Bloomberg Law®

March 10, 2025, 4:30 AM EDT

Fight Fraudulent Misjoinder Tactics Early With Strategic Filings

Varun Aery
Hollingsworth

- *Hollingsworth attorney assesses trend of state court remands*
- *Defendants should highlight any misjoinder in removal papers*

Recent opinions reveal a disturbing trend: Plaintiffs are getting their federal cases remanded to state court by fraudulently misjoining unrelated claims against nondiverse parties.

Unlike fraudulent joinder, when a plaintiff files a meritless claim against a nondiverse defendant, fraudulent misjoinder occurs when a plaintiff sues a diverse defendant in state court and joins unrelated claims involving a nondiverse plaintiff or defendant solely to defeat diversity jurisdiction.

While federal courts remain split on whether to curtail plaintiffs' fraudulent misjoinder tactics, defendants can maximize their chances at defeating remand by flagging any misjoined claims early in the litigation, optimizing motions practice, and even filing new removal papers if the case is remanded to state court.

The federal removal statute allows defendants to remove state cases to federal court based on complete diversity of citizenship. As the Second and Fifth Circuits have recognized, the statute exists to prevent gamesmanship by plaintiffs and to protect foreign defendants from local prejudices in state court.

To honor the statute's intent, some courts apply the fraudulent misjoinder doctrine to dismiss or sever and remand a plaintiff's misjoined claims that improperly destroy diversity. This doctrine originated in *Tapscott v. MS Dealer Service Corp.*, where the Eleventh Circuit affirmed an order directing the latter.

The Eleventh Circuit held that removal is proper where "the joinder of non-diverse parties is fraudulent," such as when there is no real connection amongst the primary claims to support joinder as required by Federal Rule of Civil Procedure 20.

Since *Tapscott*, other circuits have weighed in on this doctrine favorably. The Eighth Circuit upheld a denial of remand in *Graham v. Mentor Worldwide LLC* that was based on fraudulent misjoinder, finding the plaintiff's claims against the in-state defendant were unrelated.

Although the Eighth Circuit didn't expressly adopt the misjoinder doctrine, the court explained that what mattered was that the lower court dismissed the jurisdictional spoiler before judgment, and once there is complete diversity, "there is nothing to remand." The Tenth Circuit recognized that there could be "many good reasons to adopt" the fraudulent misjoinder doctrine but declined to do so in *Lafalier v. State Farm Fire & Cas. Co.,* saying it wouldn't make a difference under the unique facts of the case.

Multiple district courts in the Fourth Circuit have adopted the doctrine. The Fifth Circuit previously considered the doctrine favorably in *In re Benjamin Moore & Co.*, but regressed in 2021, asserting in *Williams v. Homeland Ins. Co. of New York*that the removal statute doesn't explicitly address fraudulent misjoinder and that procedural questions are "better resolved" in state court.

But the Fifth Circuit missed the mark. The removal statute explicitly permits removal unless a forum defendant is "properly joined and served," meaning, as courts have found, a plaintiff's misjoinder of unrelated claims is appropriate for consideration by the federal court.

Defendants exercising their removal rights should consider some specific strategies to combat fraudulent misjoinder.

Highlight any misjoinder in removal papers. Federal law only requires a removal notice contain "a short and plain statement of the grounds for removal." However, the notice is the first document seen by a judge, so defendants should detail how the misjoined claim against the nondiverse party lacks sufficient commonality to support litigating them in one action.

Defendants also should cite the cases cited above and emphasize that the removal statute serves to safeguard foreign defendants from plaintiffs' gamesmanship.

File an answer or dispositive motion concurrently in federal court. The defense shouldn't wait for the court to rule on a plaintiff's remand motion before aggressively litigating. Pursuant to Federal Rule of Civil Procedure 41, answering the complaint bars a plaintiff from voluntarily and unilaterally dismissing the federal action without court approval and simply refiling back in state court.

Moving to dismiss or to sever and remand plaintiff's misjoined claims affords another opportunity to educate the federal judge about the misjoinder at the start of the litigation.

Pursue a subsequent removal. A grant of remand doesn't foreclose a defendant's pathway to federal court forever. Federal law permits defendants to file new removal papers within a year after the state action commences, if subsequent pleadings or events reveal a different factual basis that supports removal.

For example, as found in *Vieira v. Mentor Worldwide,* if discovery reveals that a plaintiff's claim against a nondiverse party is meritless (in other words, fraudulently joined), subsequent removal on that basis would be proper. Defendants should remain cautious, however, because as the Seventh Circuitheld, multiple removals could "lead to sanctions, if nothing of significance changes between the first and second tries."

Where a plaintiff attempts to defeat removal through fraudulent means, strategic and persistent removal efforts can maximize defendants' chances of receiving the federal protections the removal statute is meant to provide.

This article does not necessarily reflect the opinion of Bloomberg Industry Group, Inc., the publisher of Bloomberg Law and Bloomberg Tax, or its owners.

Author Information

Varun K. Aery is a member of Hollingsworth's complex litigation, pharmaceutical and medical device, and products liability and toxic torts groups.
