the rule of “complete diversity” and the current operation of the fraudulent joinder doctrine. Part II offers some suggestions for how the bill might be redrafted to accomplish its purposes more effectively. Part III discusses the criteria for remand proposed in the FJPA. I conclude that the “plausible claim” prong holds promise, but the “good faith intention” prong is problematic and should be dropped. Part IV suggests an alternative approach to the problem of fraudulent joinder – an approach that utilizes minimal diversity and the concept of the “primary defendant,” already part of the law in the Class Action Fairness Act. Part V is a brief conclusion.
Written Testimony of

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House Committee on the Judiciary
Subcommittee on the Constitution and Civil Justice

Hearing on

H.R. 3624
“Fraudulent Joinder Prevention Act of 2015”

September 29, 2015

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Written Testimony of
Arthur D. Hellman

H.R. 3624, the “Fraudulent Joinder Prevention Act of 2015” (FJPA), addresses a longstanding problem in the federal judicial system: a plaintiff seeking money damages from an out-of-state defendant joins a fellow citizen as defendant solely to thwart the out-of-state defendant’s right to remove the case from state court to a neutral federal forum. Almost half a century ago, the American Law Institute observed, “The most marked abuse has been joinder of a party of the same citizenship as plaintiff in order to defeat removal on the basis of diversity jurisdiction. Such tactics have led to much litigation, largely futile, on the question of fraudulent joinder.”¹

Over the last half century, the volume of litigation on this question has only increased. A decade ago, one commentator reported that fraudulent joinder litigation “is escalating throughout the country and is fast becoming a prominent and time-consuming aspect of complex tort litigation.”² Another commentator found that determining whether joinder is fraudulent “has proved difficult and time-consuming for many federal courts” and that the federal circuits “have split over a number of the important issues in defining and applying the doctrine.”³

Against this background, it makes sense to seek a legislative remedy. The purposes of the legislation would be to reduce the extent of futile litigation, to clarify the fraudulent joinder doctrine, and to provide a federal forum when the plaintiff’s “real target” (to borrow a phrase from Chairman Goodlatte) is a diverse defendant, but a co-citizen is joined to forestall removal.⁴

The FJPA seeks to accomplish these purposes, and I therefore support the basic thrust of the bill. However, I have several concerns about the bill’s drafting. In this statement I will outline those concerns and suggest how the bill might be

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² E. Farish Percy, Making a Federal Case of It: Removing Civil Cases to Federal Court Based on Fraudulent Joinder, 91 Iowa L. Rev. 189, 192 (2005).
⁴ Chairman Goodlatte used the phrase in explaining the “primary defendant” provisions of the Class Action Fairness Act. See 151 Cong. Rec. 2642 (2005) (remarks of Rep. Goodlatte). For brief discussion, see Part IV of this statement.
redrafted to accomplish its purposes more effectively. I will also offer an alternative approach – an approach utilizing minimal diversity – that may warrant consideration.

I. Background: Diversity Jurisdiction and Fraudulent Joinder

Diversity of citizenship jurisdiction was included in the Constitution “in order to prevent apprehended discrimination in state courts against those not citizens of the State.”5 Starting with the Judiciary Act of 1789, Congress has implemented that grant through statutory authorization. Thus, from the beginning of the Nation’s history, a non-citizen sued in state court by a citizen of the forum state has had the right to remove the case to federal court, provided that the case satisfied an amount-in-controversy requirement.6

Three sections of the Judicial Code provide the framework for removal based on diversity of citizenship. Section 1332(a) confers original jurisdiction over suits between “citizens of different states” when the amount in controversy exceeds $75,000.7 Section 1441(a) allows removal of “any civil action brought in a State court of which the district courts … have original jurisdiction.” But section 1441(b)(2) prohibits removal based solely on section 1332(a) “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.” This latter provision is referred to as the “forum defendant rule.”

Today, removal is a major battleground in civil litigation. The reason is that across the spectrum of civil suits, many plaintiffs prefer to litigate in state court; defendants often prefer the federal court.8 The law governing removal is complex and often arcane; each year it generates a vast number of disputes involving timing, amount in controversy, amendments to pleadings, and many other issues.

