EVERYBODY PLAYS THE FOOL, SOMETIMES; THERE'S NO EXCEPTION TO THE RULE: PROCEDURAL MISJOINDER IS NOT AN EXCEPTION TO THE VOLUNTARY-INVOLUNTARY RULE

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I. INTRODUCTION

This Comment intends to clarify an area of the law of removal to federal court and welcome a much-needed fledgling doctrine. This doctrine, procedural misjoinder, permits a federal district court to ignore certain improperly joined parties when determining whether the case meets the standard of complete diversity. Without it, a plaintiff could thwart a defendant's right to a federal forum merely by joining a non-diverse or forum-state defendant (a "jurisdictional spoiler"[1]) against whom they have any claim, no matter how unrelated that claim is to the claim against the diverse defendant. Joining unrelated claims against different defendants violates the joinder rules of most jurisdictions. But, if the trial court creates complete diversity by severing the claims into separate suits, the defendant runs into a new barrier: the voluntary-involuntary rule (V-I rule). The V-I rule mandates that only the voluntary act of a plaintiff can take a non-removable case and make it removable. The removal of the jurisdictional spoiler does not cure the removability problem because the trial court, and not the plaintiff, executes the severance. In effect, the defendant is locked in state court.

A similar doctrine called "fraudulent joinder" protects the defendant from this injustice when the plaintiff joins a party against whom he has no possibility of recovery. A gap exists, however, where the plaintiff joins a

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[1] I borrow the term from Professor Percy. *E.g.*, E. Farish Percy, *Defining the Contours of the Emerging Fraudulent Misjoinder Doctrine*, 29 HARV. J.L. & PUB. POL'Y 569, 571 (2006).

party against whom he has a valid, yet entirely unrelated, claim. The doctrine of procedural misjoinder fills that gap.

Recently, numerous courts have been referring to these related doctrines as exceptions to the V-I rule.[2] I write to express concern over this misstatement and to correct it. On a doctrinal level, mischaracterizing procedural misjoinder as an exception to the V-I rule creates an inconsistency that, if carried to its logical conclusion, might eliminate the V-I rule. Since the Supreme Court has not approved that departure from its precedent, federal courts calling fraudulent joinder, and now procedural misjoinder, an exception to the V-I rule is a troubling trend.

In Section II, I give some background on the origin and policy of three doctrines: the voluntary-involuntary rule, fraudulent (or improper) joinder,[3] and procedural misjoinder. In Section III, I address my primary thesis: why procedural misjoinder is not an exception to the voluntary-involuntary rule, notwithstanding numerous judicial opinions to the contrary. I do so by showing that procedural misjoinder should be treated the same as fraudulent

[2] Crockett v. R.J. Reynolds Tobacco Co., 436 F.3d 529, 532 (5th Cir. 2006) ("Courts have long recognized an exception to the voluntary-involuntary rule where a claim against a nondiverse or in-state defendant is dismissed on account of fraudulent joinder."); Insinga v. LaBella, 845 F.2d 249, 254 (11th Cir. 1988) ("Fraudulent joinder is a well established exception to the voluntary-involuntary rule."); Sanders v. Merck & Co., No. 07-64-GPM, 2007 WL 924497, at *6 (S.D. Ill. March 27, 2007) ("Fraudulent joinder to defeat federal diversity jurisdiction is an exception, of course, to the voluntary-involuntary rule."); Griffith v. La. Citizens Coastal Plan, No. 2:06CV2145, 2007 WL 933510, at *2 (W.D. La. Feb. 16, 2007) (explaining "[t]he fraudulent joinder exception to the voluntary-involuntary rule"); Murphy Constr. Co. v. St. Bernard Parish, No. 06-7614, 2007 WL 442231, at *3 (E.D. La. Feb. 6, 2007) ("The Fifth Circuit confirmed that dismissal of a fraudulently joined defendant was an exception to the voluntary-involuntary rule [and that] a like exception . . . applied to improperly joined claims."); Zea v. Avis Rent a Car Sys., Inc., 435 F. Supp. 2d 603, 606 (S.D. Tex. 2006) (noting that "the voluntary-involuntary rule is not absolute, and [that] there are recognized exceptions" for fraudulent or improper joinder); Riverdale Baptist Church v. Certainteed Corp., 349 F. Supp. 2d 943, 946 (D. Md. 2004) ("Fraudulent joinder is, in fact, a well established exception to the voluntary/involuntary rule."); Jenkins v. Nat'l Union Fire Ins. Co., 650 F. Supp. 609, 614 n.1 (N.D. Ga. 1986) ("The [voluntary-involuntary] rule has always been subject to an exception for fraudulent joinder for the purpose of defeating removal."); *see also Crockett*, 436 F.3d at 533 (impliedly calling procedural misjoinder an exception to the V-I rule).

[3] The Fifth Circuit has decided that the term "fraudulent joinder" is misleading, since no intent to deceive is required. They have begun referring to the doctrine as "improper joinder." *See* Smallwood v. Ill. Cent. R.R. Co., 385 F.3d 568, 571 n.1 (5th Cir. 2004) (en banc). Of course, not everyone appreciated the makeover. *See id.* at 577 n.1 (Jolly, J., dissenting) (seeming none-too-jolly about the name change). For the purposes of this Comment, I may periodically interchange the terms.

joinder in all material respects, and that neither doctrine need be considered an exception to the V-I rule. Finally, in Section IV, I briefly describe a synthesized framework that might be useful for analyzing the propriety of removal in the procedural misjoinder scenario.

II. "THE PLAYERS"

A. The Voluntary-Involuntary Rule

Generally, a federal court's jurisdiction depends upon the state of a suit at the time it was filed.[4] In the context of removal to federal court based on diversity, however, a dual requirement exists: complete diversity must exist both at the time of filing and at the time of removal.[5] The removal statute provides for removal within thirty days of receipt by the defendant of "a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable."[6] Nevertheless, courts have clung to the rule that a diversity case that is not removable when filed cannot later become removable unless it satisfies the voluntary-involuntary rule (V-I rule).[7] Consequently, the V-I rule has persisted as an obstacle to removal of diversity cases for over a century.[8]

In the 1898 case of *Powers v. Chesapeake & Ohio Railway Co.*, Powers sued a railroad company and a number of its employees for negligently hitting him with a train.[9] Powers was diverse from the railroad company,

[4] Grupo Dataflux v. Atlas Global Group, L.P., 541 U.S. 567, 570 (2004).

[5] *See, e.g.*, Strotek Corp. v. Air Transp. Ass'n of Am., Inc., 300 F.3d 1129, 1131 (9th Cir. 2002) ("[The court] start[s] with the core principle of federal removal jurisdiction on the basis of diversity—namely, that it is determined (and must exist) as of the time the complaint is filed and removal is effected."); Jerome-Duncan, Inc. v. Auto-By-Tel, L.L.C., 176 F.3d 904, 907 (6th Cir. 1999) ("[T]here must be complete diversity of citizenship both at the time that the case is commenced and at the time that the notice of removal is filed.").

[6] 28 U.S.C. § 1446(b) (2001).

[7] *See* Weems v. Louis Dreyfus Corp., 380 F.2d 545, 548 (5th Cir. 1967) ("[T]he voluntary-involuntary rule was not affected by the [1949] amendment [to § 1446(b)]").

[8] Some commentators have questioned whether there is truly a need for this rule, but that debate is outside the scope of this Comment. *See, e.g.*, James M. Underwood, *From Proxy to Principle: Fraudulent Joinder Reconsidered*, 69 ALB. L. REV. 1013, 1025 (2006) (expressing a "firm conviction that the appropriate doctrinal change is the elimination of the voluntary/involuntary corollary to fraudulent joinder").

[9] 169 U.S. 92, 93 (1898).

but he shared citizenship with the railroad employees.[10] Those employees were the jurisdictional spoilers, preventing federal diversity jurisdiction (and, thus, preventing removal). Before trial, however, Powers voluntarily discontinued his action against the employees.[11] The Supreme Court approved the defendant's removal, even though the case was not removable when filed, because the parties had become completely diverse.[12]

Two years later, in *Whitcomb v. Smithson*, the Court affirmed an order forbidding removal in what seemed like a very *Powers*-like situation.[13] Smithson sued a railroad company and two individuals for injuries he received when the train he was riding collided with a train owned by the defendant railroad.[14] In that case, the individual defendants were diverse from the plaintiff, and the railroad played the part of jurisdictional spoiler.[15] When the trial judge ordered a directed verdict in favor of the railroad, the remaining defendants attempted to remove.[16] The trial judge refused, and the Supreme Court affirmed.[17] Courts have interpreted these cases and their progeny as creating a rule that permits diversity-based removal of an initially unremovable case only if it becomes removable due to the voluntary act of a plaintiff.[18] But, courts forbid removal if the case achieves a removable posture due to actions of the court or another litigant. This is known as the voluntary-involuntary rule (V-I rule).[19]

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[10] *Id.*

[11] *Id.* at 94.

[12] *See id.* at 103.

[13] *See* 175 U.S. 635, 636–67 (1900).

[14] *Id.* at 635.

[15] *See id.* at 636.

[16] *See id.*

[17] *See id.* at 635.

[18] *See, e.g.*, Great N. Ry. Co. v. Alexander, 246 U.S. 276, 281 (1918) ("[A] case, arising under the laws of the United States, nonremovable on the complaint . . . cannot be converted into a removable one . . . [except] by the voluntary amendment of his pleadings by the plaintiff or, where the case is not removable because of the joinder of defendants, by the voluntary dismissal or nonsuit by him of a party or parties defendant."); Am. Car & Foundry Co. v. Kettelhake, 236 U.S. 311, 316 (1915) ("[I]t must appear, to make the case a removable one as to a nonresident defendant because of dismissal as to resident defendants, that the discontinuance as to such defendants was voluntary on the part of the plaintiff."); Lathrop, Shea & Henwood Co. v. Interior Constr. & Improvement Co., 215 U.S. 246, 250 (1909).

