Litigation

The Fraudulent Joinder Prevention Act of 2016: A New Standard and a New Rationale for an Old Doctrine

By Arthur D. Hellman

Note from the Editor:

This article discusses the doctrine of fraudulent joinder and an ongoing attempt to codify it at the federal level in the Fraudulent Joinder Prevention Act of 2016, which recently passed the House.

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• H.R. Rep. No. 114-422 (House Report on H.R. 3624), *available at* https://www.gpo.gov/fdsys/pkg/CRPT-114hrpt422/pdf/CRPT-114hrpt422.pdf (Dissenting Views at page 18).

• Prepared Statement of Lonny Hoffman, *Hearing on H.R. 3624, the Fraudulent Joinder Prevention Act of 2015: Hearing Before the Subcomm. on the Constitution and Civil Justice of the House Comm. on the Judiciary*, 114th Cong. (Sept. 29, 2015), *available at* https://judiciary.house.gov/wp-content/uploads/2016/02/Hoffman-09292015.pdf.

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It is not often that members of the United States House of Representatives engage in passionate debate over a doctrine of federal-court jurisdiction, but that is what happened on February 25, 2016. The House was considering H.R. 3624, the "Fraudulent Joinder Prevention Act of 2016" (FJPA). The purpose of the bill, as its sponsor explained, was to establish "a uniform standard for determining whether a [local] defendant has been fraudulently joined to a lawsuit, in order to defeat federal diversity jurisdiction."[1] Supporters argued that the legislation would "reduce litigation abuse and forum shopping and … protect innocent parties from costly, extended, and unnecessary litigation."[2] Opponents countered that the measure would "drain judicial resources" and "delay justice for plaintiffs seeking to hold corporations accountable for harming consumers or injuring workers."[3] After an hour of debate, the House passed the bill by a vote of 229 to 189.

The vote on the House floor came less than five months after H.R. 3624 was introduced. Few bills in Congress move that far that fast. But speedy passage through the House is not the only noteworthy aspect of the FJPA. When Congress codifies a judge-made doctrine, the legislation generally moves the law in one direction or another. The FJPA is no exception; it seeks to establish "a somewhat more robust version of the fraudulent joinder doctrine" than the one generally applied by the courts today.[4] But that is not all. The proponents of the FJPA have taken a substantial step toward reconceptualizing fraudulent joinder: they rely in large part on a rationale that cannot be found in the court decisions announcing and applying the doctrine. This new rationale focuses, not on the interest of the *out-of-state* defendant in securing a neutral federal forum for litigation, but on the interest of *in-state* parties in avoiding litigation altogether when frivolous or insubstantial claims are asserted against them by a plaintiff as a stratagem for keeping the case in state court.[5]

H.R. 3624, supported by this enlarged policy perspective, now awaits action by the Senate. Should the Senate act favorably on the bill? The answer to that question depends on whom you ask. Supporters argue that the bill corrects an imbalance in current doctrine that allows plaintiffs to game the system, defeat the legitimate removal rights of out-of-state defendants, and drag local

1 Markup of H.R. 3624 at 51 (Feb. 3, 2016) (unofficial transcript), http://judiciary.house.gov/_cache/files/e4fc993b-e006-40a6-a5dd-9d2864c334b9/02.03.16-markup-transcript.pdf [hereinafter Markup Transcript] (remarks of Rep. Buck).

2 162 Cong. Rec. H908 (daily ed. Feb. 25, 2016) (remarks of Rep. Goodlatte).

3 *Id.* at H910 (remarks of Rep. Nadler).

4 H.R. Rep. No. 114-422 at 5 [hereinafter House Report].

5 In this article, I will use the terms "in-state," "resident," and "local" interchangeably when referring to defendants who reside in the state where the suit was filed. That is what the courts do also, even when plaintiffs invoke a rule that limits joinder of defendants based on their shared citizenship with the plaintiff. *See infra* note 71.

individuals or small businesses into lawsuits notwithstanding their "tangential or peripheral role"[6] in the controversy. Opponents insist that the bill is "a solution in search of a problem,"[7] that it seeks "to tilt the civil justice playing field in favor of corporate defendants,"[8] and that it will "create problems by upending longstanding rules and potentially wreak havoc on the Federal courts."[9]

This article provides an initial look at the FJPA. Part I sketches the background. Part II traces the evolution of the bill, and Part III describes its provisions. Parts IV through VI discuss the principal points of contention between the bill's supporters and its opponents. The article concludes by suggesting that the debate over the FJPA reflects a deeper disagreement over the role of removal based on diversity of citizenship in the American legal system.