5 Erie R. Co. v. Tompkins, 304 U.S. 64, 74 (1938).

6 In the Judiciary Act of 1789, the right of removal was limited to cases in which the plaintiff was a citizen of the forum state. Today the right extends to all cases in which all plaintiffs are diverse from all defendants, provided that the amount-in-controversy requirement is satisfied and no defendant properly joined and served is a citizen of the forum state.

7 Section 1332(a) also provides for other kinds of party-based jurisdiction. As noted in Part II, the Subcommittee should consider whether to include these in the FJPA.

A frequent source of dispute is the doctrine known as “fraudulent joinder.” The doctrine is a qualification on the rule of “complete diversity.” Under that rule, which traces back to a decision by Chief Justice John Marshall, a suit is “between ... citizens of different states,” and thus within federal jurisdiction under section 1332(a), only when no plaintiff is a citizen of the same state as any defendant. The fraudulent joinder doctrine comes into play when the plaintiff sues a defendant who is a citizen of a different state and also sues a co-citizen. For example, in an insurance dispute, the in-state policyholder sues an out-of-state insurance company and joins the local agent as a co-defendant. In a products liability action, the plaintiff sues an out-of-state pharmaceutical manufacturer and also the local doctor who prescribed the drug. The diverse defendant removes based on section 1332(a); the plaintiff moves to remand on the ground that complete diversity is lacking; the defendant opposes the motion on the ground that the joinder of the co-citizen is “fraudulent.”

As many courts and commentators have noted, “fraudulent” is a term of art; the plaintiff’s motives are irrelevant. Rather, “fraudulent” is defined in accordance with the purpose of the doctrine, and the purpose is to protect the right of the non-citizen defendant to the neutral forum of the federal court. The Seventh Circuit has summarized the rationale in an often-quoted opinion:

No matter what the plaintiff’s intentions are, an out-of-state defendant may need access to federal court when the plaintiff’s suit presents a local court with a clear opportunity to express its presumed bias — when the insubstantiality of the claim against the in-state defendant makes it easy to give judgment for the in-state plaintiff against the out-of-state defendant while sparing the in-state defendant.

So the insubstantiality of the claim against the “spoiler” defendant is the key to the doctrine. But there is a disconnect between the rationale as stated by the Seventh Circuit and the statement in the same paragraph (echoed by other courts) that a claim is fraudulent only when it “has no chance of success.” If the courts were really seeking to identify cases in which it would be “easy to give

9 As will be discussed in Part II, the doctrine is also invoked when there is complete diversity but one or more defendants are citizens of the forum state.

10 Poulos v. Naas Foods, Inc., 959 F.2d 69, 73 (7th Cir. 1992). As this quotation indicates, it is often assumed that the plaintiff is a citizen of the forum state, and in most cases the assumption is borne out.
judgment for the in-state plaintiff against the out-of-state defendant while sparing
the in-state defendant.” I do not think they would set the bar as high as they do.

Plaintiffs and defendants alike recognize the importance of the doctrine to
litigation strategy. A plaintiff-oriented practice guide explains: “Myriad attempts
have been made by creative counsel to state a tenable claim against non-diverse
defendants in order to defeat diversity jurisdiction without running afoul of the
fraudulent joinder rule. As would be expected, some have been successful and
some not.”

11 A defense-oriented guide warns:

[Fighting] fraudulent joinder requires reasonable preparation and, as a
consequence, can substantially raise litigation costs. [The efforts] will
probably fail under the “no possibility” standard. Apparently erroneous
decisions by the district court, moreover, are final because remand orders
are generally not reviewable by appeal or writ of mandamus. Even worse,
there is a possibility that the corporate client will have to pay opposing
counsel’s attorneys’ fees under 28 U.S.C. § 1447(c) in the event that the
district court determines that the removal was improvident.

12 The preceding quotation suggests another reason why legislative
clarification is desirable: if the district court erroneously remands a case on the
ground that the plaintiff’s claim against the co-citizen has some chance of success,
the error cannot be corrected by the court of appeals because section 1447(d)
prohibits review of remand orders. To make matters worse, many district
judges follow a mantra to the effect that there is a “presumption against removal
jurisdiction” and “any doubt about the right of removal requires resolution in
favor of remand.”

