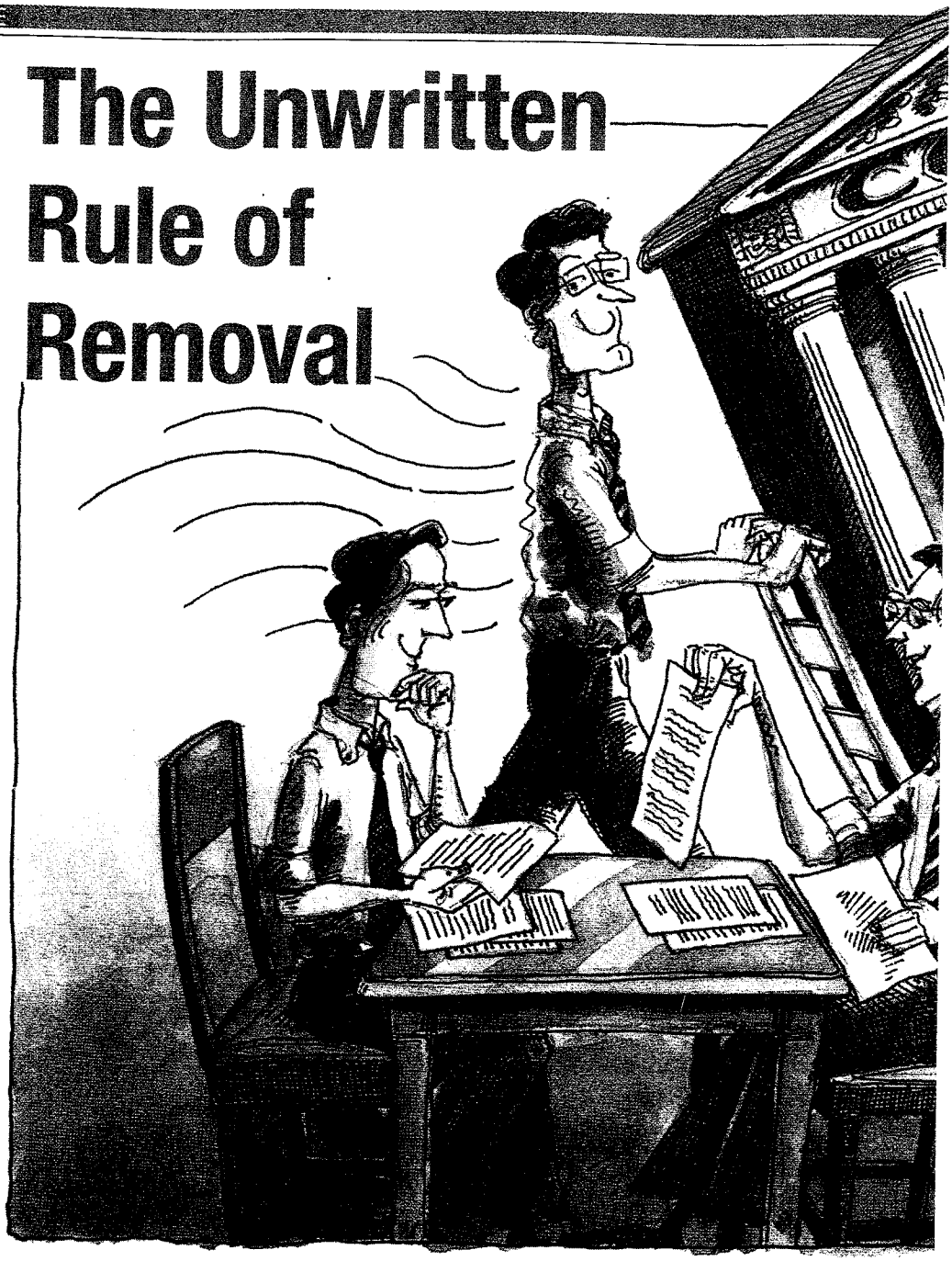
Voluntary vs. Involuntary

The Unwritten Rule of Removal



By Christopher P. Nease and Christy Martin Liddle

Unsettled aspects of rule make possible creative arguments to extend or revisit precedent.