I. Background: Diversity Jurisdiction and Fraudulent Joinder

The doctrine of fraudulent joinder emerged from the intersection of jurisdictional rules and litigation strategy. The jurisdictional rules are those governing removal based on diversity of citizenship. The strategy is most commonly seen today in products liability suits and other personal injury or wrongful death cases.

Diversity of citizenship jurisdiction was included in the Constitution "in order to prevent apprehended discrimination in state courts against those not citizens of the State."[10] Starting with the Judiciary Act of 1789, Congress has implemented that grant through statutory authorization. In particular, from the beginning of the nation's history, an out-of-state defendant sued in state court by a citizen of the forum state has had the right to remove the case to federal court, provided that the case satisfies an amount-in-controversy requirement.[11]

Three sections of the Judicial Code—Title 28 of the U.S. Code—and a two-centuries-old precedent provide the current framework for removal based on diversity of citizenship. Section 1441(a) allows removal of "any civil action brought in a State court of which the district courts . . . have original jurisdiction." Section 1332(a) confers original jurisdiction over suits between "citizens of different states" when the amount in controversy exceeds $75,000. But jurisdiction under § 1332(a) is governed by the rule of "complete diversity." Under that rule, which traces back to Chief Justice John Marshall's 1806 decision in *Strawbridge v. Curtiss*,[12] a suit is "between . . . citizens of different states," and thus within federal jurisdiction under § 1332(a), only when no plaintiff is a citizen of the same state as *any* defendant. Finally, superimposed on the requirements for diversity jurisdiction generally is a separate statutory provision applicable only to removal. This provision is referred to as the "forum defendant rule." It is codified in § 1441(b)(2), and it prohibits removal based solely on § 1332(a) "if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought."

Today, removal is a major battleground in civil litigation. The reason is that across the spectrum of civil suits, plaintiffs often prefer to litigate in state court; defendants typically prefer federal court.[13] The complete-diversity requirement and the forum defendant rule create numerous opportunities for plaintiffs to secure their preferred forum. For example, in an insurance dispute, the in-state policyholder sues the out-of-state insurance company that issued the policy, and joins the local agent or claims adjuster as a co-defendant. In a products liability action, the plaintiff sues the out-of-state pharmaceutical manufacturer and also the local doctor who prescribed the drug or the local pharmacist who filled the prescription.

Ordinarily, the joinder of a co-citizen of the plaintiff as defendant would destroy complete diversity and prevent removal. If the out-of-state defendant removes nevertheless, the federal court would be required to grant the plaintiff's motion to remand the case back to the state court. But in the first part of the 20th century, the Supreme Court recognized that plaintiffs might abuse the complete-diversity requirement in order to defeat out-of-state defendants' right to removal. To limit that abuse, the Court developed the doctrine of fraudulent joinder.[14] Under that doctrine, federal courts can disregard the citizenship of non-diverse defendants—and decline to remand cases against diverse defendants to state court—when those defendants have been "fraudulently" joined.

As many courts and commentators have noted, "fraudulent" is a term of art; the plaintiff's motives are irrelevant. But determining what *does* make joinder fraudulent can often be difficult. The Supreme Court has not addressed the issue in many decades, and lower courts have diverged both in their articulation of the governing law and in setting forth procedures for making the determination.

One feature, however, is common to all circuits' law: the standard for identifying fraudulent joinder is very demanding. Typically, courts take the position that joinder is not fraudulent unless the plaintiff has "no possibility" of imposing liability on the in-state defendant.[15] Some courts go so far as to say that the

6 House Report, *supra* note 4, at 3.

7 *Id.* at 19 (Dissenting Views).

8 *Id.* at 18.

9 *Id.* at 22–23.

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

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

12 7 U.S. (3 Cranch) 267 (1806).