13 I have no illusions that legislation can eliminate all litigation over fraudulent
joinder or answer all of the questions that will arise. But it is worth some effort

11 David S. Casey, Jr. and Jeremy Robinson, Litigating Tort Cases §7.7 (updated August
2014).

12 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 Advocacy 297, 310
(2000).

13 There are some court-made exceptions to the prohibition on appellate review, but the
orders described in the text fall squarely within the prohibition’s heartland.

14 See, e.g., Dulich Inc. v. Mayer Brown LLP, 954 F.Supp.2d 1129, 1135-36 (D. Or. 2013);
see generally Scott R. Haiber, Removing the Bias Against Removal, 53 Cath. U. L. Rev. 609
(2004).
to try to bring greater clarity and uniformity to the doctrine and also to strike a better balance between the diverse defendant’s right to a federal forum and the plaintiff’s prerogative to shape his lawsuit in the way he thinks best.

II. Drafting the FJPA: Structure and Coverage

The FJPA addresses the problem of fraudulent joinder by adding two sentences to section 1447(c) of the Judicial Code. The first sentence specifies the kinds of materials that may be presented by the parties in a motion for remand and “any opposition thereto.” The second sentence specifies the criteria for denying a motion to remand.15

I have several concerns about the way the bill is drafted. Here I will discuss the structure and coverage of the bill and will offer some technical suggestions for redrafting that I believe are consistent with the intent of the bill in its current form. I will also suggest one possible expansion in the bill’s coverage. In Part III, I will discuss the criteria set forth in the second sentence.

First, the proposed language would be added to section 1447(c), which applies to all cases removed from state court, whatever the basis for original jurisdiction. That includes federal-question cases covered by section 1331 and class actions covered by section 1332(d). But fraudulent joinder is not a problem for federal-question cases, because the citizenship of the defendant is irrelevant to jurisdiction. It is not a problem for class actions, because the statute itself allows for removal based on minimal diversity. See section 1332(d)(2). So the new provision should be limited to cases removed under the general diversity statute, section 1332(a). Moreover, the Subcommittee should consider whether to include all or just some of the separate provisions of section 1332(a).

Second, the bill provides that if the district court finds that the specified criteria are satisfied – i.e., if the joinder of the co-citizen is fraudulent – the court “shall deny a motion to remand.” This seems to assume that if there is a motion to remand, it would assert that removal is barred by the rule of complete diversity. But there can be many other grounds for a motion to remand. Some are jurisdictional like the complete-diversity rule; others are procedural. If even one of those other grounds is well-taken, the case should be remanded whether or not the joinder is fraudulent. The bill should specify that the new provision

15 All references in this statement are to the draft bill printed on Sept. 21, 2015, at 10:50 a.m. I understand that that draft is identical to the bill as introduced.
applies only when there is a motion to remand on the ground that diversity is incomplete.

Third, the bill would bar remand if the complaint fails against “a” nondiverse defendant. What happens if the plaintiff names more than one nondiverse defendant, and the complaint fails against only one? There is still one legitimate nondiverse defendant, and that destroys complete diversity. I assume that it is not the intent of the drafters to abrogate the complete-diversity rule. Thus, as long as there is at least one legitimate nondiverse defendant, the motion to remand should be granted.

Fourth, the bill refers to “defendants” without qualification, thus including defendants who have not been served. This is inconsistent with the approach taken in analogous Code provisions, e.g. section 1441(b)(2). I suggest that the FJPA should follow that example.

Fifth, the purpose of the bill is to allow removal under specified circumstances notwithstanding incomplete diversity. Such a defect would ordinarily require remand. This consideration suggests that the bill should provide for remand unless the defendant shows that the specified criteria are satisfied.