[19] *See* Laura J. Hines & Steven S. Gensler, *Driving Misjoinder: The Improper Party Problem in Removal Jurisdiction*, 57 ALA. L. REV. 779, 815 (2006); Percy, *Defining the Contours*, *supra* note 1, at 589; Underwood, *supra* note 8, at 1019.

The cases developing the V-I rule were sparse as to underlying rationale; however, one can discern at least two policies currently supporting it.[20] The first is pragmatic and often referred to as that of "finality" or "appealability."[21] If the court dismisses a party or rules in favor of a defendant, the plaintiff is likely to appeal that judgment at the first opportunity.[22] On the other hand, if a plaintiff voluntarily nonsuits a defendant, the plaintiff cannot appeal and challenge his own voluntary action; the party is gone for good.[23] For example, Joe, a Texan, sues Sally, from Delaware, and Sam, from Texas, on a simple tort. The defendants in this case generally cannot remove because the plaintiff and Sam are non-diverse. Assume that the trial judge grants a directed verdict in favor of Sam. Now the remaining parties to the suit, Joe and Sally, are completely diverse. If the law permits Sally to remove to federal court and Joe appeals

[20] E. Farish Percy, *Making A Federal Case of It: Removing Civil Cases to Federal Court Based on Fraudulent Joinder*, 91 IOWA L. REV. 189, 208 (2005). Most courts agree that both policies exist and are furthered by the rule, but there are exceptions. *See, e.g.*, Quinn v. Aetna Life & Cas. Co., 616 F.2d 38, 40 n.2 (2d Cir. 1980) (seeming to hold finality or appealability the only rationale for the rule); Jenkins v. Nat'l Union Fire Ins. Co., 650 F. Supp. 609, 613 (N.D. Ga. 1986) (asserting cases decided based on appealability or finality rationale are "simply incorrect").

[21] *See, e.g.*, *Quinn*, 616 F.2d at 40 n.2 (2d Cir. 1980) ("The purpose [of the V-I rule] is to protect against the possibility that a party might secure a reversal on appeal in state court of the non-diverse party's dismissal . . . producing a renewed lack of complete diversity, a result repugnant to the requirement in 28 U.S.C. § 1441 . . . ."); Self v. Gen. Motors. Corp., 588 F.2d 655, 658 (9th Cir.1978) ("It has been suggested that the rule promotes judicial efficiency by 'prevent(ing) removal of those cases in which the issue of the resident defendant's dismissal has not been finally determined in the state courts.'" (quoting Weems v. Louis Dreyfus Corp., 380 F.2d 545, 546 (5th Cir. 1967))); *Weems*, 380 F.2d at 456 ("[the V-I rule] prevents removal of those cases in which . . . a resident defendant was dismissed on appealable ground."). Though this is clearly not the only policy, as evidenced by *Lathrop, Shea & Henwood Co.*, 215 U.S. at 249–51 (voluntary-involuntary rule invoked to prohibit removal even though the state appellate process was complete); *see also Jenkins*, 650 F. Supp. at 613 (explaining other cases in which the V-I rule was applied notwithstanding lack of possible appeal).

[22] *See* Higgins v. E.I. DuPont de Nemours & Co., 863 F.2d 1162, 1166 (4th Cir. 1988) (reasoning that one cannot presume diversity will persist "if the non-diverse party has been involuntarily dismissed by order of the state judge. The plaintiff may choose to appeal the dismissal").

[23] *See, e.g.*, *Am. Car & Foundry Co.*, 236 U.S. at 317 (finding dispositive the lack of "[a] voluntary dismissal and consequent conclusion of the suit in the state court as to [the jurisdictional spoiler]"); *Higgins*, 863 F.2d at 1166 ("If the plaintiff voluntarily dismissed the . . . non-diverse defendant . . . the state action may be removed because there is no risk that diversity will be destroyed later on. The voluntary act has demonstrated the plaintiff's desire not to pursue the case against the non-diverse party.").

Sam's directed verdict, we run into complications if the appellate court reverses. The reversal would result in half of the case in federal court, and half of the case in state court, all of which the state court should have retained.[24] At least one circuit has predicted that this would destroy federal jurisdiction over the claim against Sally, resulting in a kind of "yo-yo effect."[25] The V-I rule avoids this potentiality by ensuring that removal will only occur when the plaintiff cannot revive his claim against the spoiler defendant.

By prohibiting removal after the involuntary dismissal of the jurisdictional spoiler, the V-I rule also promotes a policy of deference to the plaintiff's role as "master of the complaint." American jurisprudence has a long history of allowing the plaintiff to sculpt his lawsuit by selecting the initial forum as well as the claims and defendants that he will join.[26] Some

[24] *See Am. Car & Foundry Co.*, 236 U.S. at 316–17 (approving the trial judge's fear that permitting removal where a plaintiff may still appeal from the order dismissing a jurisdictional spoiler could result in "a section of the suit in the United States court and a section here").

[25] *See* Polous v. Naas Foods, Inc., 959 F.2d 69, 72 (7th Cir. 1992) ("Removal following an involuntary dismissal may be only temporary: the plaintiff may appeal the dismissal in state court, and success on appeal would lead to the reinstatement of the non-diverse party, destroying federal jurisdiction and compelling remand to the state court. *We are anxious to avoid this sort of yo-yo effect*." (emphasis added) (citation omitted)).

[26] *See* Caterpillar, Inc. v. Williams, 482 U.S. 386, 392 (1987) (explaining how the well-pleaded complaint rule "makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law"); The Fair v. Kohler Die & Specialty Co., 228 U.S. 22, 25–26 (1913); Wecker v. Nat'l Enameling & Stamping Co. 204 U.S. 176, 182 (1907) ("[I]f a plaintiff . . . in good faith, elect[s] to make a joint cause of action . . . for the purpose of removal the case must be held to be that which the plaintiff has stated in setting forth his cause of action.") (discussing the policy in the fraudulent joinder context); Ala. Great S. Ry. Co. v. Thompson, 200 U.S. 206, 214–15 (1906) ("'[A] defendant has no right to say that an action shall be several which the plaintiff seeks to make joint. A separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his suit to final decision in his own way. The cause of action is the subject-matter of the controversy, and that is, for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings.'" (quoting Pirie v. Tvedt, 115 U.S. 41, 43 (1885))); Insinga v. LaBella, 845 F.2d 249, 253 (11th Cir. 1988) ("There appears to be a policy favoring a plaintiff's right, absent fraudulent joinder, to determine the removability of his case."); *Self*, 588 F.2d at 658 ("[T]he voluntary-involuntary rule is based on a formalistic approach to pleadings similar to the *Mottley* line of cases and applies to the diversity requirement of 28 U.S.C. § 1332 in the same fashion that [the well-pleaded complaint rule] applies to the federal question requirement of 28 U.S.C. § 1331. . . . Thus, in determining the removability of a suit based on diversity of citizenship the Court . . . looked only to the plaintiff's pleadings.") (citing *Ala. Great S. Ry.*, 200 U.S. at 217). *But see Polous*, 959 F.2d at 72 ("[T]his principle of deference [to the plaintiff's complaint] is entirely inconsistent with the apparent purpose of the

courts consider the V-I rule to be the diversity-jurisdiction "analog of federal question removal cases, where the removability of a case depends upon . . . the plaintiffs well-pleaded complaint . . . ."[27] The only limits on the plaintiff's right to shape the suit are to obey the rules of selecting a proper court and properly joining parties and claims.[28] This right should not be defeated merely because the facts did not turn out to be as the plaintiff anticipated or his arguments did not persuade the judge.[29] The V-I rule furthers this policy by allowing the plaintiff to remain in his chosen forum even if some of the claims or parties are disposed of before final judgment. If the plaintiff changes the posture of the case himself, though, the situation is different. Why should we ignore the plaintiff's new selection of parties yet give deference to his initial choice?

Although the V-I rule has evolved over the years, the basic premise remains the same: If a potential diversity suit is not removable as originally filed, the defendant may subsequently remove it to federal court on diversity grounds only if the voluntary act of a plaintiff later made the case removable.[30] The only significant discrepancy between circuits is that they

removal statute—to give defendants a means to escape the plaintiff's hometown forum—but it is consistent with our general desire to limit federal jurisdiction.").

[27] Katz v. Costa Armatori, S.P.A., 718 F. Supp. 1508, 1510 (S.D. Fla. 1989) (citing *Insinga*, 845 F.2d at 253) (quotes omitted); *see also Self*, 588 F.2d at 658–59 (discussing the common origin of the V-I rule and the well-pleaded complaint rule).

[28] Boyer v. Snap-on Tools Corp., 913 F.2d 108, 110 (3d Cir. 1990) ("As a general proposition, plaintiffs have the option of naming those parties whom they choose to sue, subject only to the rules of joinder of necessary parties.").

[29] *See* Whitcomb v. Smithson, 175 U.S. 635, 638 (1900) ("The right to remove was not contingent on the aspect the case may have assumed on the facts developed on the merits of the issues tried."); *see also* Percy, *supra* note 20, at 208.