13 *See* Arthur D. Hellman, *Another Voice for the Dialogue: Federal Courts as a Litigation Course*, 53 St. Louis U. L.J. 761, 765–68 (2009); *see also* Barlow v. Colgate Palmolive Co., 772 F.3d 1001, 1015–16 (4th Cir. 2014) (en banc) (Davis, J., dissenting) (citing differences in discovery practice, availability of summary judgment, and jury pool composition as reasons for the preferences).

14 *See* Wecker v. National Enameling & Stamping Co., 204 U.S. 176, 186 (1907) (because "the real purpose in joining [the resident defendant] was to prevent the exercise of the right of removal by the nonresident defendant," the lower court was correct in refusing to remand the case).

15 Stillwell v. Allstate Ins. Co., 663 F.3d 1329, 1332 (11th Cir. 2011).

removing party "must prove that there is *absolutely* no possibility that the plaintiff will be able to establish a cause of action against the in-state defendant in state court."[16] In the Fourth Circuit, remand is required if the court finds even a "glimmer of hope" for the plaintiff's claims.[17]

It is true that some decisions use language that appears to embody a less demanding standard—for example, asking whether there is a "reasonable basis" for the claim. But often those same opinions will also contain language that closely resembles the "no possibility" test.[18]

Plaintiffs and defendants alike recognize the importance of the doctrine to litigation strategy. A plaintiff-oriented practice guide explains: "Myriad attempts have been made by creative counsel to state a tenable claim against non-diverse defendants in order to defeat diversity jurisdiction without running afoul of the fraudulent joinder rule. As would be expected, some have been successful and some not."[19] A defense-oriented guide warns:

> [Fighting] fraudulent joinder requires reasonable preparation and, as a consequence, can substantially raise litigation costs. [The efforts] will probably fail under the "no possibility" standard. Apparently erroneous decisions by the district court, moreover, are final because remand orders are generally not reviewable by appeal or writ of mandamus. Even worse, there is a possibility that the corporate client will have to pay opposing counsel's attorneys' fees under 28 U.S.C. § 1447(c) in the event that the district court determines that the removal was improvident.[20]

This quotation calls attention to another important element of removal practice: if the district court erroneously remands a case on the ground that the plaintiff's claim against the co-citizen has *some* chance of success, the error cannot be corrected by the court of appeals because 28 U.S.C. § 1447(d) prohibits review of remand orders.[21] To make matters worse (from the perspective of the removing defendant), many district judges follow a mantra to the effect that there is a "presumption against removal jurisdiction" and "any doubt about the right of removal requires resolution in favor of remand."[22]

Against this background, Congressman Ken Buck (R. Colo.) introduced H.R. 3624, the Fraudulent Joinder Prevention Act of 2015.

II. Evolution of the Bill

In its original form, the FJPA addressed the problem of fraudulent joinder by adding two sentences to § 1447(c) of the Judicial Code. The first sentence specified the kinds of materials that may be presented by the parties in a motion for remand and "any opposition thereto." The second sentence delineated two criteria for denying a motion to remand. Attention focused on the first criterion: "the complaint does not state *a plausible claim for relief* against a nondiverse defendant under applicable state law."

The Subcommittee on the Constitution and Civil Justice of the House Judiciary Committee held a hearing on the bill on September 29, 2015, the day after the bill was introduced.[23] Three witnesses testified.[24] Strong support for the legislation came from Elizabeth Milito, representing the National Federation of Independent Business, and Cary Silverman, speaking on behalf of the U.S. Chamber of Commerce Institute for Legal Reform. Professor Lonny Hoffman of the University of Houston Law Center spoke against the bill. I submitted a statement that supported the general thrust of the bill, but expressed several concerns about the bill's drafting and suggested a number of technical changes.