All of the suggestions thus far are technical; they are aimed at implementing what I believe to be the intent of the bill in its current form. The Subcommittee may also wish to consider one substantive change that would modestly expand the coverage of the legislation. As currently drafted, the FJPA addresses fraudulent joinder only in the context of the complete-diversity rule. But fraudulent joinder is also used to exploit the forum defendant rule of section 1441(b)(2). And the doctrine has been applied in the same way. Just last week, a district court in Missouri observed, “The standards for determining whether a resident defendant is fraudulently joined are the same as the standards for determining whether a diversity-destroying defendant is fraudulently joined.”\(^{16}\) And earlier this month, a district court in California remanded a case based on the forum defendant rule even though there was complete diversity; the court rejected the defendant’s fraudulent joinder argument.\(^{17}\) So I suggest that the


Subcommittee consider revising the bill to address both types of fraudulent joinder.¹⁸

To correct the technical flaws I have identified—and to clarify the operation of the new provision—I suggest that instead of adding language to section 1447(c), the new provision should be codified as a new subsection (f) in section 1447. A draft of the new subsection is set forth below. The draft contains three paragraphs. Paragraph (1) identifies the class of cases that would be covered by the new provision. Paragraph (2) specifies the criteria for granting a motion to remand in those cases. Paragraph (3) incorporates the substance of the first sentence of the HLC draft bill; it makes clear that the district court, in a considering a motion to remand, may consider affidavits and other evidence as well as the pleadings.

[DRAFT]

(f) (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) and

(b) a motion to remand is made on the ground that

[i] one or more defendants properly joined and served 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.

(2) The motion described in paragraph (1)(b) shall be granted unless the court finds that—

¹⁸ In 2013, the Seventh Circuit said that no court of appeals had decided “whether the fraudulent joinder doctrine creates an exception to the forum defendant rule.” The court found no need to resolve the question, but it laid out the policy factors on both sides. Morris v. Nuzzo, 718 F.3d 660, 666-671 (7th Cir. 2013). The Subcommittee may wish to study this analysis. It seems to me that if a plaintiff goes to the trouble of bringing suit outside his home state, then includes a marginal claim against a forum defendant as well as a claim against a non-forum defendant, there is a good chance that he is trying to gain some tactical advantage from litigating in that particular state. If so, that may be a good reason to apply the fraudulent joinder doctrine.
(a) the complaint fails to state a plausible claim for relief under applicable state law against each defendant described in paragraph (1)(b), or

(b) there is no good faith intention to prosecute the action against all defendants described in paragraph (1)(b) or to seek a joint judgment including all such defendants.

(3) In determining whether to grant a motion under paragraph (1)(b), the court shall consider the pleadings, affidavits, and other evidence submitted by the parties.

III. Drafting the FJPA: Criteria for Remand

The FJPA seeks to prevent fraudulent joinder by requiring the district court to deny a motion to remand under two circumstances: first, “if the complaint does not state a plausible claim for relief against a nondiverse defendant under applicable state law,” and second, if “there is no good faith intention to prosecute the action against a nondiverse defendant or to seek a joint judgment.” I think that the “plausible claim” test holds promise, though there may be some room for fine-tuning. However, the “good faith intention” test is problematic, and I suggest that it be omitted from the legislation.

A. The “plausible claim” prong

Under current law, it is extremely difficult for a defendant to avoid remand by invoking the “fraudulent joinder” doctrine. Typically, the courts say that a case should not be remanded unless “there is no possibility of recovery by the plaintiff against [the spoiler] defendant.”19 Some courts go so far as to say that a “glimmer of hope for the plaintiff” is sufficient.20 The FJPA would ease the burden on defendants by providing that the court should keep the case “if the complaint does not state a plausible claim for relief against a [spoiler] defendant under applicable state law.”

The plausibility standard is borrowed from Twombly and Iqbal, the Supreme Court’s cases interpreting Rule 12(b)(6) of the Federal Rules of Civil Procedure. I would thus expect that in construing the FJPA, courts would draw on the Court’s

19 Smallwood v. Illinois Central R. Co., 385 F.3d 568, 573 (5th Cir. 2004) (en banc) (emphasis added). To be sure, there is enormous variation in the language used by the courts. One commentator has identified “four basic tests.” Percy, supra note 2, at 216.

exposition of the plausibility standard in the 12(b)(6) context. In Iqbal, the later of the two cases, the Court explained that the plausibility standard is not akin to a “probability requirement,” but “it asks for more than a sheer possibility that a defendant has acted unlawfully.” At least verbally, this certainly appears to be a more demanding test than the standard generally applied to assertions of fraudulent joinder.