[30] *See* Davis v. McCourt, 226 F.3d 506, 510 n.3 (6th Cir. 2000) ("The voluntary-involuntary rule 'conditions removability on voluntary actions of a plaintiff, rather than factors beyond a plaintiff's control.'" (quoting Hollenbeck v. Burroughs Corp., 664 F. Supp. 280, 281 (E.D. Mich. 1987))); Higgins v. E.I. DuPont de Nemours & Co., 863 F.2d 1162, 1166 (4th Cir. 1988) ("If the plaintiff voluntarily dismissed the state action against the non-diverse defendant, creating complete diversity, the state action may be removed . . . ."); *Insinga*, 845 F.2d at 252 ("This is a rule developed in diversity cases 'that if the resident defendant was dismissed from the case by the voluntary act of the plaintiff, the case became removable, but if the dismissal was the result of either the defendant's or the court's action against the wish of the plaintiff, the case could not be removed.'" (quoting Weems v. Louis Dreyfus Corp., 380 F.2d 545 (5th Cir. 1967))); *In re* Iowa Mfg. Co. of Cedar Rapids, 747 F.2d 462, 463 (8th Cir. 1984) ("[I]f the plaintiff voluntarily dismisses the non-diverse defendant, the case may be removed. Removal is improper, however, if the dismissal of that resident defendant was involuntary."); DeBry v. Transamerica Corp., 601

sometimes disagree about what constitutes a voluntary act. For instance, the Second Circuit has held that failure to appeal the dismissal of the non-diverse defendant "constituted the functional equivalent of a 'voluntary' dismissal."[31] In all other material respects, the rule is applied uniformly across the circuits.

B. Fraudulent (Improper) Joinder

The predecessor to procedural misjoinder is the doctrine of fraudulent joinder. *Chesapeake & Ohio Railway Co. v. Cockrell* was the first time the Supreme Court analyzed the doctrine.[32] In *Cockrell*, a woman was struck and fatally injured by a train owned by the defendant railroad company.[33] The administrator of her estate sued the railroad, as well as the engineer and fireman that were operating the train.[34] The plaintiff-administrator, the engineer, and the fireman were all citizens of Kentucky, but the railroad was a citizen of Virginia.[35] The railroad attempted to remove, alleging that the engineer and fireman were improperly joined because the allegations against them were "each and all 'false and untrue,'" and made for the purpose of defeating removal jurisdiction.[36] The Court explained that the right of a defendant to remove to federal court cannot be defeated by the plaintiff's joining a defendant that does not belong in the case.[37] However,

F.2d 480, 487 (10th Cir. 1979) (explaining that what the V-I rule "requires is a voluntary act of the plaintiff which effects a change rendering a case subject to removal (by defendant) which had not been removable before the change"); *Self*, 588 F.2d at 657 ("[T]he [V-I rule] . . . requires that a suit remain in state court unless a 'voluntary' act of the plaintiff brings about a change that renders the case removable."); *Weems*, 380 F.2d at 546 ("[I]f the resident defendant was dismissed from the case by the voluntary act of the plaintiff, the case became removable, but if the dismissal was the result of either the defendant's or the court's acting against the wish of the plaintiff, the case could not be removed." (quoting Comment, *The Effect of Section 1446(b) on the Nonresident's Right to Remove*, 115 U. PA. L. REV. 264, 267 (1966))). *See also* Penelope A. Dixon & David J. Walz, *Preview of the FDLA Defense Manual*, 25 No. 2 TRIAL ADVOC. Q. 23, 25 (2006).

[31] *See* Quinn v. Aetna Life & Cas. Co., 616 F.2d 38, 40 n.2 (2nd Cir. 1980).

[32] *See generally* 232 U.S. 146 (1914). But, the first removal on the basis of fraudulent joinder appears years earlier, in Wecker v. National Enameling & Stamping Co., 204 U.S. 176 (1907).

[33] *Cockrell*, 232 U.S. at 150.

[34] *Id.*

[35] *Id.*

[36] *Id.* at 151.

[37] *Id.* at 152 ("[The] right of removal cannot be defeated by a fraudulent joinder of a resident defendant having no real connection with the controversy."). Obviously, however, the idea has been around since far earlier. *See, e.g.*, Ill. Cent. R.R. Co. v. Sheegog, 215 U.S. 308, 316 (1909)

it held that merely "traversing the allegations" and declaring them to be untrue, or merely calling the joinder "fraudulent," would not suffice to constitute fraudulent joinder.[38]

The policy behind the fraudulent joinder rule is to preserve the plaintiff's status as master of his complaint, as long as he plays fair. The rule's name, however, is misleading. Courts have forsaken an approach that focuses on the subjective fraudulent intent of the joinder. Instead, they have opted for objective standards.[39] The courts respect the plaintiff's initial choice of forum and the contents of his complaint, but they will not allow him to impede removal by asserting meritless claims or incorrectly pleading jurisdictional facts.[40] When the plaintiff uses one of those means to create a case that appears not to be removable, the court will assess diversity without regard to the defendants that the plaintiff should not have included.[41]

Courts have stated the rule in a number of ways, though they have the same end result: the court will ignore the fraudulently joined party when

("Of course, if it appears that the joinder was fraudulent as alleged, it will not be allowed to prevent the removal."); Powers v. Chesapeake & Ohio Ry. Co., 169 U.S. 92, 102 (1898) ("We do not find it necessary [sic] to pass upon the points of fraudulent joinder . . . .").

[38] *Cockrell*, 232 U.S. at 152.

[39] *See* Underwood, *supra* note 8, at 1041; *Ill. Cent. R.R. Co.*, 215 U.S. at 316 ("In the case of a tort which gives rise to a joint and several liability the plaintiff has an absolute right to elect, and to sue the tort-feasors jointly if he sees fit, *no matter what his motive*, and therefore an allegation that the joinder of one of the defendants was fraudulent, without other ground for the charge than that its only purpose was to prevent removal, would be bad on its face.") (citing Ala. Great S. Ry. Co. v. Thompson, 200 U.S. 206, 214–15 (1906) (emphasis added)); *see also* Mecom v. Fitzsimmons Drilling Co., 284 U.S. 183, 189 (1931) ("[I]n a removal proceeding the motive of a plaintiff in joining defendants is immaterial, provided there is in good faith a cause of action against those joined.").

[40] *See* Wecker v. Nat'l Enameling & Stamping Co. 204 U.S. 176, 186 (1907) ("While the plaintiff, in good faith, may proceed in the state courts upon a cause of action which he alleges to be joint, it is equally true that the Federal courts should not sanction devices intended to prevent a removal to a Federal court where one has that right . . . ."); *Ala. Great S. Ry. Co.*, 200 U.S. at 218 ("[T]he federal courts may and should take such action as will defeat attempts to wrongfully deprive parties entitled to sue in Federal courts of the protection of their rights in those tribunals.").

[41] Smallwood v. Ill. Cent. R.R. Co., 385 F.3d 568, 575 (5th Cir. 2004) (en banc) ("In every case where a diverse defendant proves that the plaintiff's decision to join an in-state party is improper, the diverse defendant gains access to the federal courts.").

determining diversity.[42] Courts have found improper joinder in two categories of cases, namely when: (1) the plaintiff incorrectly pleads the jurisdictional facts, whether through inadvertence or deception,[43] or (2) no

[42] Florence v. Crescent Res., LLC, 484 F.3d 1293, 1297 (11th Cir. 2007) ("[I]f a defendant shows that there is no possibility the plaintiff can establish a cause of action against the resident defendant, then the plaintiff is said to have fraudulently joined the non-diverse defendant. In that situation, the federal court must dismiss the non-diverse defendant and deny any motion to remand the matter back to state court." (citations omitted)); *Smallwood*, 385 F.3d at 573 ("[W]e have recognized 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 . . . [meaning there is] no reasonable basis for the district court to predict that the plaintiff might be able to recover against an in-state defendant."); Filla v. Norfolk S. Ry. Co., 336 F.3d 806, 811 (8th Cir. 2003) (noting that when determining if a defendant is fraudulently joined, "the district court's task is limited to determining whether there is arguably a reasonable basis for predicting that the state law might impose liability based upon the facts involved"); Bishop v. Wal-Mart Stores, Inc., 24 Fed. App'x. 236, 237 (6th Cir. 2001) (stating that to establish fraudulent joinder "the removing party must show that plaintiff cannot establish a cause of action against the non-diverse defendant"); Hartley v. CSX Transp., Inc., 187 F.3d 422, 424 (4th Cir. 1999) ("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." (quotes and citations omitted)); Poulos v. Naas Foods, Inc., 959 F.2d 69, 73 (7th Cir. 1992) ("Although false allegations of jurisdictional fact may make joinder fraudulent, in most cases fraudulent joinder involves a claim against an in-state defendant that simply has no chance of success . . . ." (quotations omitted) (citations omitted)); McCabe v. Gen. Foods Corp., 811 F.2d 1336, 1339 (9th Cir.1987) ("[I]f the plaintiff fails to state a cause of action against a resident defendant, and the failure is obvious according to the settled rules of the state, the joinder of the resident defendant is fraudulent."); Roe v. Gen. Am. Life Ins. Co., 712 F.2d 450, 452 n.1 (10th Cir. 1983) ("[T]he joinder of a resident defendant against whom no cause of action is pled, or against whom there is in fact no cause of action, will not defeat removal.") (citing Dodd v. Fawcett Publ'ns, Inc., 329 F.2d 82 (10th Cir.1964)). As you can see, some jurisdictions prefer the "no possibility" standard to the "no reasonable basis" standard. It even appears that the "no reasonable basis" language might currently be the minority among the circuits. However, the "reasonable basis" language has been the holding of the more recent decisions and tracks more closely with the early opinions of the Supreme Court, like *Cockrell*. *See* Percy, *supra* note 1, at 579–80 ("Of all the tests, the 'reasonable basis for the claim' test is most consistent with Supreme Court precedent and also most sensitive to federalism concerns . . . ."). In fact, the Fifth Circuit has recently recognized that "[n]either [the Fifth Circuit] nor other circuits have been clear in describing the fraudulent joinder standard. . . . Although these tests appear dissimilar, 'absolutely no possibility' vs. 'reasonable basis,' we must assume that they are meant to be equivalent because each is presented as a restatement of the other." Travis v. Irby, 326 F.3d 644, 647 (5th Cir. 2003).