It was at this hearing that the new focus on the interest of the potential in-state defendant first emerged. The idea was stated briefly at the very end of the opening statement of Rep. Trent Franks (R. Ariz.), the chairman of the subcommittee, but it emerged full-blown only when the chairman of the full Committee, Rep. Bob Goodlatte (R. Va.), made his opening statement. The FJPA, Rep. Goodlatte said, will "help address a litigation abuse that regularly drags small businesses into court to answer for claims to which they have no real connection."[25] The remainder of his statement enlarged on that point. The first witness, Elizabeth Milito, elaborated further; she emphasized the "substantial financial costs" and the "heavy emotional toll" experienced by small business owners who find themselves being used as "diversity-destroying pawn[s]."[26]

16 Sanchez v. Lane Bryant, Inc., 2015 WL 4943579 at *2 (C.D. Cal. Aug. 17, 2015) (internal quotations omitted) (emphasis added); *see also, e.g.*, National Pump & Compressor, Ltd. v. Nichols, 2013 WL 1501861 at *6 (E.D. Tex. Apr. 10, 2013); Loid v. Computer Sciences Corp., 2013 WL 808696 at *2 (E.D. Wash. Mar. 5, 2013).

17 Hartley v. CSX Transp., Inc., 187 F.3d 422, 426 (4th Cir. 1999).

18 For example, in the leading case of *Filla v. Norfolk Southern Ry. Co.*, 336 F.3d 806 (8th Cir. 2003), the opinion says at one point that to determine whether joinder is fraudulent, "the court must simply determine whether there is a *reasonable basis* for predicting that the state's law might impose liability against the defendant." *Id.* at 811 (emphasis added). That sounds at least somewhat less demanding than a "no possibility" test. But the opinion also says that joinder is *not* fraudulent "if the state law *might* impose liability on the resident defendant under the facts alleged." *Id.* at 810 (emphasis in original). That is very close to a "no possibility" test.

19 David S. Casey, Jr. & Jeremy Robinson, Litigating Tort Cases § 7.7 (updated Aug. 2014).

20 Jay S. Blumenkopf et al., *Fighting Fraudulent Joinder: Proving the Impossible and Preserving Your Corporate Client's Right to a Federal Forum*, 24 Am. J. Trial Advoc. 297, 310 (2000).

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

22 *See, e.g.*, Dulcich Inc. v. Mayer Brown LLP, 954 F. Supp. 2d 1129, 1135-36 (D. Or. 2013); *see generally* Scott R. Haiber, *Removing the Bias Against Removal*, 53 Cath. U. L. Rev. 609 (2004); Aaron-Andrew P. Bruhl, *Jurisdictional Canons*, 70 Vand. L Rev. ___ (forthcoming 2016).

23 *H.R. 3624, the Fraudulent Joinder Prevention Act of 2015: Hearing Before the Subcomm. on the Constitution and Civil Justice of the House Comm. on the Judiciary*, 114th Cong. (2015), *available at* http://judiciary.house.gov/_cache/files/46c87093-52db-4b6e-a9b3-9b2b67e6611f/114-44-96273.pdf [hereinafter *House Hearing*].

24 The text of the bill was made available to the witnesses as they prepared their statements.

25 *House Hearing*, *supra* note 23, at 7 (statement of Rep. Goodlatte).

26 *Id.* at 14 (statement of Elizabeth Milito).

On February 1, 2016, an Amendment in the Nature of a Substitute (Substitute) was posted on the Judiciary Committee website. The Substitute largely retained the substance of the bill as introduced, but the structure was different, and several new provisions had been added. Two days later, at a markup session, the Committee voted to approve the Substitute and to report the bill as amended. The vote was 13-10, with Republicans voting "Yea" and Democrats voting "Nay." The Committee issued its Report on February 16, 2016. The Report included "Dissenting Views" signed by 12 Democratic members of the Committee. One week later, the House Rules Committee met and approved a structured rule for consideration of H.R. 3624 on the House floor. Two amendments were allowed, one a technical Manager's Amendment and one a hostile Democratic amendment.

The bill was considered on the House floor on February 25, 2016. The chairman of the House Judiciary Committee and Rep. Buck spoke in support of the legislation. Democratic members of the Committee spoke against it, generally reprising the arguments in the Dissenting Views in the Committee Report. The Manager's Amendment was agreed to on a voice vote; the Democratic amendment was rejected. The bill as amended was then approved; as already noted, the vote was 229 to 189. Ten Republicans joined all participating Democrats in voting against it.