While many attorneys believe that the prerequisites to remove a case are clearly set out in 28 U.S.C. §1441 *et seq.*, an important, but little known rule of removal is not contained anywhere in the United States Code. Fail-

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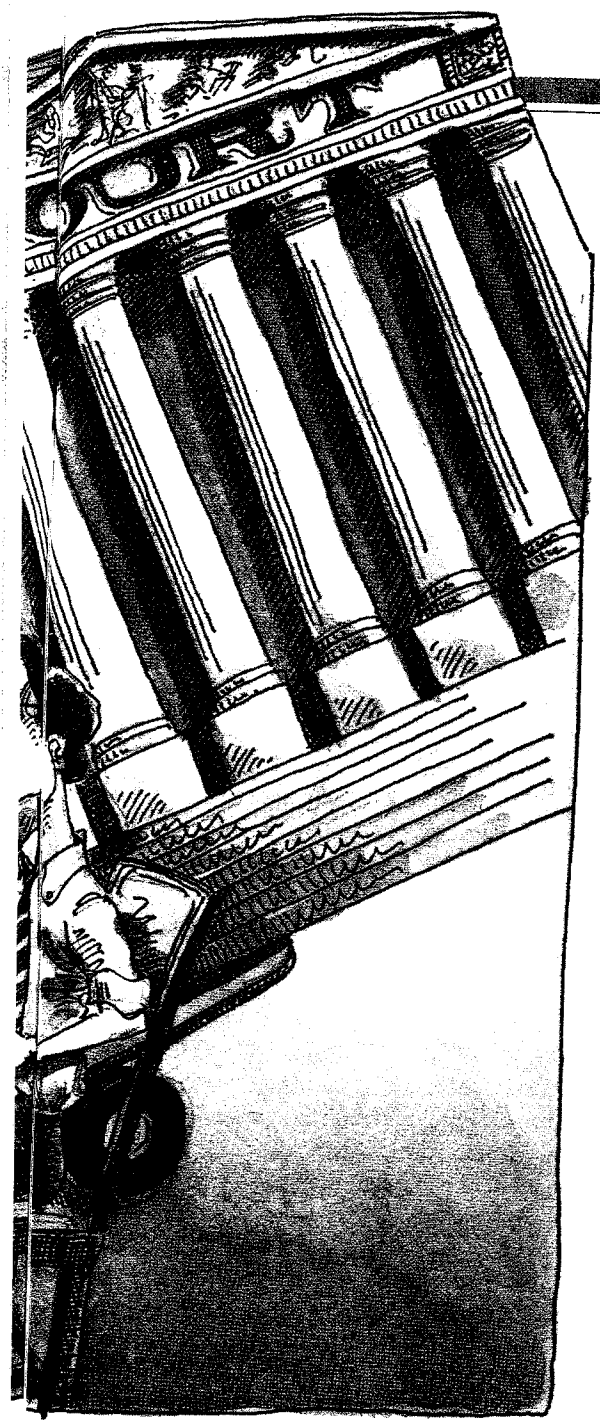

ure to know and understand the nuances of this unwritten rule of removal can cost a defendant the opportunity to remove a case that was not initially removable or lead to sanctions for improper removal. Because the parameters and application of this rule are constantly changing, it is critical for any defense attorney involved in the defense of national or international clients to know, understand, and use the unwritten rule of removal to his or her advantage.

The second paragraph of 28 U.S.C. §1446(b) discusses removal of cases that were not initially removable but later become removable. What is not written in the statute is that the case must become removable as a result of some voluntary act of the plaintiff. The United States Supreme Court established this "voluntary-involuntary rule" over a century ago. Although application of the rule is clear for merits-based dismissals of non-diverse parties, application of the rule is questionable in cases where the non-diverse party is no longer a party, but was not dismissed on the merits. This article examines the origins of the rule, the exceptions to the rule, and the aspects of the rule upon which the circuit courts disagree.

The Historical Origins of the Voluntary-Involuntary Rule

The United States Supreme Court created the voluntary-involuntary rule in the early 20th century, long before the Rules of Civil Procedure provided for removal of a case that was not initially removable but later became removable. In fact, at the time the Court developed the rule, no statutory provision dealt with removal after commencement of a suit.