Two courts of appeals have addressed the relationship between the Twombly-Iqbal standard for Rule 12(b)(6) motions and the standard for finding fraudulent joinder. Both courts concluded that the 12(b)(6) standard is more demanding, and both reversed district courts that had applied that standard in denying motions to remand. In Stillwell v. Allstate Ins. Co., the Eleventh Circuit quoted the “more than a sheer possibility” language from Iqbal and said: “In contrast, all that is required to defeat a fraudulent joinder claim is ‘a possibility of stating a valid cause of action.’” In Junk v. Terminix Intern. Co., the Eighth Circuit contrasted Iqbal’s plausibility standard with circuit precedent stating that joinder is not fraudulent when “there is arguably a reasonable basis for predicting that the state law might impose liability based upon the facts involved.”

In this light, I think that the “plausible claim” prong will serve the purpose of reducing the very high burden that currently rests on defendants who invoke the fraudulent joinder doctrine. Stillwell confirms that the “plausible claim” standard is more demanding than the “possibility” test applied by the Eleventh Circuit to assertions of fraudulent joinder. Junk indicates that the standard is also more demanding than the “reasonable basis” test applied by other circuits.

I do have one concern, however. The Twombly-Iqbal standard was developed in cases involving claims created by federal law. It will not necessarily be easy to apply the test to state common-law claims, especially when “creative counsel” come up with claims that are novel but not foreclosed by state law. Suppose, for example, that there is a state-law rule that appears to bar the claim against the “spoiler” defendant, but the plaintiff argues that the claim falls within an

22 Stillwell v. Allstate Ins. Co., 663 F.3d 1329, 1333 (11th Cir. 2011).
24 Of course the standard is applied to state-law claims today at the Rule 12(b)(6) stage. See, e.g., Menard v. CSX Transp., Inc., 698 F.3d 40 (1st Cir. 2012).
exception to the rule, and there is no direct authority one way or the other in the controlling jurisdiction. Is that a “plausible” claim?

If the Subcommittee thinks that such claims should not be allowed to defeat removal, the “plausible claim” prong could be modified by specifying that remand should be denied “if the complaint does not state a plausible claim for relief against a [spoiler] defendant under applicable state law as established by legislative enactment or prior judicial decision.” (This language is taken from a line of cases in Utah in a different context.)

B. The “good faith intention” prong

Under the second prong of the FJPA’s standard, remand should be denied if “there is no good faith intention to prosecute the action against a nondiverse defendant or to seek a joint judgment.” This language comes from Goldberg v. CPC International, Inc., a 1980 federal district court decision that has been quoted in some later cases. The district court in Goldberg wrote: “Courts have found joinder to be 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 that defendant or seek a joint judgment.” For that proposition, the court cited two Supreme Court decisions.

A few years ago, a district court in Oregon gave careful and thorough consideration to an argument for remand based on the “good faith intention” criterion derived from the Goldberg opinion. In rejecting the argument, the court made three points. First, the Supreme Court cases cited by the Goldberg court did not endorse any kind of subjective “intent test” for fraudulent joinder. Indeed, in one of the cases the Supreme Court itself said, “[T]he motive of the

25 For example, in Simpkins v. Southern Wine & Spirits of America, 2010 WL 3155844 (N.D. Cal. Aug. 9, 2010), the out-of-state defendant argued that the in-state defendant was fraudulently joined because state law precluded tort claims against him under the well-established “economic loss rule.” But no state-court decision had decided the specific question whether the rule would bar tort claims against a contracting party’s individual employees. So “settled” law did not “obviously” bar the claims against the co-citizen defendant, and the joinder was not fraudulent. The court acknowledged that the question was “very close” and that “the result it [was] compelled to reach in light of the very high standard for establishing fraudulent joinder may not further the interests of judicial economy and deterrence of forum shopping.”


