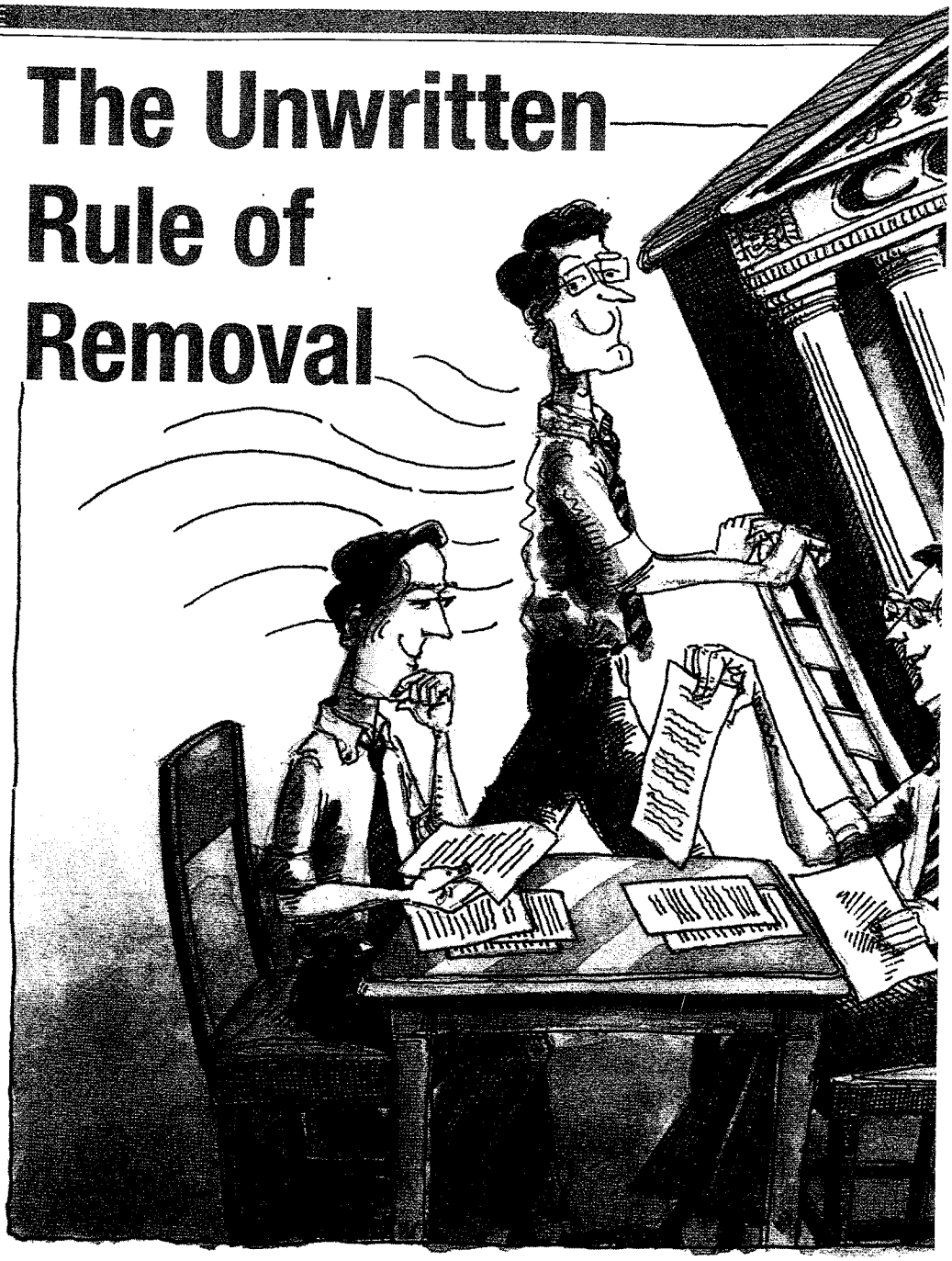
Voluntary vs. Involuntary

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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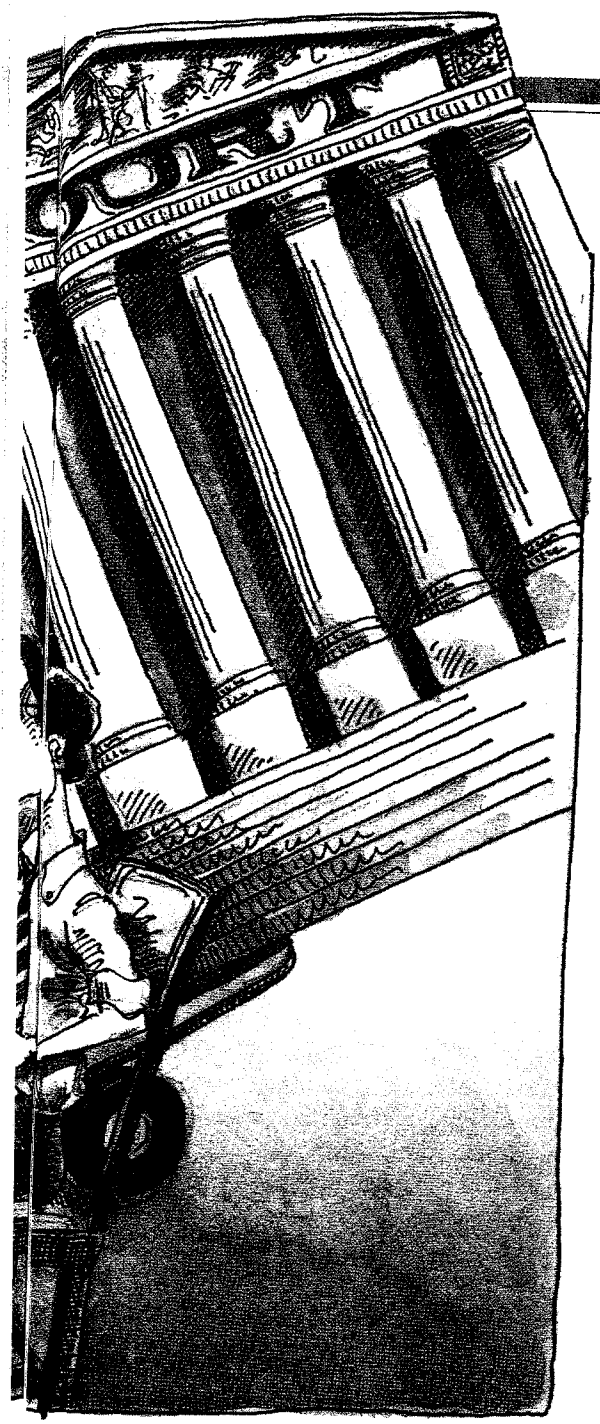

ure to know and understand the nuances of this unwritten rule of removal can cost a defendant the opportunity to remove a case that was not initially removable or lead to sanctions for improper removal. Because the parameters and application of this rule are constantly changing, it is critical for any 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.*