The first time the Court indicated that a defendant could remove a case that was non-removable when commenced but subsequently became removable was in *Powers v. Chesapeake & O. Ry.*, 169 U.S. 92 (1898). However, the Court in *Powers* never once mentioned that removal depended on a voluntary act of the plaintiff. The Court merely stated that the case was properly removable after the plaintiff discontinued its action against the non-diverse parties. Despite the fact that the Court never uttered the words "voluntary" or "involuntary," *Powers* is considered to be the origin of the voluntary-involuntary rule.

Just two years later in *Whitcomb v. Smithson*, 175 U.S. 635 (1900), the Court firmly established the rule. The Court held that under *Powers*, a case is properly removable based on diversity jurisdiction only if it became diverse through a voluntary act of the plaintiff. Throughout the early 20th century, the Court issued several other opinions based on the voluntary-involuntary rule. Although the Supreme Court repeatedly adhered to the rule, it never explained the rationale behind the rule.

In 1949, the United States Code was amended to provide that a case not initially removable could be removed within 30 days of the existence of an order or other paper from which it can be ascertained that the case is properly removable. Notably missing from the statute was the requirement of a voluntary act by the plaintiff. Consequently, after the 1949 amendment to section 1446(b), there was some disagreement as to whether the rule survived. For nearly 20 years, the survival of the rule remained unresolved, until the United States Court of Appeals for the Fifth Circuit held in *Weems v. Louis Dreyfus Corp.*, 380 F.2d 545 (5th Cir. 1967), that the voluntary-involuntary rule did in fact survive the 1949 amendments. Every circuit court decision since has followed the Fifth Circuit and has held that the voluntary-involuntary rule is still viable.

Divergent Rationales for the Voluntary-Involuntary Rule

Perhaps the most important aspect of *Weems* was that the Fifth Circuit finally provided a rationale for the voluntary-involuntary rule. The court stated:

> Until 1949 no statutory provision dealt with the question of removal after commencement of a suit. The case law developed the rule, relatively simple to apply, 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 acting against the wish of the plaintiff, the case could not be removed. Although the rule has often been criticized for failing to explicate an underlying rationale, it nevertheless had merit in that it prevents removal of those cases in which the issue of the resident defendant's dismissal has not been finally determined in the state courts. This avoids the duplication and expense that would result if a resident defendant was dismissed on an appealable ground, the nonresident was permitted to remove, and the plaintiff then obtained a reversal of the dismissal in the state appellate courts. On the other hand, that danger does not arise where a plaintiff voluntarily drops a resident defendant since appeal then is not available, and the elimination of the resident defendant from the case is final.

Weems, 380 F.2d at 546.

This rationale is often called the finality/efficiency rationale, and it is the only rationale ever recognized by any court in the

Fifth Circuit. The United States Courts of Appeal for the Second and Fourth Circuits concur that the primary rationale behind the rule is judicial economy/finality. *See Higgins v. E.I. DuPont de Nemours & Co.*, 863 F.2d 1162 (4th Cir. 1988); *Quinn v. Aetna Life & Cas. Co.*, 616 F.2d 38 (2d Cir. 1980).

However, since *Weems* was decided a second rationale has emerged—the so-called comity/control rationale. The Ninth Circuit in *Self v. General Motors Corp.*, 588 F.2d 655 (9th Cir. 1978), was arguably the first court to identify this rationale for a covenant before trial not to execute judgment against the non-diverse defendant. *Id.* at 656. Based on the covenant, General Motors (GM) unsuccessfully attempted to remove the case on fraudulent joinder grounds. After trial proceeded to judgment against both defendants, GM filed a motion for new trial. GM again unsuccessfully attempted to remove, arguing that because the case proceeded to final judgment against the non-diverse defendant, that defendant had been eliminated from the case and the parties were diverse. The district court again remanded, reasoning that the state appellate process had to be exhausted before the non-diverse defendant's elimination from the case was truly final. The parties cross-appealed, and the California Supreme Court refused to hear the case. At that point, GM successfully removed the case to the district court for a new trial. The plaintiff appealed the trial court's order denying remand. *Id.*

The rationale each jurisdiction recognizes could make a tremendous difference in the removability of a case.