III. Codifying Fraudulent Joinder: The Content of the Act

The FJPA as approved by the House deals with the problem of fraudulent joinder by adding a new subsection (f) to 28 U.S.C. § 1447, the section of the Judicial Code that deals with procedure after removal. The new subsection has four paragraphs. Paragraph (1) defines the class of cases to which the bill applies. Paragraph (2) specifies four situations in which courts should find joinder to be fraudulent. The remaining paragraphs deal with procedure.[27]

A. Defining the Class of Cases to Which the Bill Applies

Paragraph (1) specifies the three criteria that, in combination, define the class of cases in which courts would apply the standard set forth in paragraph (2) for determining whether joinder is fraudulent. These criteria relate to the basis for original jurisdiction, the ground of the motion to remand, and the ground for opposing the motion. Essentially, they limit application of the new subsection to cases in which removal is based on § 1332(a) and the issue is fraudulent joinder.

One provision of paragraph (1) proved to be surprisingly controversial. The bill as introduced addressed fraudulent joinder only in the context of the complete-diversity rule. But, as already noted, fraudulent joinder is also used to exploit the forum defendant rule of 28 U.S.C. § 1441(b)(2). And the doctrine has generally been applied in the same way.[28] The Substitute therefore added language bringing both kinds of remand motions within the ambit of the Act.

When the Committee Report appeared, the Dissenting Views asserted that the bill "effectively repeals" the forum defendant rule.[29] It is hard to understand the thinking behind this accusation. The forum defendant rule remains as it was. The court may disregard the in-state defendant if, and only if, that defendant has been fraudulently joined as defined in paragraph (2) of the new provision.

B. Defining Fraudulent Joinder

Paragraph (2) sets forth four criteria that define fraudulent joinder. To a large extent, these four prongs codify current law. There is one major exception: prong (B) adopts a uniform "plausibility" standard in place of tests like "no possibility." Paragraph (2) also makes clear that affirmative defenses can be considered as a basis for finding fraudulent joinder, and it abrogates the "common defense" doctrine recognized by some courts.

1. Actual fraud and lack of "good faith intention"

Two of the four prongs—(A) and (D)—do little more than codify seldom-invoked aspects of existing law. Under prong (A), joinder is fraudulent if "there is actual fraud in the pleading of jurisdictional facts." This language is taken verbatim from the Fifth Circuit's landmark en banc decision in *Smallwood v. Illinois Central R.R. Co*.[30] Many cases repeat the language, but very few actually consider this basis for finding fraudulent joinder. The House Report cites one of the few, a 2013 decision by a district court in Texas.[31] The case gives as an example of actual fraud a knowingly false representation about a party's citizenship.

Under prong (D), joinder of a non-diverse or in-state defendant is fraudulent if "objective evidence clearly demonstrates that there is no good faith intention to prosecute the action against that defendant or to seek a joint judgment against that defendant." This language is taken, with slight modification, from an often-cited decision of the Third Circuit.[32] Again, the language is frequently repeated, but the criterion itself is rarely invoked. The House Report cites two district court cases to illustrate how the lack of good faith intention can be shown by objective evidence.[33]

2. Plausibility instead of possibility

Prong (B) will be widely regarded as the central provision of H.R. 3624. It provides that joinder of a non-diverse or in-state defendant is fraudulent if, "based on the complaint and [other materials submitted by the parties], it is *not plausible* to conclude that applicable state law would impose liability on that defendant." (Emphasis added.)

27 *See* House Report, *supra* note 4, at 9–16, for a detailed section-by-section explanation of the bill's provisions. This article provides only a brief summary, with emphasis on the changes the bill would make to existing law.

28 *See id.* at 10 (citing cases); *see also House Hearing*, *supra* note 23, at 68–69 (statement of Arthur D. Hellman).

29 House Report, *supra* note 4, at 18 (Dissenting Views); *see also id.* at 27.

30 385 F.3d 568, 573 (5th Cir. 2004) (en banc).

31 Coffman v. Dole Fresh Fruit Co., 927 F. Supp. 2d 427, 434-35 (E.D. Tex. 2013).

32 *In re* Briscoe, 448 F.3d 201, 216 (3d Cir. 2006) (quotation marks omitted).