[43] *See Florence*, 484 F.3d at 1297 n.2 (11th Cir. 2007) ("A defendant may demonstrate fraudulent joinder by showing . . . that the plaintiff has fraudulently pled jurisdictional facts . . . ."

reasonable basis exists for the court to predict that the plaintiff can recover from the jurisdictional spoiler.[44] The latter test closely tracks the language of *Cockrell*, that "the joinder . . . [is] merely a fraudulent device to prevent a removal [if it is] without any reasonable basis."[45] The result is that "when the required showing is made, the federal court will disregard the fraudulently joined defendant and assess diversity based on the remaining parties."[46]

(citations omitted)); *Poulos*, 959 F.2d at 73 ("[F]alse allegations of jurisdictional fact may make joinder fraudulent . . . ." (citations omitted)).

[44] *Smallwood*, 385 F.3d at 573 (holding that one can "establish improper joinder . . . [by showing that] there is no reasonable basis for the district court to predict that the plaintiff might be able to recover against an in-state defendant."); *Filla*, 336 F.3d at 811 ("[T]he district court's task is limited to determining whether there is arguably a reasonable basis for predicting that the state law might impose liability based upon the facts involved."). This second type of improper joinder includes two recognized sub-categories. The first variety is "no legal basis" fraudulent joinder, and it uses a 12(b)(6)-like analysis. For joinder to be improper under this theory there must be no reasonable basis for the district court to predict that the plaintiff's alleged facts would state a cause of action against the defendant. The second category is "no factual basis" improper joinder. This variety arises when the plaintiff pleads certain facts and states a valid cause of action against a defendant, but if the court were to make a shallow, cursory look past the pleadings, they would discover discrete, undisputed facts that would preclude the plaintiff from recovering from that defendant. Therefore, in both situations, no reasonable basis exists to predict the plaintiff can recover from that defendant. *See Smallwood*, 385 F.3d at 573–74; *Travis*, 326 F.3d at 648–49. For a closer look at these variants and an account of which circuits have adopted which standards, see Underwood, *supra* note 8, at 1045–85.

[45] Chesapeake & Ohio Ry. Co. v. Cockrell, 232 U.S. 146, 152 (1914); *see also Wecker*, 204 U.S. at 185 ("In view of this testimony and the *apparent want of basis* for the allegations . . . and [other] uncontradicted evidence . . . we think the court was right in [finding fraudulent joinder].") (emphasis added).

[46] Hines & Gensler, *supra* note 19, at 791. Put another way, "The federal court will ignore the citizenship of the fraudulently joined defendant, assume jurisdiction over the case, and dismiss the claims against the spoiler." Percy, *supra* note 1, at 572; *see also Cockrell*, 232 U.S. at 152 ("[The] right of removal cannot be defeated by a fraudulent joinder of a resident defendant having no real connection with the controversy."); Ill. Cent. R.R. Co. v. Sheegog, 215 U.S. 308, 316 (1909) ("Of course, if it appears that the joinder was fraudulent as alleged, it will not be allowed to prevent the removal."); Henderson v. Wash. Nat'l Ins. Co., 454 F.3d 1278, 1281 (11th Cir. 2006) ("When a plaintiff names a non-diverse defendant solely in order to defeat federal diversity jurisdiction, the district court must ignore the presence of the non-diverse defendant and deny any motion to remand the matter back to state court."); Cobb v. Delta Exps., Inc., 186 F.3d 675, 677 (5th Cir. 1999) ("[T]he doctrine has permitted courts to ignore (for jurisdictional purposes) . . . non-diverse parties on the record in state court at the time of removal." (emphasis omitted)).

C. The New Kid on the Block: Procedural Misjoinder

A recent addition to this dance of removal and remand is procedural misjoinder. Like traditional fraudulent joinder, this doctrine applies when the plaintiff joins a party that appears to destroy complete diversity. As discussed, the fraudulent joinder inquiry focuses on whether the plaintiff can recover against the jurisdictional spoiler. Procedural misjoinder, on the other hand, governs when the spoiler is joined in violation of the joinder rules. It was first recognized over a decade ago in *Tapscott v. MS Dealer Service Corp*.[47] In *Tapscott*, an Alabama citizen brought a putative class action against four defendants, one of whom was also from Alabama.[48] A second amended complaint added two new putative class representatives, also from Alabama, and one putative defendant class representative from North Carolina, Lowe's Home Centers.[49] The initial class action, however, was based on automobile service contracts while the newly joined parties' dispute arose out of service contracts for retail products.[50] Despite the facial lack of complete diversity, Lowe's removed to federal court and asked the district court to sever and remand the claims against the other defendants.[51] The district court looked at the requirements of the joinder rules and granted these motions because the court perceived joining these claims to the original action was "an improper and fraudulent joinder, bordering on a sham."[52] On appeal, the Eleventh Circuit stated, "Misjoinder may be just as fraudulent as the joinder of a resident defendant against whom a plaintiff has no possibility of a cause of action."[53] Based on this premise, the court applied procedural misjoinder as it applies fraudulent joinder, ignoring the misjoined party for the purpose of determining diversity jurisdiction.[54]

[47] 77 F.3d 1353 (11th Cir. 1996), *overruled on other grounds by* Cohen v. Office Depot, Inc., 204 F.3d 1069 (11th Cir. 2000).

[48] *Id.* at 1355.

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.* at 1360.

[53] *Id.*

[54] *Id.*

1. The Need: Who Cares About Procedural Misjoinder?

So, why is this doctrine important? Imagine that you are a defense lawyer.[55] You have a client who is accused of running a red light and crashing into another person in a small town out in south-central Texas. The local plaintiff, Joe, has sued your client in state court in his home town. The facts look pretty good for your client, who is a well-respected New Yorker visiting Texas on business. You have a witness claiming the light was green for your client and that the intersection was otherwise clear. But Joe had a passenger in the car who says your client was swerving as he approached the intersection and that Joe had the green light. Joe is diverse from your client and is seeking over $100,000 in damages.[56] You think this whole notion of local prejudice against out-of-state litigants is poppycock, but when you catch Joe chuckling by the water cooler with the local judge, you decide it may be prudent to file a notice of removal.

Unfortunately, Joe (or, more likely, Joe's attorney) anticipated this tactic. Joe has joined his claims against your client with a wrongful discharge claim against Joe's employer. The two claims are entirely unrelated, and their joinder does not satisfy federal or Texas procedural rules,[57] but there they are. Joe's employer, like Joe, is a Texas citizen. Complete diversity is now destroyed.

So, what now? You can give notice of removal. However, once Joe's attorney moves for remand, you will face an apparent lack of federal jurisdiction. This looks like a case of fraudulent joinder, but Joe's claim against his employer is meritorious and will not meet any existing fraudulent joinder standard.[58] You could ask the state court judge to sever the claim against you and then remove. But, Judge Sledge in the Federal courthouse knows about the V-I rule and is not going to let you remove unless the plaintiff himself makes the case removable—and Joe will not

[55] For many of you, such as you civil defense lawyers, this will be an easy task.

[56] This satisfies the basic requirements of federal diversity jurisdiction. *See* 28 U.S.C. § 1332 (2005).

[57] *See* FED. R. CIV. P. 20; TEX. R. CIV. P. 40. Both rules require the claims against the joined parties to share a common "transaction or occurrence." There is almost certainly no common transaction here.

[58] *See supra* notes 42–46 and accompanying text regarding the standard of fraudulent joinder. This clearly is not fraudulent joinder.

dismiss either claim.[59] Your client's right to a federal forum is being denied by Joe's clear violation of the applicable procedural rules. This is the quintessential situation calling for the procedural misjoinder doctrine.

The doctrine is necessary to fill a gap. Without it, the V-I rule might be exploited to keep cases locked in state court when the only properly joined parties are diverse. In our hypothetical, for example, diversity jurisdiction has been defeated through the misjoinder of Joe's employer. The problem, in the simplest terms, is that Joe is not playing fair. He has violated clearly established procedural rules to destroy federal jurisdiction.

State and federal rules set forth requirements for joining multiple claims or parties to a single suit, and a plaintiff should not be able to block a defendant's access to federal court by ignoring them.[60] If we allow misjoined parties to hinder removal, any plaintiff can prevent removal as long as he has one viable claim against a non-diverse person.[61] All he must do is join his claim against the local defendant to his claim against the diverse defendant, no matter how unrelated the claims are, and removal becomes impossible. The diverse defendant can seek severance by the trial judge; but the V-I rule demands that a voluntary act of a plaintiff, and not of the judge, make the case removable. Severance would not cure the removability problem. Procedural misjoinder allows the court to ignore those misjoined parties for the purposes of determining diversity.[62] Since no severance is necessary, the V-I rule poses no obstacle.

Because the doctrine is fairly new and some questions surrounding it are unsettled, I will briefly discuss the major areas of contention.

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[59] *See supra* note 30 and accompanying text for review of the V-I rule. Absent the doctrine of procedural misjoinder, allowing removal after severance would violate the V-I rule in this instance.

[60] *See, e.g.*, FED. R. CIV. P. 20; FED. R. CIV. P. 18; OR. R. CIV. P. 28; N.Y. C.P.L.R. 1002(b); MISS. R. CIV. P 20; LA. C. CIV. P. art. 463.

[61] If he were to join a party against which he had no claim at all, traditional fraudulent joinder would allow the federal court to ignore the presence of that party. There would be no problem with removal. *See supra* notes 42–46 and accompanying text.