The Ninth Circuit held that the case was not properly removable, despite the fact that the trial court ruling was final. *Id.* at 660. The court rejected the finality/appealability rationale, arguing:

> It has been suggested that the rule promotes judicial efficiency by preventing removal of those cases in which the issue of the resident defendant's dismissal has not been finally determined in the state courts. If the finality of state court proceedings were the basis for the rule, it would seem that once the appellate process were ended in the state courts, removal would be possible. The Supreme Court, however, apparently does not rely on this basis as evidenced by *Lathrop, Shea & Co.*, where the voluntary-involuntary rule was invoked to prohibit removal even though the state appellate process was complete.

Id. at 659 (citations and quotations omitted). The court drew its primary rationale for the rule from one of the Supreme Court's early decisions, stating:

> [I]n the absence of a fraudulent purpose to defeat removal, the plaintiff may by the allegations of his complaint determine the statute with respect to removability of a case... when it is commenced, and that this power to determine the removability of his case continues with the plaintiff throughout the litigation...

Id.

With this statement, the control rationale emerged. Subsequent Ninth Circuit cases have applied the control rationale. *See, e.g., California v. Keating*, 986 F.2d 346 (9th Cir. 1993); *Gould v. Mut. Life Ins. Co. of NY*, 790 F.2d 769 (9th Cir. 1986). Additionally, the United States Court of Appeals for the Tenth Circuit seems to have followed the Ninth Circuit's approach and recognized the control rationale as the primary basis for applying the voluntary-involuntary rule. *DeBry v. Transamerica Corp.*, 601 F.2d 480 (10th Cir. 1979). The Seventh and Eleventh Circuits recognize both rationales as justification for the rule. *See, e.g., Poulos v. Naas Foods, Inc.*, 959 F.2d 69 (7th Cir. 1992); *Insinga v. LaBella*, 845 F.2d 249 (11th Cir. 1988).

Although determining the rationale for the rule may seem to be a purely academic exercise, the rationale each jurisdiction recognizes could make a tremendous difference in the removability of a case. Without question, the control rationale is much more plaintiff-friendly. No matter what the practical reality of the case is, the case will never be removed without a voluntary act of the plaintiff, due to the plaintiff's inherent right to choose his or her forum. Even if the jurisdiction recognizes both rationales, the control rationale will usually prevent a defendant from removing a case if the plaintiff has not voluntarily made the case diverse.

Defendants who are lucky enough to be in jurisdictions that follow the finality/appealability rationale have room to argue for exceptions to the voluntary-involuntary rule. If the appeals process has been exhausted or is highly unlikely to change the federal court's jurisdiction, a defendant could theoretically remove the case.

Exceptions to the Voluntary-Involuntary Rule

Courts generally agree that the voluntary-involuntary rule prevents removal of a case in which the non-diverse party exited the case through a motion to dismiss, motion for summary judgment or directed verdict that was not voluntary by the plaintiff. In fact, the Fifth Circuit called a dismissal on the merits "the classic situation where removal long has been denied for good reason." *Weems*, 380 F.2d at 548. However, courts diverge widely about application of the rule in situations that do not follow the classic pattern.

Fraudulent Joinder

Fraudulent joinder is a well established exception to the voluntary-involuntary rule. *Insinga*, 845 F.2d at 254. Consequently, a defendant can remove a case arguing that the non-diverse parties are fraudulently joined without pointing to any voluntary act of the plaintiff.

The interplay between fraudulent joinder and the voluntary-involuntary rule, however, has been the source of some disagreement. In *Poulos*, the Seventh Circuit held that despite the lack of a voluntary act, removal was proper after the state court granted summary judgment in favor of the non-diverse defendant. 959 F.2d at 74. The Seventh Circuit affirmed the district court's decision that the non-diverse defendant was fraudulently joined. *Id.* The Seventh Circuit emphasized that determining whether a party was fraudulently joined requires prediction of what the state court would do, but in cases where the state court has already dismissed or granted summary judgment for the non-diverse defendant, the court should determine whether there was any possibility that the judgment will be reversed on appeal. *Id.*

The Seventh Circuit's analysis of fraudulent joinder essentially merges the fraudulent joinder doctrine with the finality/appealability rationale of the voluntary-involuntary rule. In other words, fraudulent joinder is a question of a federal court's subject matter jurisdiction. However, where the state court has already removed the non-diverse party from the case, the fraudulent joinder determination is more about the procedural propriety of removal, just like the voluntary-involuntary rule. If the plaintiff has no possibility of prevailing against the non-diverse party on appeal, then not only is removal proper because that non-diverse defendant should be considered fraudulently joined, but also because the finality/appealability rationale is satisfied.