33 House Report, *supra* note 4, at 15, citing Faulk v. Husqvarna Consumer Outdoor Products N.A., Inc., 849 F. Supp. 2d 1327, 1331 (M.D. Ala. 2012); and *In re* Diet Drugs Prods. Liab. Litig., 220 F. Supp. 2d 414, 420-22 (E.D. Pa. 2002).

Prong (B) thus replaces standards like "no possibility of recovery" with a uniform standard of "plausibility" drawn from the Supreme Court's *Twombly* and *Iqbal* decisions that redefined the federal pleading standard under Rule 8 of the Federal Rules of Civil Procedure.[34] Those decisions make clear that "plausibility" requires more than "possibility," but it is not tantamount to a requirement of "probability."[35] Rather, a claim lacks plausibility when "there is *no reasonable likelihood* that the plaintiffs can construct a claim from the events related in the complaint."[36] Under paragraph (2)(B), the removing defendant bears the burden of showing that the claims against the non-diverse or in-state defendants lack plausibility in the sense set forth in *Twombly* and *Iqbal*.

3. Affirmative defenses

Prong (C) states that joinder of a non-diverse or in-state defendant is fraudulent if "State or Federal law clearly bars all claims in the complaint against that defendant." The purpose of this provision is to establish that a plainly meritorious affirmative defense, whether under state or federal law, can be the basis for finding fraudulent joinder. Some courts already take that position. For example, in the same Third Circuit case cited earlier, the court stated: "Courts have . . . recognized that a statute of limitations defense is properly considered in connection with a fraudulent joinder inquiry."[37] Just last year, the Fourth Circuit held that a non-diverse defendant was fraudulently joined because "the Communications Act clearly preempts the [plaintiffs'] state-law tort claim against [that defendant] as a matter of law."[38]

Other courts, however, have held that affirmative defenses cannot be considered as a basis for finding fraudulent joinder. There seems to be a particular resistance to considering *federal* defenses, notably the defense of preemption. This resistance is grounded in part on the assumption that the "well-pleaded complaint" rule applies in the context of fraudulent joinder.[39] Under that rule, "a case may not be removed to federal court on the basis of a federal defense, including the defense of preemption."[40] But as the Supreme Court has made clear, the well-pleaded complaint rule governs whether a federal court has *federal-question jurisdiction* under 28 U.S.C. § 1331.[41] It "applies only to statutory 'arising under' cases."[42] It does not apply to diversity jurisdiction, and it is thus irrelevant to fraudulent joinder.

Nor is there any policy reason for excluding defenses—state or federal, affirmative or otherwise—from consideration as a basis for fraudulent joinder. The purpose of the fraudulent joinder doctrine is to prevent a plaintiff from nullifying an out-of-state defendant's removal rights by "fraudulently" joining an in-state or co-citizen party as defendant. From that perspective, it does not matter whether the joinder is fraudulent because the *claim* against the local defendant is insubstantial under the governing state law or because the claim is barred by an affirmative *defense* under state or federal law.

4. Abrogation of the "common defense" doctrine

As the House Report points out, prongs (B) and (C), taken together, abrogate the "common defense" doctrine, a limitation on fraudulent joinder recognized by some courts. Under the "common defense" rule, "no matter how clear it is that the plaintiff's claim against the in-state defendant is barred, the case must be remanded to the state court if the same defense also bars the claim against the out-of-state defendant."[43]

The principal authority for the "common defense" rule is the closely divided (9-7) en banc decision of the Fifth Circuit in *Smallwood v. Illinois Central R. Co*.[44] Full discussion is beyond the scope of this article, but three points should be noted. First, the majority opinion in *Smallwood* relies heavily on an old and opaque Supreme Court decision.[45] Of course, that decision is not binding on Congress. Second, the opinion says that when there is a common defense, "there is no [fraudulent] joinder; there is only a lawsuit lacking in merit."[46] The court never explains why the two are mutually exclusive. And they are not. Finally, the doctrine creates practical problems for both sides. As one district court observed, the *Smallwood* rule "puts all of the parties in the unenviable position of arguing contrary to their interests while running the risk of making judicial admissions that could haunt them later."[47]

Under H.R. 3624, a court should examine only the case against the in-state or non-diverse defendants. If the claims against those defendants are "fraudulent" as defined by the statute, that is the end of the matter, and the case should stay in federal court. The possibility that the same arguments might bar the claims against the removing defendant should play no role at the jurisdictional stage.