[62] *See, e.g.*, Tapscott v. MS Dealer Serv. Corp., 77 F.3d 1353, 1360 (11th Cir. 1996), *overruled on other grounds by* Cohen v. Office Depot, Inc., 204 F.3d 1069 (11th Cir. 2000); Milliet v. Liberty Mut. Ins. Co., No. 07-7443, 2008 U.S. Dist. LEXIS 2344, at *7 (E.D. La. Jan. 11, 2008) (finding procedural misjoinder and ignoring that defendant's citizenship "for the purposes of evaluating the existence of federal jurisdiction"); Asher v. Min. Mining & Mfg. Co., No. 04-CV-522-KKC, 2005 U.S. Dist. LEXIS 42266 at *37 (E.D. Ky. June 30, 2005) ("[T]his Court may find diversity jurisdiction where diversity is destroyed only through misjoinder of parties.").

2. Unsettled Issues in Procedural Misjoinder

The first major question left unresolved by the cases is what standard one should use when applying the procedural misjoinder doctrine. In *Tapscott*, the court was perfectly happy treating as fraudulent the joinder of a party that, procedurally, should not have been joined.[63] But it made clear that ordinary misjoinder would not be treated as fraudulent joinder. Instead, the misjoinder must be egregious.[64] Identifying egregiousness has not been easy.[65] The hypothetical involving the car accident with Joe, above, would probably be an example of egregious misjoinder. No rational reason exists to believe that a car accident and a wrongful termination, against different defendants, should be tried in the same lawsuit.

The courts have not settled on a consistent test or consistent application. Some have elected to apply the egregious-misjoinder standard as stated in *Tapscott*.[66] Some courts have decided to soften the test and use some intermediate standard.[67] Others hold that any form of misjoinder will be treated the same as fraudulent joinder.[68] This has led to some confusion.

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[63] *Tapscott*, 77 F.3d at 1360.

[64] *Id.* ("We do not hold that mere misjoinder is fraudulent joinder, but we do agree with the district court that Appellants' attempt to join these parties is so egregious as to constitute fraudulent joinder.").

[65] *See* Hines & Gensler, *supra* note 19, at 799 ("Unfortunately, the court did not provide additional guidance for distinguishing between ordinary misjoinder and 'egregious' misjoinder that would permit a court to disregard the citizenship of nondiverse misjoined defendants in considering removal from state courts of otherwise completely diverse parties."); *see also In re* Bridgestone/Firestone, Inc., 260 F. Supp. 2d 722, 728 (S.D. Ind. 2003) ("[U]nder *Tapscott*, something more than 'mere misjoinder' of parties may be required to find fraudulent misjoinder. Precisely what the 'something more' is was not clearly established in *Tapscott* and has not been established since.").

[66] *See* Hines & Gensler, *supra* note 19, at 783 ("Finally, some courts have adopted the doctrine [of procedural misjoinder] but have limited it to situations of 'egregious' misjoinder."); *see also* Greene v. Novartis Pharms. Corp., No. 7:07-CV-00091-HL, 2007 WL 3407429, at *3–4 (M.D. Ga. Nov. 14, 2007); Murphy Constr. Co. v. St. Bernard Parish, No. 06-7614, 2007 WL 442231, at *3 (E.D. La. Feb. 6 2007); Ramey v. Gilbert, No. 5:05-CV-244, 2005 WL 3149381, at *3 (M.D. Ga. Nov. 23, 2005); Juneau v. Ducote, No. Civ. A. 04-0789, 2005 WL 2648861 (W.D. La. Oct. 17, 2005); Jones v. Nastech Pharm., 319 F. Supp. 2d 720, 725 (S.D. Miss. 2004).

[67] *See, e.g.*, Boteler v. Pleko Se. Corp., No. 3:06CV128LN, 2006 WL 1364387, at *2 (S.D. Miss. May 16, 2006) (asking whether there is a "reasonable possibility" that the joinder is proper (citing Conk v. Richards & O'Neil, LLP, 77 F. Supp. 2d 956, 972 (S.D. Ind. 1999))); Fed. Ins. Co. v. Tyco Int'l Ltd., 422 F. Supp. 2d 357, 379–80 (S.D.N.Y. 2006) (stating a "no possibility" standard, but citing authority using a "reasonable possibility" standard); Terrebonne Parish Sch.

I agree with *Tapscott*'s basic premise: misjoinder should not automatically rise to the level of fraudulent joinder.[69] Most joinder rules are not clear-cut and require subjective determinations of whether a litigant has satisfied or violated them.[70] One can easily analogize this to fraudulent joinder: joinder is not fraudulent merely because a state judge finds that a party has failed to state a claim, even if the result is a directed verdict against that defendant.[71] The federal judge makes the fraudulent joinder determination. A state judge's determination that a party is, in some marginal way, not properly joined should not be tantamount to a finding of procedural misjoinder. This is, as discussed above, due to the Supreme Court's mandated deference to the structure that the plaintiff has chosen for his lawsuit.[72]

A few courts and commentators have suggested what seems like a better test for procedural misjoinder: the reasonable basis test used to identify fraudulent joinder.[73] That is, the federal judge must ask herself whether a reasonable basis exists to predict that the party is properly joined under the applicable procedural rules.[74] The reasonable basis standard is familiar,

Bd. v. Texaco, Inc., No. CIV. A. 98-0115, 1998 WL 160919, at *3 (E.D. La. April 3, 1998) (requiring a "palpable connection" between the joined claims).

[68] *See, e.g.*, *In re* Rezulin Prods. Liab. Litig., 168 F. Supp. 2d 136, 147–48 (S.D.N.Y. 2001) (recognizing "that several courts have applied *Tapscott*'s egregiousness standard" but "respectfully tak[ing] another path"); Grennell v. W. S. Life Ins. Co., 298 F. Supp. 2d 390, 396–97 (S.D. W. Va. 2004) (following the reasoning of *In re Rezulin* specifically for cases of misjoined plaintiffs).

[69] *Tapscott*, 77 F.3d at 1360.

[70] For instance, Federal Rule of Civil Procedure 20 requires that the claims by the joined parties "aris[e] out of the same transaction, occurrence, or series of transactions or occurrences" and share "any question of law or fact." FED. R. CIV. P. 20. Both tests yield to a judge's characterization of the case and of the rule. *See, e.g.*, Mosley v. Gen. Motors Corp., 497 F.2d 1330, 1334 (8th Cir. 1974) (holding that "a company-wide policy purportedly designed to discriminate against blacks . . . arises out of the same series of transactions or occurrences").

[71] *See supra* notes 42–46 and accompanying text referring to what is required to find fraudulent joinder. A simple directed verdict is insufficient to establish fraudulent joinder.

[72] *See supra* notes 26–29 and accompanying text.

[73] *See* Smallwood v. Ill. Cent. R.R. Co., 385 F.3d 568, 573 (5th Cir. 2004) (en banc).

[74] Percy, *supra* note 1, at 572 ("Fraudulent misjoinder occurs when a plaintiff sues a diverse defendant in state court and joins a non-diverse or in-state defendant even though the plaintiff has no reasonable procedural basis to join such defendants in one action."); *see also* Conk v. Richards & O'Neil, LLP, 77 F. Supp. 2d 956, 971 (S.D. Ind. 1999); Ashworth v. Albers Med., Inc., 395 F. Supp. 2d 395, 410–11 (S.D. W. Va. 2005) (borrowing the standard from *Conk*, 77 F. Supp. 2d at 971).

easy to apply, and tracks a popular standard used for the related doctrine of fraudulent joinder.

Assume the applicable standard for joinder of two parties requires the plaintiff to have claims against the parties that share a common question of law or fact and that arise out of the same transaction, occurrence, or series of transactions or occurrences.[75] Joe, the plaintiff in our earlier hypothetical, would not have a reasonable basis to believe he could join his wrongful termination claim against his former employer to his personal injury claim against your client. Most courts likely would see those as distinct transactions that lack any significant overlapping questions of law or fact. On the other hand, a plaintiff who files suit claiming negligence against a hospital that failed to diagnose her illness and a product manufacturer that allegedly caused that illness may have a reasonable basis to predict that those claims are properly joined.[76] The claims arguably arise out of a series of related transactions, and proof of causation may involve common questions of fact. This plaintiff's claim would not fall under the procedural misjoinder doctrine.

A second unresolved question that has received debate is whose joinder rules should be used to identify procedural misjoinder. The court in *Tapscott* applied the federal rules,[77] but only after pointing out that, in this instance, the state and federal rules were "identical."[78] Some advocate applying federal joinder rules,[79] while others believe that applying state joinder rules is the best answer.[80] Both positions have strong pragmatic and policy bases.

Federal joinder rules define the party relationships that federal courts must respect, and it is when there is complete diversity between parties properly joined under those rules that federal courts have jurisdiction.[81]

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[75] As, for instance, under Federal Rule of Civil Procedure 20. I say "assume" only in recognition of the fact that a dispute exists over whether federal or state rules should govern the procedural misjoinder analysis. *See infra* notes 77–91 and accompanying text.

[76] The facts of this hypothetical are based loosely on Crockett v. R.J. Reynolds Tobacco Co., 436 F.3d 529 (5th Cir. 2006), discussed *infra* Part III.C.

[77] Tapscott v. MS Dealer Serv. Corp., 77 F.3d 1353, 1360 (11th Cir. 1996), *overruled on other grounds by* Cohen v. Office Depot, Inc., 204 F.3d 1069 (11th Cir. 2000).

[78] *Id.* at 1355 n.1.

[79] *See* Hines & Gensler, *supra* note 19, at 817.

[80] *See* Percy, *supra* note 1, at 593.

[81] *See* Hines & Gensler, *supra* note 19, at 815.