Even though there is logic to the Seventh Circuit's analysis, it is unusual when one considers the further application of the decision. The situation presented in *Poulos* should have been a classic application of the rule: the non-diverse defendant was granted judgment on the merits and therefore the voluntary-involuntary rule *should have* prevented removal. However, under the Seventh Circuit's reasoning, the removing party can point to the state court's summary judgment as proof that the non-diverse defendant was fraudulently joined. Taking this reasoning a step further, it would seem that the fraudulent joinder exception could theoretically swallow up the voluntary-involuntary rule. The Seventh Circuit insisted, however, that such is not the case, because where the state court has already come to judgment, the federal court is not bound by that state court decision. *Id.* at 73 n. 4. So theoretically, since the federal courts are not bound by the state court dismissal, a federal court could remand a fully diverse case based on the voluntary-involuntary rule, finding that the plaintiff had a reasonable possibility of recovery against a defendant who the state court has already determined the plaintiff cannot recover against.

The Seventh Circuit's *Poulos* opinion is also unusual because the Court noted that the diverse defendant should have realized that the non-diverse defendant was fraudulently joined within 30 days of the initial suit. Surprisingly, the court did not hold that the defendant waived the fraudulent joinder argument. Instead, the court held that Nass waived the 30-day limit by failing to raise it in the motion to remand. *Id.*

In *Wiacek v. Equitable Life Assur. So. of U.S.*, 795 F. Supp. 223, 225 (E.D. Mich. 1992), the court followed the same logic, expressing it in a slightly different way: "Although it is true that an involuntary dismissal in state court operates as an exception to a defendant's right to remove under §1446, fraudulent joinder of the involuntarily dis-

missed defendant negates the exception and permits removal." The court, relying on *Poulos*, observed:

> In essence, a successful fraudulent joinder claim functions as an exception to the exception; that is, if defendants can show that the [non-diverse defendant] was fraudulently joined, then removal is permitted under §1446, regardless of whether the dismissal was voluntary or involuntary. The fraudulent joinder 'exception to the exception' makes sense because, for purposes of establishing federal jurisdiction, a fraudulently joined defendant is *completely* disregarded.

Id. at 226. As in *Poulos*, the *Wiacek* court noted that the dismissal was unlikely to be reversed on appeal, thus finding removal was proper. *Id.* at 227.

Courts diverge widely about application of the rule in situations that do not follow the classic pattern.

The most recent decision on these facts, however, led to a different result. In *Knutson v. Allis-Chalmers Corp.*, 358 F. Supp. 2d 983, 987 (D. Nev. 2005), the diverse defendants removed after the state court granted summary judgment for a group of non-diverse defendants. The district court was in the "interesting position of being asked to determine whether the claims which were already dismissed by the state court were obviously not viable according to well-settled rules of state law." *Id.* at 994. Just as the court in *Poulos*, the district court did not feel bound to follow the state court's determination. *Id.* But unlike *Poulos*, the court found that the defendants waived the opportunity to assert a fraudulent joinder argument because the plaintiff's response to the non-diverse parties' motion for summary judgment did not allege any different facts from those alleged in the complaint. *Id.* at 997. Therefore, waiver should be recognized as a real possibility when attempting to make a *Poulos*-type fraudulent joinder argument.

The most extensive analysis of the interplay between fraudulent joinder and the voluntary-involuntary rule was presented in *Katz v. Costa Armatory, S.P.A.*, 718 F. Supp. 1508 (S.D. Fla. 1989). There, the state court granted the non-diverse defendant's motion for summary judgment on the basis that the non-diverse party could not be held liable under federal maritime law. *Id.* at 1509. In arguing against remand, the defendant mentioned that the voluntary-involuntary rule did not require remand because the non-diverse defendant was fraudulently joined. *Id.* In reconsidering the defendant's argument, the court expressed concern with previous approaches to both fraudulent joinder and the voluntary-involuntary rule. *Id.* at 1514. On the one hand, the court was concerned that if federal courts limited the fraudulent joinder analysis to the initial complaint, the result would be frustration of federal jurisdiction even though the case against the non-diverse party was essentially a sham. *Id.* On the other hand, the court was concerned that the fraudulent joinder exception could "eviscerate" the voluntary-involuntary rule:

> Every time a state court issues summary judgment in favor of a non-diverse defendant, the plaintiff in fact can never prove the cause of action against that defendant. Accordingly, in an action with only one remaining diverse defendant, that defendant could automatically remove the action. This conclusion necessarily renders the voluntary-involuntary distinction meaningless, for an involuntary dismissal via a state court summary judgment makes the case as removable as when the plaintiff voluntarily dismisses the nondiverse defendant.