plaintiff, taken by itself, does not affect the right to remove.”28 Second, case law in the Ninth Circuit and elsewhere has emphasized that a plaintiff’s motive has no bearing on a fraudulent joinder analysis. Third, pragmatic concerns militate against employing an “intent test.” On the latter point, the court said in part:

Under an “intent test” for fraudulent joinder, a defendant could possibly obtain discovery against a plaintiff and a plaintiff’s counsel regarding their subjective intentions and motivations for naming a particular resident (nondiverse) defendant against whom that plaintiff has adequately stated a plausible claim. This would invite potentially expensive and intrusive collateral discovery and discovery disputes, especially where the inquiry would seek to invade the thought-processes of the plaintiff’s counsel. In addition, such an “intent test” could potentially flood the federal courts with removal petitions and requests for discovery into the intentions and motivations of a plaintiff’s counsel.

It might be thought that “good faith intention” would be a workable criterion here because it is analogous to a provision added by the Federal Court Jurisdiction and Venue Clarification Act of 2011 (JVCA). That provision, codified in 28 U.S.C. § 1446(c)(1), allows the removal of a diversity case more than a year after commencement of the action if the district court finds that “the plaintiff has acted in bad faith in order to prevent a defendant from removing the action.” However, that provision operates quite differently from the one proposed in the FJPA. The bad faith exception in § 1446(c)(1) comes into play only when a case has been pending in the state court for at least a year. The district court will thus have ample evidence on which to determine whether the plaintiff has acted in bad faith. For example, in one recent case, the district court found bad faith because the plaintiffs delayed accepting settlement offers “to continue the litigation” until the one-year period passed.29 In other cases, a “bad faith” argument can be based on the plaintiff’s failure to engage in discovery against the non-diverse defendant. In the present context, the defendants will have removed within 30 days of being served. That is just not long enough to provide evidence of bad faith – or its absence.

For these reasons, I believe that the “good faith intention” prong of the FJPA would be disruptive and difficult to administer. I also believe that it is

probably unnecessary. An objective test, properly defined and applied, should be adequate to limit fraudulent joinder.

IV. An Alternative Approach

The FJPA, if limited to the “plausible claim” prong and redrafted along the lines suggested in Part II, will go a long way toward accomplishing the purposes set forth in Part I. Nevertheless, I can understand the unease that some people will feel about the basic approach of the bill. Courts will be probing whether claims against a co-citizen defendant “possess enough heft” to edge over the line from the merely possible to the plausible. This inquiry is difficult enough when the claims are federal; it will be even more challenging when the district court is assessing a complaint asserting state-law claims and filed in state court under state pleading rules. To be sure, under the FJPA the court can consider affidavits and other materials that supplement the pleadings, but the downside is that the inquiry may be more time-consuming and complex. Is there a better way?

Consider Greenberg v. Macy’s, a case decided a few years ago in the Eastern District of Pennsylvania. Plaintiff, a citizen of Pennsylvania, filed a complaint in state court asserting a single count of negligence against five corporate entities related to Macy’s, Inc. She alleged that while shopping at a Macy’s store she was injured when she tripped on a platform placed in front of a store elevator. She alleged that the defendants wrongfully created the dangerous condition that injured her.

The defendants – all citizens of states other than Pennsylvania – removed to federal court based on diversity. The plaintiff quickly filed a notice of dismissal without prejudice. The next day, she filed a new complaint in state court. The substance of the new complaint was the same as the first, but the parties were not. In addition to the five corporate defendants named in the original complaint,

30 A district judge in Texas has identified “badges of improper joinder” that may point to a determination that an in-state defendant has been joined “solely for the purpose of defeating federal court jurisdiction.” But in the leading case considering the “badges,” the judge also found that the plaintiff’s pleading against the in-state defendant did not survive a “Rule 12(b)(6)-type analysis.” Plascencia v State Farm Lloyds, 2014 U.S. Dist. LEXIS 135081 (N.D. Tex. Sept. 25, 2014).

31 Omitting the “good faith intention” prong will have the added benefit of deleting the reference to a “joint judgment.” This is a rarely used phrase that would likely cause confusion.


plaintiff added four new defendants. Two of the new defendants were Pennsylvania citizens; each was an employee of a non-Pennsylvania corporate defendant. The defendants again removed, now arguing that the plaintiff fraudulently joined the two Pennsylvania employees to defeat diversity.