C. Procedures for the Fraudulent Joinder Inquiry

In broad outline, the process for resolving disputes about fraudulent joinder is well established. After the plaintiff sues in state court, the out-of-state defendant removes the case to federal district court based on diversity jurisdiction even though the plaintiff has joined one or more co-citizens or forum residents as co-defendants. The plaintiff moves to remand, asserting that the

34 *See* Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007); Ashcroft v. Iqbal, 556 U.S. 662 (2009).

35 *Iqbal*, 556 U.S. at 678.

36 *Twombly*, 550 U.S. at 558, quoting Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984) (emphasis added).

37 *In re* Briscoe, 448 F.3d 201, 219 (3d Cir. 2006).

38 Johnson v. American Towers, LLC, 781 F.3d 693, 705–06 (4th Cir. 2015).

39 *See, e.g.*, *In re* Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig., 905 F. Supp. 2d 644, 646–47 (E.D. Pa. 2012).

40 Caterpillar, Inc. v. Williams, 482 U.S. 386, 393 (1987) (emphasis removed).

41 *Id.* at 392.

42 American National Red Cross v. S.G., 505 U.S. 247, 258 (1992).

43 House Report, *supra* note 4, at 14.

44 385 F.3d at 574–76.

45 *See* Chesapeake & O. R. Co. v. Cockrell, 232 U.S. 146 (1914).

46 *Smallwood*, 385 F.3d at 574.

47 Frisby v. Lumberman's Mut. Cas. Co., 500 F. Supp. 2d 697, 700 (S.D. Tex. 2007).

joinder of those defendants—the "spoilers"—destroys complete diversity or violates the forum defendant rule of 28 U.S.C. § 1441(b)(2). The defendant opposes the motion on the ground that the joinder is fraudulent. The district court determines whether this opposition is well-taken. If it is, and the joinder is fraudulent, the district court denies the motion to remand, and the case proceeds in federal court.

The FJPA retains this process and specifies a few details, largely ratifying what the courts have been doing. Paragraph (3) states that, in determining whether joinder is fraudulent, the court should not restrict itself to the pleadings but should consider affidavits and materials submitted by the parties. This codifies the practice that courts have generally been following, as illustrated by an Eleventh Circuit decision cited in the House Report.[48] But a few courts have taken the position that they may not consider materials such as affidavits.[49] H.R. 3624 rejects the notion that a court should be "held captive by the allegations in the complaint."[50]

Paragraph (3) also states that the court may allow amendments to pleadings. This provision is new. As the House Report explains, it is designed to address the concern "that the plaintiff, having filed a complaint in state court under state procedural rules, may not have anticipated application of a . . . federal standard."

Paragraph (4) instructs the court to dismiss the fraudulently joined defendants *without* prejudice. This accords with the view of all but one of the courts of appeals that have addressed the issue. The one outlier is the Seventh Circuit, which issued its ruling in a single sentence without explanation.[51] H.R. 3624 abrogates that decision.

IV. The FJPA and Current Law

Apart from policy arguments, supporters and opponents of the FJPA disagree about the relationship between H.R. 3624 and current law. There are two points of contention. First, is the fraudulent joinder doctrine today "well-settled" or is it rife with uncertainty and inconsistency? Second, how much of a change in the law would be effected by the FJPA?

A. Conflict or Consensus?

Subcommittee Chairman Franks opened the hearing on H.R. 3624 by asserting that "the lack of guidance from the Supreme Court and Congress has led to poorly defined standards and inconsistent interpretations and application of the fraudulent joinder doctrine in the lower Federal courts."[52] Later in the hearing, however, Professor Lonny Hoffman countered that the law of fraudulent joinder is "well-settled" and that the "minor variances" in language in court decisions reflect only "semantic differences."[53] The debate on this point continued in the Committee Report on the bill and thereafter on the House floor. Who has the better of the argument?