Id. at 1513–14. The court then fashioned its own two-part analysis to balance these competing interests. *Id.* at 1515. First, a district court should review the complaint under the same standard as a Rule 12(b)(6) motion to determine whether the complaint states a cause of action. *Id.* If the state court granted or denied a motion to dismiss under the same standard, the federal court should defer to the state court's determination of its own law. *Id.* If the complaint could or did survive a 12(b)(6) motion to dismiss, the district court should determine whether under Federal Rule of Civil Procedure 11 the claims against the non-diverse defendant are not frivolous. *Id.* The court explained that this prong is essentially a determination of whether the plaintiff "should have" voluntarily dismissed the action against the non-diverse defendant. *Id.* at 1515–16. While the court's approach is somewhat interesting in how it attempts to strike a balance between a plaintiff's right to be the master of his or her own complaint, and a defendant's right to be in federal court, it has gained little support from other courts.

Although fraudulent joinder is a "well established" exception to the voluntary-involuntary rule, the interplay between the two is far from well established. *Poulos* is the only circuit court opinion that addresses the interplay between the two. *Poulos* and the cases interpreting it seem to indicate that a defendant can remove based on fraudulent joinder after a state court dismisses the non-diverse party, but the potential for waiver of a fraudulent joinder argument is considerable.

Dismissals Based upon Jurisdictional Grounds

One of the seminal Supreme Court cases on the voluntary-involuntary rule emphasized the distinction between rulings on the merits from other rulings:

> This was a ruling on the merits, and was not a ruling on the question of jurisdiction. It was adverse to plaintiff, and without his assent, and the trial court rightly held that it did not operate to make the cause then removable and thereby to enable the other defendants to prevent plaintiff from taking a verdict against them.

Whitcomb, 175 U.S. at 638.

In *Insinga*, the United States Court of Appeals for the Eleventh Circuit seized on this language and became the only circuit to refuse to apply the voluntary-involuntary rule in a situation where the non-diverse party was dismissed on sovereign immunity grounds. *Insinga*, 845 F.2d 249. In *Insinga*, a man masquerading as a doctor admitted the plaintiff's decedent to a Florida hospital. *Id.* at 250. After the decedent's death, the plaintiff sued the "doctor," the Florida Board of Medical Examiners, the Florida Department of Professional Regulation, and Humana, the company that ran the hospital. The "doctor" was extradited to Canada and was never served with the com-

plaint. The other defendants moved for summary judgment. The plaintiff voluntarily dismissed the Florida Department of Professional Regulation, and the court granted summary judgment to the Florida Board of Medical Examiners on that entity's sovereign immunity. The court denied Humana's motion for summary judgment, leaving it the only defendant left in the case. *Id.*

Humana successfully removed the case to federal court. Ultimately, the district court *sua sponte* directed a verdict in favor of Humana. *Id.* In considering the propriety of Humana's removal, the Eleventh Circuit held that the case was properly removed based upon *Whitcomb*, stating:

> While the [Supreme] Court did not state what the result would have been had the dismissal been premised on jurisdictional grounds, the obvious implication is that, had the state court dismissal been based on a finding of lack of jurisdiction over the resident defendant, the voluntary-involuntary rule would not have come into play.
>
> In this case, the state court's dismissal of the Board was based on sovereign immunity. Under Florida law, sovereign immunity is a defense that relates solely to the jurisdiction of the court, not the merits of the case. Under these circumstances, we hold that the voluntary-involuntary rule does not apply and that the case was properly removed to the federal district court.