Section 1441[82] permits removal based on original federal jurisdiction, not failed state-law joinder. Thus, the argument goes, when the jurisdictional spoiler would not be properly joined under federal law, the case has achieved a posture that would permit federal jurisdiction.[83] Also, permitting the states, through their joinder rules, to govern when a case is removable raises federalism concerns.[84] Finally, federal judges are more familiar with federal joinder rules and more often will apply them consistently and correctly.[85]

On the other hand, good reasons exist for selecting state rules of joinder as the appropriate standard. Most logically, the suit is not misjoined if the state's joinder rules are satisfied—the suit is, after all, in state court and governed by the state's rules.[86] Second, the litigant bringing his suit in state court should be concerned with meeting the requirements for filing in state court. Asking the plaintiff to satisfy both federal and state procedural rules may be overly burdensome. Third, requiring litigants to satisfy federal rules of joinder in suits filed in state courts, lest they be whisked away to federal court, implicates principles of comity and parity.[87] And not to be overlooked, if the test for procedural misjoinder is whether "the plaintiff has a reasonable basis to predict that the jurisdictional spoiler is properly joined under state law," it is a near-perfect analog to the test for fraudulent joinder.[88] Such would be a civil procedure professor's dream of clarity. (The students would probably like it, too.)

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[82] 28 U.S.C. § 1441 (1991).

[83] *See* Hines & Gensler, *supra* note 19, at 814–15.

[84] *See id.* at 815 ("The removal statute which is nationwide in its operation, was intended to be uniform in its application, unaffected by local law definition or characterization of the subject matter to which it is to be applied." (quoting Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 104 (1941))); *see also infra* note 87.

[85] *See* Hines & Gensler, *supra* note 19, at 818.

[86] *See* Percy, *supra* note 1, at 593 ("If joinder is permissible under state rules but impermissible under federal rules, no intent to wrongfully defeat removal jurisdiction can be inferred from such joinder simply because it fails to meet the federal threshold for joinder of claims."); *see also* Conk v. Richards & O'Neil, LLP, 77 F. Supp. 2d 956, 971 (S.D. Ind. 1999) ("[T]he court is not persuaded that the Federal Rules of Civil Procedure provide the governing legal standard. After all, when Conk filed his complaint in the Indiana court, he was not required to comply with the Federal Rules of Civil Procedure . . . .").

[87] An in-depth discussion of the issues of federalism, comity, and parity is far outside the scope of this Comment. Obviously, they will always be big topics in issues of removal or diversity jurisdiction.

[88] *See supra* note 44 concerning the reasonable basis standard for fraudulent joinder.

For better or worse, proponents of state rules seem to be winning.[89] Many courts faced with the issue avoided it by finding the state and federal rules would achieve the same result in the particular case.[90] Commentators acknowledge that most state joinder rules mimic the federal rules, but they are concerned about differences in interpretation.[91] This decision does not affect the conclusion of this Comment, so we must press on. The best advice for plaintiffs is to try to satisfy both state and federal joinder rules for each claim. Given the rules' similarity, the task should be fairly easy in most cases.

Procedural misjoinder has not been accepted by all circuits,[92] and some commentators are suspicious of the doctrine.[93] Most who address the issue

[89] *See* Percy, *supra* note 1, at 591 ("While a minority of district courts evaluate allegations of fraudulent misjoinder pursuant to the federal joinder rule, most evaluate such allegations by reference to the state joinder rule."); *see, e.g.*, Leif's Auto Collision Ctrs. v. Progressive Halcyon Ins. Co., No. 05-1958-PK, 2006 WL 2054552, at *4 (D. Or. July 21, 2006) ("[S]ince this case was originally filed in Oregon state court, this court is not persuaded that the federal rules provide the governing legal standard."); Boteler v. Pleko Se. Corp., No. 3:06CV128LN, 2006 WL 1364387, at *2 (S.D. Miss. May 16, 2006) ("[W]hether there has been fraudulent or improper misjoinder is determined by reference to the state's rules on joinder."). *But see* Juneau v. Ducote, No. Civ.A. 04-0789, 2005 WL 2648861, at *4 (W.D. La. Oct. 17, 2005) (applying federal joinder rules to procedural misjoinder analysis, but noting in a footnote that the decision was not outcome-determinative).

[90] *See, e.g.*, Hines v. Bank of Am. Corp., No. Civ.A.2:03 CV 64-P-A, 2004 WL 439997, at *2 (N.D. Miss. Feb. 12, 2004) (finding that joinder meets either state or federal standard).

[91] *See* Hines & Gensler, *supra* note 19, at 812; Percy, *supra* note 1, at 591–92. The noted exception, as is so often the case, is Louisiana. *Id.* at 592 n.117. Some courts have admitted the same thing. *See, e.g.*, Burrell v. Ford Motor Co., 304 F. Supp. 2d 883, 889 (S.D. Miss. 2004) ("[C]ase law interpretations of Mississippi Rule 20 are far more liberal than case law interpretations of Federal Rule 20 in regard to joinder of plaintiffs and claims.").

[92] *See, e.g.*, Rabe v. Merck & Co., No. Civ. 05-363-GPM, Civ. 05-378-GPM, 2005 WL 2094741, at *2 (S.D. Ill. Aug. 25, 2005) ("This Court is familiar with the misjoinder doctrine, but it is quite confident that whatever precedential value *Tapscott* may have elsewhere, it has none in the Seventh Circuit."); Ballard v. Wyeth, No. 4:04CV1111 CDP, 2004 WL 5436353, at *2 (E.D. Mo. Nov. 8, 2004) (finding the doctrine not yet adopted in the Eighth Circuit); Osborn v. Metro. Life Ins. Co., 341 F. Supp. 2d 1123, 1127 (E.D. Cal. 2004) (declining to accept the doctrine and instead permitting removal after state court severance); John S. Clark Co. v. Travelers Indem. Co., 359 F. Supp. 2d 429, 436 (M.D.N.C. 2004) (finding the doctrine not yet adopted in the Fourth Circuit).

[93] *See* 14B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 3723 at 658 (rev. 3d ed. Supp. 2008).

agree, however, that procedural misjoinder is necessary.[94] All agree that a plaintiff should not be able to join blatantly unrelated parties and claims in a way that deprives the proper defendants of their right to remove.[95]

3. Treatment of Procedural Misjoinder As Compared to Fraudulent Joinder

Procedural misjoinder and fraudulent joinder behave almost identically. In terms of application, *Tapscott* and subsequent cases show that when a case appears non-removable due to the presence of a jurisdictional spoiler who is procedurally misjoined, removal is nevertheless proper.[96] This parallels the district courts' practice of ignoring fraudulently joined parties when assessing diversity.

The policies that support applying the V-I rule, appealability or finality and deference to the plaintiff's choice of forum, apply with equal force in situations of alleged fraudulent joinder and alleged procedural misjoinder.[97] If the state court severs a party or claim for the plaintiff's failure to satisfy the rules of joinder, she is just as likely to appeal the decision as if the court had dismissed her claim on the merits. If the law permits removal after a severance, we can expect to experience vertigo from the same "yo-yo" effect that the V-I rule seeks to avoid.[98]

Likewise, no good reason exists for the court to be less respectful of the plaintiff's initial choice of forum, as long as the choice is reasonable. The flexible standards of the federal joinder rules result in a wide zone of potential disagreement, in which judges could come to different conclusions about the propriety of the joinder of parties or claims.[99] The similarly-articulated state rules, if one finds that they are the appropriate standard for procedural misjoinder, are no less troublesome. No reason exists to be less

[94] *See* Hines & Gensler, *supra* note 19, at 803; *see also* Percy, *supra* note 1, at 590 ("[U]nless the Supreme Court abolishes the voluntary-involuntary rule or Congress amends the removal statute to alter application of the rule, the fraudulent misjoinder doctrine is necessary to protect a diverse defendant's right to remove.").

[95] *See* Percy, *supra* note 1, at 576 ("The emerging fraudulent misjoinder doctrine is based upon the same proposition as the traditional fraudulent joinder doctrine: Courts should not permit plaintiffs to wrongfully defeat a defendant's statutory right to remove a civil case based on diversity jurisdiction.").

[96] *See supra* note 62.

[97] *See supra* notes 20–29 and accompanying text regarding policies relating to V-I rule.

[98] *See supra* note 25.

[99] *See supra* note 70.

deferential to "the master of the complaint" when he makes small procedural missteps than when he makes substantive ones.

One may argue that procedural misjoinder requires federal judges to dabble in the state's rules of joinder, a body of procedural law that is otherwise useless to a federal judge.[100] However, that is merely a plea to apply a different standard: that of the federal rules instead of the rules of the state. Further, even if the states' rules were to control, a federal judge would not need more than a passing understanding of the rules to determine whether the joinder had a "reasonable basis."[101] Essentially, procedural misjoinder is no more than the procedural equivalent of fraudulent joinder, and the courts should treat it as such.

III. PROCEDURAL MISJOINDER IS NOT AN EXCEPTION TO THE VOLUNTARY-INVOLUNTARY RULE

A number of cases and commentators assert that fraudulent joinder (and now procedural misjoinder) is an exception to the voluntary-involuntary rule (V-I rule).[102] This statement is incorrect and dangerously misleading. The key principle that underlies all three above-mentioned doctrines is fairness. But, each doctrine comes to the rescue of a different party: the V-I rule protects the plaintiff's right to his chosen forum; procedural misjoinder (and fraudulent joinder) protects the defendant's right to seek a federal forum. Consideration of the purpose and application of the rules demonstrates that they work perfectly in conjunction; neither is truly an "exception" to the other. The two doctrines are related, but independent.