The district court began by applying the fraudulent joinder doctrine as defined by the Third Circuit. Under Third Circuit case law, joinder is not fraudulent as long as there is “even a possibility that a state court would find that the complaint states a cause of action against” the non-diverse defendants. The complaint satisfied that test because plaintiff had pled a “colorable case” of “negligent malfeasance” against the two employees. The defendants offered affidavits by the two employees stating that they had nothing to do with the condition that allegedly caused plaintiff’s injuries, but the court believed that under circuit law it could not consider those affidavits.

But the court did not stop there. It noted that some district courts, in deciding whether to remand under a fraudulent joinder inquiry, had applied the “plausibility test” of *Twombly* and *Iqbal*. Out of caution, the court went on to apply that test to the case before it. It found that “[e]ven with the benefit of [the rulings in *Twombly* and *Iqbal*], Defendants have not made out fraudulent joinder.”

Toward the end of its opinion, the court acknowledged that the case presented “a close question,” because plaintiff had not alleged in any detail how the two employees acted wrongfully. Moreover, it was “apparent that Plaintiff joined [the two employees] simply to defeat diversity.” Nevertheless, “I cannot conclude that the joinder is fraudulent.”

Three points about this case stand out. First, the court applied the “plausibility” test and still found that the joinder of the co-citizens was not fraudulent. Second, the result might have been different if the court had been able to consider affidavits, as it would be able to do under the FJPA. Third, the “real targets” of the suit were the corporate defendants, all non-Pennsylvania citizens, who were named in the initial complaint. Plaintiff added the individual defendants only to keep the case in state court.

In this light, I cannot help wondering if the FJPA unnecessarily perpetuates the “inherent complexity”34 of the fraudulent joinder doctrine because it treats the complete-diversity rule as inviolable. Of course the complete-diversity rule is not a constitutional requirement; under the Supreme Court’s interpretation,

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34 Percy, supra note 2, at 122.
Article III can be satisfied by minimal diversity. In this century, Congress has taken advantage of this interpretation in the Multi-party, Multiforum Trial Jurisdiction Act of 2002 and the Class Action Fairness Act of 2005 (CAFA).

In both statutes, Congress distinguished among defendants and recognized the concept of the “primary” defendant. It may well be that many “fraudulent joinder” cases could be easily decided if the court, instead of having to determine whether the claims against the “spoiler” rise to some level of “plausibility” (or other standard), had to decide only whether the “real target” of the suit – the primary defendant – was diverse from the plaintiff. If that were the law, Greenberg probably would not have come to the court as a fraudulent joinder case at all; the plaintiff would not have bothered to dismiss and re-file. In Selman, the Oregon case discussed in Part III-B, the fraudulent joinder issue might have been litigated, but the court would readily have denied the motion to remand. The “real target” was the manufacturer of the drugs that allegedly caused the plaintiffs’ illness; inclusion of the non-diverse medical providers as defendants did not change the essential character of the litigation.

I have not attempted to flesh out this idea, because it is not part of the FJPA and it would be a substantial departure from current law. If the Subcommittee thinks the idea is worth pursuing, I would be happy to suggest some details of how it might be implemented.

**V. Conclusion**

The FJPA addresses a real problem in the federal judicial system: a plaintiff’s naming of an in-state defendant solely to keep a civil lawsuit in state court and thwart the right of an out-of-state defendant to remove the case to a neutral federal forum. The fraudulent joinder doctrine was developed by the federal courts to combat this stratagem, but it does not do that very effectively. One reason the doctrine has so little bite is that courts are in thrall to the notion that there is “a general presumption against removal jurisdiction” and that “all doubts are [to be] resolved in favor of remand.”\(^\text{35}\) By enacting legislation to clarify and strengthen the fraudulent joinder doctrine, Congress can neutralize the presumption (at least for this class of cases) and make it more likely that removal will be permitted when the “real target” of the plaintiff’s claims is the out-of-state defendant.

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