Id. at 254 (citations and quotations omitted). The Eleventh Circuit reasoned that being dismissed on jurisdictional grounds rather than on the merits is analogous to fraudulent joinder:

> For all intents and purposes, a trial court's finding that it lacks jurisdiction over a resident defendant is akin to a finding of fraudulent joinder of that defendant in that it involves a determination by the court that the resident defendant was never properly before the courts, rather than a determination that the court had jurisdiction of that defendant but that the case against him, although not frivolous, was not meritorious.

Id.

No other circuit court has joined the Eleventh Circuit in its analysis. Furthermore, district courts outside the Eleventh Circuit heavily criticize this opinion because it is contrary to the finality/appealability rationale. *See, e.g., Gandy v. Crompton*, 55 F. Supp. 2d 593 (S.D. Miss. 1999); *Arthur v. E.I. du Pont*, 798 F. Supp. 367, 368 n.2 (S.D. W.Va. 1992); *Greco v. Beccia*, 2001 WL 121887 at *4–5 (M.D. Pa. 1991). In other words, a dismissal based on jurisdictional grounds could still be appealed and reversed, potentially depriving the federal court of jurisdiction. However, the *Insinga* approach—distinguishing merits-based dismissals from procedural dismissals—has received some support from the Fifth Circuit and some of the District Courts in that circuit. *See Phillips v. Unijax, Inc.*, 625 F.2d 54 (5th Cir. 1980); *Johnson v. Snapper*, 825 F. Supp. 127 (E.D. Tex. 1993); *Guangini v. Prudential Securities*, 872 F. Supp. 361 (W.D. Tex. 1994); *Caldwell v. Alpha*, 806 F. Supp. 623 (S.D. Miss. 1992).

Severance of the Non-Diverse Parties

Recently, the Fifth Circuit became the first circuit court to hold that the voluntary-involuntary rule does not prevent removal where the non-diverse party is severed in state court. *See Crockett v. R.J. Reynolds Tobacco Co.*, 436 F.3d 529 (5th Cir. 2006). In *Crockett*, the plaintiffs' decedent died of lung cancer. *Crockett*, 436 F.3d at 530–31. Plaintiffs brought suit in state court against several diverse tobacco companies (the "tobacco defendants") alleging product liability claims, as well as against the decedent's non-diverse treating physician and medical group (the "medical defendants") for medical malpractice. The tobacco defendants initially attempted to remove, arguing that the medical malpractice defendants were fraudulently joined because the plaintiffs' claims were barred by the statute of limitations. The United States District Court for the Southern District of Texas rejected this argument, finding that the possibility of recovery against the medical malpractice defendants was enough to defeat fraudulent joinder, and remanded the case. *Id.*

Back in state court, the tobacco defendants moved to sever the products liability case from the medical malpractice case. *Id.* The state court, finding "the medical negligence and malpractice claim and the burden of proof to sustain [that] claim is totally different [from] the burden of proof... necessary to secure judgment for product liability," severed the medical malpractice claims. *Id.* at 533. Minutes after the state court issued its severance order, the tobacco defendants again removed, arguing that the case was completely diverse. *Id.* at 531. The plaintiffs moved to remand, arguing that the voluntary/involuntary rule prevented removal. The district court denied plaintiffs' motion to remand, granted the defendants' motion for judgment on the pleadings, and plaintiffs appealed. *Id.*

In considering the plaintiffs' appeal, the Fifth Circuit initially recognized that fraudulent joinder is a well established exception to the voluntary-involuntary rule. *Id.* at 532. The court then noted that "[a] party, however, can be improperly joined without being fraudulently joined." *Id.* at 533. The court explained that if the requirements of Fed. R. Civ. P. 20(a) are not met, then joinder is improper even if the classic test for fraudulent joinder is not met. The court then held that, to the extent that the state court severance was tantamount to a finding of improper joinder under Rule 20(a), the Fifth Circuit agreed with the finding. The court then held the district court properly denied remand. *Id.*

The court reasoned that permitting removal when a case becomes diverse upon the severance of improperly joined parties serves the same policy goals of the fraudulent joinder exception to the voluntary-involuntary rule: "to prevent plaintiffs from blocking removal by joining non-diverse and/or in-state defendants who should not be parties." The court thus concluded that "removal on the basis of an unappealed severance, by a state court, of claims against improperly joined defendants is not subject to the voluntary-involuntary rule." *Id.*