A. The Voluntary-Involuntary Rule Needs No Exception

No reason exists to seek out an exception to the V-I rule for procedural misjoinder because the V-I rule does not apply when severing procedurally misjoined parties. An underlying premise of the V-I rule is that some change has occurred in the composition of the lawsuit that moves it from the class of cases that cannot be removed to the class of cases that can be removed. For this to be true, and for the V-I rule to apply at all, the case

[100] *See* 28 U.S.C. § 1652 (1994) (Rules of Decision Act); Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938). *But see* 28 U.S.C. § 2072 (2006) (Rules Enabling Act); FED. R. CIV. P. 1.

[101] *See supra* notes 73–74. The same would be true if the more subjective "egregious misjoinder" standard were used.

[102] *See supra* note 2.

must initially be non-removable. Generally, this is because the plaintiff has joined one or more legitimate non-diverse or forum-state defendants. Next, the arrangement of parties must change in some relevant way. The lawsuit must achieve a procedural posture that, if filed that way initially, could have been removed. A party's dismissal from the case, or death, might cause such a change. Only when those two aspects are present do we apply the V-I rule to determine whether the defendant can now remove to federal court. If the change that created removability came about due to the voluntary act of a plaintiff, removal would be proper. Otherwise, it would not be. Neither aspect is present in the procedural misjoinder (or fraudulent joinder) context.

Consider first the most basic case: an otherwise completely diverse lawsuit with a single jurisdictional spoiler that has been procedurally misjoined. As discussed at length above, a case in which the only jurisdictional spoiler is procedurally misjoined can be removed without more; the spoiler defendant's citizenship is ignored when assessing diversity.[103] Thus, this scenario is missing the first required element. If the case can be removed as initially filed, analyzing whether the V-I rule bars removal is not necessary because it simply does not apply. If a rule does not apply, an exception is not needed.

In a way, to call procedural misjoinder an exception to the V-I rule is like calling the fact that the victim did not die an *exception* to the murder laws. In reality, death is a required element to the application of the murder law.[104] Justifiable homicide, on the other hand, is an exception to the crime of murder. It includes all of the principle requirements of murder and yet a conviction will not lie. A suit that cannot be removed and some event that could potentially change that non-removable status are required before one applies the V-I rule. When a claim is procedurally misjoined, these prerequisites are not present. In truth, though it did not look that way, the case was removable from the get-go. Therefore, the V-I rule is inapplicable.

This result holds up equally well in more complex scenarios. For example, consider a situation with multiple jurisdictional spoilers, only

[103] *See supra* note 62 and accompanying text.

[104] *See, e.g.*, Tex. Penal Code Ann. § 19.02(b) (Vernon 2003) (listing three ways one can commit homicide if his conduct "causes the death of an individual"); CONN. GEN .STAT. ANN. § 53a–54c (West 2003) (requiring one to "cause[] the death of another person" to be guilty of felony murder).

some of whom are procedurally misjoined. The mere presence of procedurally misjoined parties does not make the case removable, since legitimately joined spoilers are also present. Elimination of the legitimately joined spoiler defendants, leaving only the procedurally misjoined ones, puts the case in a posture that otherwise could be removed.[105] Because the case was non-removable as originally filed, and later became removable, we must apply the V-I rule to assess the defendant's right to removal. If the legitimately-joined spoilers were removed from the case by the voluntary act of a plaintiff, removal is proper. Once again, no exception comes into play.

The *raison d'être* of the V-I rule is to preserve the plaintiff's initial choice of forum if he is able to properly build his case to avoid federal jurisdiction. If the plaintiff's joinder of the jurisdictional spoiler(s) is improper, procedurally or substantively, he has failed to avoid federal jurisdiction. In that respect, one might easily mistake improper joinder as an exception to the V-I rule. After all, procedural misjoinder is one situation in which the state court can sever a non-diverse party (a procedurally misjoined jurisdictional spoiler), and removal may nevertheless be proper.

Professor Percy has commented that "[fraudulent joinder] is an exception to the [V-I rule] in the sense that in the absence of fraudulent joinder, a case can become removable only by a voluntary act of the plaintiff."[106] His choice of words was imprecise. In the fraudulently joined scenario, no exception to the V-I rule exists. It is true that whether the fraudulently joined (or procedurally misjoined) parties were removed from the suit by the voluntary act of a plaintiff makes no difference; actually, it does not matter whether they were removed from the suit at all. But that is not because of an exception to the V-I rule. Instead, it is because the V-I rule should not be applied to those claims.[107]

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[105] Note that the analysis would be the same if both the legitimately joined spoiler defendants and the procedurally misjoined ones were somehow removed from the suit. The procedurally misjoined parties do not affect the diversity analysis. They are just ghost-parties.

[106] Percy, *supra* note 20, at 207. Note the parallel to the following: survival is an exception to the murder laws in the sense that, unless the victim does not die, one can be convicted for murder.

[107] Of course, if one still insists that the V-I rule must apply to this scenario, Professor Percy's words may still be inaccurate. To satisfy the V-I rule, only the voluntary act of the plaintiff can make the case removable. Obviously, the only person whose actions caused the procedural misjoinder of certain parties (and therefore caused the case to be removable via the procedural

B. Reasons for Concern

"What's in a name? That which we call a rose by any other name would smell as sweet."[108] Why does it matter if we call fraudulent joinder, and now procedural misjoinder, an exception to the V-I rule? There are two reasons. The first is logical cleanliness. Lawyers love exceptions. Every rule must have an exception, and any exception worth its salt has at least one exception of its own. But, in this case, no exception is necessary. Enough exceptions and complications in the area of federal subject matter jurisdiction already exist.[109] More, in this case, is not better. The V-I rule gives the plaintiff the power to build his lawsuit such that the defendant cannot remove it, and the courts will respect that right (to an extent). If the case is not removable as filed, it will not be removable later, unless the plaintiff tinkers with it himself. The key is that the courts will respect the plaintiff's right to build a lawsuit that cannot be removed; but when the jurisdictional spoiler is procedurally misjoined, the suit can be removed.

My primary concern, however, is with those who may take the word exception literally. An exception is a situation in which a rule, otherwise applicable, does not have its usual effect.[110] When one calls procedural misjoinder an exception to the V-I rule, she might assume the action of someone other than the plaintiff can take a case that is not removable, and make it removable. The authors of *Federal Practice and Procedure* seem to have taken this stance. They recommend that litigants that wish to challenge a procedural misjoinder seek severance in state court and remove only after severance is granted.[111] They also suggest that if a federal court is faced with a removal based on procedural misjoinder, they remand the

misjoinder doctrine) is the plaintiff who drafted the complaint. No one except the plaintiff can be to blame for the initial selection of defendants. Thus, one might argue that the voluntary act of a plaintiff made the case removable. That satisfies the V-I rule. Again, no exception is necessary.

[108] WILLIAM SHAKESPEARE, ROMEO AND JULIET act 2, sc. 2.

[109] *See, e.g.*, 28 U.S.C. § 1331 (1980) ("arising under" jurisdiction); 28 U.S.C. § 1332(a)–(b) (2005) (deeming provisions for aliens and corporations, creating multiple citizenship); 28 U.S.C. § 1367(b) (1990) ("carve-out" for certain diversity cases, over which the court cannot exercise supplemental jurisdiction); 28 U.S.C. § 1441(b) (2002) (exception in removal statute if in-state defendants are present).

[110] *See* BARRON'S LAW DICTIONARY 182 (5th ed. 2003) ("[S]omething that otherwise ought to be included in the category from which it is eliminated."); BLACK'S LAW DICTIONARY 603–04 (8th ed. 2004) ("Something that is excluded from a rule's operation.").

[111] *See* 14B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 3723 at 658 (3d ed.1998, Supp. 2005).

case to the state court to deal with the joinder issue and, if the defendant succeeds in his motion to sever, he can remove again.[112]

This method of handling procedural misjoinder, coupled with its implicit assumption that a procedurally misjoined party can restrict a defendant's right to remove, violates the V-I rule. Further, this method is an unwarranted step away from the V-I rule that could put the courts on a slippery slope. If a state court severance is tantamount to a finding of procedural misjoinder by a district court, why not treat a directed verdict by a state judge as tantamount to a finding of fraudulent joinder? That small step could herald the end of the V-I rule. The recent Fifth Circuit case of *Crockett v. R.J. Reynolds Tobacco Co.* exemplifies this second concern.

B. The Crockett Confusion

In *Crockett*, Johnny Crockett and other survivors of Veronica Crockett (collectively "Crockett") sued a number of tobacco manufacturers ("Reynolds") and a health care provider ("the Hospital") for wrongful death in state court.[113] Crockett alleged that a combination of defective cigarettes produced by Reynolds and a negligent failure to diagnose by the Hospital caused Veronica's death.[114] He therefore joined both parties to the suit.[115] The parties were not completely diverse because, though Reynolds was diverse from Crockett, Crockett and the Hospital were both Texas citizens.[116]

Reynolds removed the case to federal court, alleging that Crockett fraudulently joined the Hospital to the suit and attacking the merits of the claim against the Hospital.[117] The district court found no fraudulent joinder and remanded the case to the state court for want of subject matter jurisdiction.[118] Once back in state court, Reynolds sought severance of Crockett's claims against the Hospital.[119] The court granted the motion to sever, thus creating complete diversity, and Reynolds immediately removed

[112] *See id.* § 3641 at 12 ("Another technique used by some district courts is to remand the case and require the diverse defendant to resolve the claimed misjoinder in state court.").

[113] Crockett v. R.J. Reynolds Tobacco Co., 436 F.3d 529, 531 (5th Cir. 2006).