In the brief time since *Crockett* was issued, the district courts in the Fifth Circuit have applied and extended *Crockett* to other circumstances. *Farmer v. St. Paul Fire & Marine Ins. Co.*, 2006 WL 1134238 (N.D. Miss. April 24, 2006); *Schwartz v. Chubb & Sons, Inc.*, 2006 WL 980673 (E.D. La. April 11, 2006). For example, in *Zea v. Avis Rent A Car System, Inc.*, 435 F. Supp. 2d 603, 607 (S.D. Tex. May 18, 2006), the court denied the plaintiffs' motion to remand, relying heavily on *Crockett*. *Zea* involved numer-

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ous parties, interpleaders and third-party claims. *Id.* at 604. The third-party defendants filed a motion to realign parties, which the state court granted over the third-party plaintiffs' objection. *Id.* at 604–05. The motion to realign parties made the case diverse, and the defendants removed. *Id.* The court, recognizing tension between *Weems* and *Crockett*, relied heavily on *Crockett*. *Id.* at 607. The court found that *Weems* did not require remand because in *Weems*, the order that made the case diverse was a decision on the merits, while in *Zea*, like *Crockett*, the decision was simply based upon the alignment of the parties. *Id.* The court's decision thus extended *Crockett*'s holding to other situations where the order that made the case removable was not based upon the merits.

Crockett has also been extended to allow the federal district court to sever and remand claims against improperly joined, non-diverse parties. *See Hardin v. Guidant Corp.*, No. G-05-430, slip op. (S.D. Tex. Feb. 1, 2006, Kent, J.). In *Hardin*, the plaintiffs sued a medical device manufacturer and the non-diverse physician who implanted the device. The defendant removed, arguing the physician was fraudulently joined. Plaintiff filed a motion to remand. However, before the judge remanded, the defendants filed a motion to sever and remand the claims against the non-diverse physician, relying upon *Crockett*. Following the rationale used in *Crockett*, the judge severed and remanded the claims against the non-diverse physician and retained the newly diverse claims against the manufacturer. *Id.*

Unfortunately, the success of this strategy is not universal. *See Shannon v. Mejias*, No. 06-1191-MLB slip op. at 10–11 (D. Kan. Nov. 11, 2006, Belot, J.). Under similar facts, Judge Belot of the District of Kansas remanded, holding that he lacked jurisdiction to decide any matters in the case, including severance. Judge Belot also found that the defendants lacked an objectively reasonable basis for removal, and assessed costs and attorneys' fees. *Id.* at 12.

Outside the Fifth Circuit, no other courts have applied *Crockett*. However, the success of this procedure may again depend on the rationale the jurisdiction recognizes for the voluntary rule. Because the severance of claims is unlikely to make finality/efficiency an issue, jurisdictions that recognize this principle would probably be more inclined to recognize severance as an exception to the voluntary-involuntary rule. However, this procedure could still be successful in jurisdictions that recognize the control rationale, because the improper joinder exception is analogous to fraudulent joinder, which is recognized as an exception to the voluntary-involuntary rule by every jurisdiction.

No matter what rationale the jurisdiction recognizes, however, litigants can only take advantage of this argument if the claims were truly severed into separate suits (*i.e.*, with separate case numbers and separate judgments) rather than merely separated for trial purposes. For example, just a few months ago, in *Vogel v. Merck & Co. Inc.*, 476 F. Supp. 2d 996 (S.D. Ill. 2007), the Southern District of Illinois remanded a case, in part because it was unclear whether the state court ordered a true severance of the claims against the nondiverse parties. Therefore, defendants should be very clear with the state court that they are seeking a true severance.

Conclusion

While the voluntary-involuntary rule will almost certainly preclude removal when a non-diverse party obtains a dismissal or summary judgment, the rule may not preclude removal in many situations. Defendants should not feel bound by the rule as settled law. Many aspects of the rule are not remotely settled. Case law regarding the rule is so divergent among jurisdictions; the possibility for creative argument to extend or revisit precedent is virtually boundless. Furthermore, the Supreme Court has not issued a decision regarding any aspect of voluntary-involuntary rule in nearly 90 years. Most recently, the Court denied certiorari for *Crockett*. If the Court were to hear a case regarding any aspect of the voluntary-involuntary rule, defendants could face a completely different set of possibilities. FD