[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] *Id.*

[118] *Id.*

[119] *Id.*

the case again.[120] Crockett moved to remand, asserting that the V-I rule prohibited removal because the act of the state court, not the voluntary act of the plaintiff, made the case removable.[121] The district court rejected the argument, retained jurisdiction, and rendered judgment for Reynolds on the pleadings.[122]

On appeal, the Fifth Circuit concluded, "[The] suit was initially non-removable because the health care defendants were non-diverse and were citizens of Texas . . . ."[123] With citation to a single case, however, it declared, "Courts have long recognized an exception to the voluntary-involuntary rule where a claim against a non-diverse or in-state defendant is dismissed on account of fraudulent joinder."[124] That did not fully resolve the issue, however, as the court conceded that the joinder of the Hospital was not fraudulent.[125] Instead, the court cited *Tapscott* and adopted some form of the procedural misjoinder doctrine, explaining that "[a] party . . . can be improperly joined without being fraudulently joined . . . [And if the joinder] requirements are not met, joinder is improper even if there is no fraud in the pleadings and the plaintiff does have the ability to recover against each of the defendants."[126] As a result, the court found the doctor and hospital had been procedurally misjoined, and exercised jurisdiction over the case.[127]

So what's the big deal? If Crockett improperly joined the Hospital, the Fifth Circuit came to the correct conclusion, right? The problem is that, as discussed above, calling procedural misjoinder an exception to the V-I rule

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[120] *Id.*

[121] *Id.* Crockett also alleged that the district court lacked jurisdiction because exercise of jurisdiction over the removal action after finding no fraudulent joinder would constitute a review of an order remanding a case back to state court, in violation of 28 U.S.C. § 1447(d). *Id.* at 532–33. The court dismisses this concern without discussion, saying only that "Crockett notes correctly that that decision is made unreviewable by 28 U.S.C. § 1447(d)." *Id.* at 532. The court does not explain why this is not a review of such remand ruling.

[122] *Id.* at 531. The court also withheld judgment on its own jurisdiction to address the motion to dismiss, but it was chastised for this by the circuit court. *Id.* at 531 n.1.

[123] *Id.* at 532.

[124] *Id.* at 532 (citing Insinga v. LaBella, 845 F.2d 249, 254 (11th Cir. 1988)). Then again, a single case is more authority than the source itself had for the assertion. *See Insinga*, 845 F.2d at 254.

[125] *Crockett*, 436 F.3d at 532–33.

[126] *Id.* at 533.

[127] *Id.* ("[R]emoval jurisdiction existed in this case upon the severance of Crockett's claims against the nondiverse in-state health care defendants.").

does not make sense. Two things make this case a frightening example of the misuse of the word exception when describing the interplay between the V-I rule and procedural misjoinder. First, the court did not set forth a standard to guide the lower courts in identifying procedurally misjoined parties in the future. This, of course, is not uncommon.[128] Very few courts have bothered to articulate anything more substantial than *Tapscott's* egregiousness. The *Crockett* court did not even go so far as to adopt that standard explicitly—it might have thrown itself in with the courts that find that mere misjoinder suffices to permit application of the rule.[129] The second mistake further aggravated this omission: the court appears to have relied entirely upon the decision of the state court in severing the non-diverse defendants, and it did not itself analyze the propriety of the joinder of the Hospital.[130] In other words, the court held that a state court severance is tantamount to a federal judge's finding of procedural misjoinder.

This is a problem. To understand why, one must look to the purpose underlying the V-I rule and recall the similarity in policy and application between fraudulent joinder and procedural misjoinder. As discussed, procedural misjoinder is not an exception to the V-I rule, yet that is how the court treated it. Since 1900, the Supreme Court and lower federal courts have recognized that, notwithstanding the adoption of broadly-worded removal statutes,[131] only the voluntary act of a plaintiff can take a case that is not removable and thereafter render it removable.[132] The Supreme Court has said, "[T]he right to remove [is] not contingent on the aspect the case may have assumed on the facts developed on the merits of the issues tried."[133] With due respect to Chief Justice Fuller, this sentence is a bit befuddling at first glance. It means that in assessing the defendant's right to remove, we are not to look far past the pleadings. If we must address the

[128] *See supra* notes 66–68 and accompanying text.

[129] *See Crockett*, 436 F.3d at 533 ("If [the joinder] requirements are not met, joinder is improper even if there is no fraud in the pleadings and the plaintiff does have the ability to recover against each of the defendants.").

[130] *See id.* ("To the extent the severance decision was tantamount to a finding of improper joinder, we agree with that finding.").

[131] 28 U.S.C. § 1441 (1991); Ellen Bloomer Mitchell, *Improper Use of Removal and its Disruptive Effect on State Court Proceedings: A Call to Reform* 28 U.S.C. § 1446, 21 ST. MARY'S L.J. 59, 73 (1989) ("It is generally accepted that this 'voluntary-involuntary' test of removability survived the 1948 revision and 1949 amendment of the removal statutes.").

[132] *See supra* note 30 and accompanying text regarding the V-I rule.

[133] Whitcomb v. Smithson, 175 U.S. 635, 638 (1900).

merits of any particular issue, we have gone too far. Joinder is such an issue. Unless the misjoinder is obvious from a cursory look at the pleadings, it should have no impact on the defendant's right to remove.

I have found no case in which a federal court has treated a directed verdict or summary judgment, dismissing the jurisdictional spoiler, as sufficient to make the case removable. Why? Because a finding, by a state court judge, that a party does not state a cause of action is neither (1) a voluntary act of a plaintiff, nor (2) tantamount to a finding of fraudulent joinder by the federal district court. The federal courts adhere to the V-I rule. No reason exists for a state court judge's decision to sever a case to be treated differently. The federal judge must herself determine the veracity of the allegedly-improper joinder. This is just an extension of the duty of a federal judge to determine her own jurisdiction.[134] This is yet another situation in which no reason exists to treat procedural misjoinder different from fraudulent joinder. They must not rely upon the state judge's finding of misjoinder, and they must certainly not rely upon the mere fact that the state judge has decided to grant a severance as tantamount to a finding of procedural misjoinder. For a federal judge to do so is either to ignore the V-I rule or to shirk her duty to independently determine the extent of her jurisdiction.

IV. A PROPOSED MODEL FOR APPLICATION

My position is not that the defendant must beat the state court to the punch and remove before a severance locks the case into state court. As mentioned above, if a jurisdictional spoiler is procedurally misjoined, the state court severing the claims by or against him will not invoke the V-I rule. Instead, I propose a four-step analysis for assessing removal jurisdiction. It is an attempt to create a synthesized procedure that addresses the complete diversity requirement and the rules discussed in this Comment. First, one must look to the face of the plaintiff's complaint and list the name and citizenship of each party named at the time of filing.[135] This bookkeeping step will preserve the composition of the case as filed

[134] *See* Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 583 (1999) ("[S]ubject-matter delineations must be policed by the courts on their own initiative even at the highest level.").

[135] *See* Freeport-McMoRan, Inc. v. K N Energy, Inc., 498 U.S. 426, 428 (1991) (referencing the "well-established rule that diversity of citizenship is assessed at the time the action is filed").

and ensure that we respect the general rule that diversity must exist when the suit was filed as well as at the later time of removal.[136]

Second, account for changes to the party make-up that occurred due to the plaintiff's voluntary acts. This includes (1) striking any party who, at the time of removal, is no longer a party to the suit due to the voluntary act of a plaintiff[137] and (2) identifying any change in the citizenship of a plaintiff, due to his own voluntary act, that would create diversity.[138] As mentioned above, what constitutes a voluntary act may differ from jurisdiction to jurisdiction, so one will have to consult precedent from his home circuit.[139] This step ensures satisfaction of the V-I rule. Only changes brought about by the voluntary act of the plaintiff will affect our final assessment of removability.

Third, determine if the plaintiffs had improperly joined, procedurally or substantively (or both), any of the remaining parties. Obviously, one need only consider the propriety of the joinder of non-diverse parties or forum-state defendants to determine if removal may be proper. If one finds that a party is fraudulently joined, or procedurally misjoined, he may strike that party from the list. This step applies the fraudulent joinder and procedural misjoinder doctrines to effectively ignore the misjoined parties.

Finally, assess the completeness of diversity among the parties that remain. Note that this process intentionally does not consider state court severances or dismissals, since such are not voluntary acts of the plaintiff and should not affect whether the case can be removed. If complete diversity exists among the remaining parties, the V-I rule is satisfied and removal is proper.

V. CONCLUSION

Procedural misjoinder and the voluntary-involuntary rule (V-I rule) are not at odds. The doctrines protect the rights of different parties, but both do so by ensuring that the plaintiff does not manipulate the rules to artificially

[136] *See supra* notes 4–5 and accompanying text.

[137] This includes multi-plaintiff suits where a plaintiff non-suits and multi-defendant suits where a claim against one defendant is dismissed.

[138] The plaintiff, by her voluntary act, cannot change her citizenship to destroy federal jurisdiction if jurisdiction exists at the time of filing. *See* Freeport-McMoRan, Inc., 498 U.S. at 428 ("We have consistently held that if jurisdiction exists at the time an action is commenced, such jurisdiction may not be divested by subsequent events.").

[139] *See supra* note 31 and accompanying text.

lock his lawsuit into the state court and defeat the defendant's right to a federal forum. Neither doctrine is an exception to the other, as they will never apply to the same claim. Either a claim is a genuine hindrance to removal, in which case the voluntary act of a plaintiff is the only way to cure the defect, or that claim is misjoined (either fraudulently joined or procedurally misjoined), in which case it does not block removal at all. To call procedural misjoinder an exception to the V-I rule is to invite decisions like *Crockett*, where the federal court disregards the V-I rule by calling a state court's action tantamount to a finding of procedural misjoinder. This could put courts in a slippery-slope to ignoring the V-I rule in similar situations, such as directed verdicts or summary judgments against jurisdictional spoilers. Until the Supreme Court expresses approval of that departure from its 100-year-old precedent, we should avoid creating potentially fatal and unnecessary exceptions to this doctrine.