I think Prof. Hoffman is correct to say that some of the differences in the formulation of the standard are semantic rather than substantive. But it is also true that commentators have repeatedly pointed to conflicts and inconsistency in lower court decisions.[54] Moreover, even semantic differences can be a source of uncertainty and can generate litigation, in part because lawyers cannot be confident that the differences are indeed semantic.

The Dissenting Views in the House Report attempted to turn Rep. Franks' point about the lack of guidance from the Supreme Court into an argument against the bill. Said the dissenters: "Current law already establishes a standard for courts to determine when a party has been improperly joined, a standard that has been in place for a century. *Tellingly, the Supreme Court has not seen fit to change this standard* . . . ."[55] The implication is that the Supreme Court has consciously decided not to change the law currently applied by the lower federal courts.

There is no basis whatever for inferring that the Supreme Court has made any kind of decision about fraudulent joinder, much less that it endorses what courts do today. The Supreme Court can address issues only if they are presented in certiorari petitions, and there are many obstacles to the Court's ever receiving a petition raising a fraudulent joinder issue. As already noted, if the district court remands a case under current law, appellate review is forbidden by 28 U.S.C. § 1447(d), so the case will never even get to the court of appeals. If the district court denies the motion to remand, appellate review is theoretically possible, but only after final judgment. And "after final judgment in a removed case that is not remanded, only the most disappointed and dogged of parties would have sufficient incentive to pursue this threshold issue."[56]

The upshot is that if there is disarray in the law of fraudulent joinder, it can be remedied only through legislation. And supporters of H.R. 3624 do emphasize the importance of uniformity. But it would be naïve to think that Members of Congress would devote considerable time and effort simply to bring greater coherence to a small corner of jurisdictional doctrine. The purpose of the legislation is to change the law. But to what degree, and is the change justified?

B. A "Narrowly Targeted" Response, or a Bill Making "Radical Changes"?

The House Report on H.R. 3624 characterizes the bill as "a narrowly targeted legislative response to a very real problem created by current law."[57] Opponents argue that the legislation

48 *See* Legg v. Wyeth, 428 F.3d 1317, 1320–23 (11th Cir. 2005).

49 *See, e.g.*, Greenberg v. Macy's, 2011 WL 4336674 at *5 (E.D. Pa. Sept. 15, 2011).

50 House Report, *supra* note 4, at 16, quoting Mills v. Allegiance Healthcare Corp., 178 F. Supp. 2d 1, 5–6 (D. Mass. 2001).

51 Walton v. Bayer Corp., 643 F.3d 994, 1000–01 (7th Cir. 2011).

52 *House Hearing*, *supra* note 23, at 2 (statement of Rep. Franks).

53 *Id.* at 23-24 (statement of Lonny Hoffman)

54 *See* House Report, *supra* note 4, at 3 (quoting law review articles published in 1991, 2005, and 2009).

55 *Id.* at 19 (Dissenting Views) (emphasis added).

56 Gentile v. Biogen Idec, Inc., 934 F. Supp. 2d 313, 326 n.3 (D. Mass. 2013). This assessment may be somewhat overstated, but it is nevertheless true that appellate decisions on fraudulent joinder are uncommon.

57 House Report, *supra* note 4, at 5.

makes "radical changes to long-standing jurisdictional practice" and "would . . . potentially wreak havoc on the Federal courts."[58]

The opponents' characterization is based in part on untenable assumptions about of two of the four criteria used to define fraudulent joinder in the bill. The Dissenting Views in the House Report describe the "actual fraud" and "good faith intention" prongs as "significant" or "major" departures from current law.[59] But as shown in Part III, they are anything but that; both formulations are taken directly from often-cited court of appeals decisions. And the Dissenting Views barely mention prong (C), which deals with affirmative defenses.

So if H.R. 3624 effects a "radical change," it must be through prong (B) and the "plausibility" standard. Certainly prong (B) effects a change. If Congress wanted to codify current law, prong (B) would provide that joinder is fraudulent if "it is not *possible* to conclude that applicable State law would impose liability on [the spoiler] defendant."[60] Instead, it provides that joinder is fraudulent if that conclusion is not *plausible*.

To understand what this change would mean, we can look at the cases from which the plausibility standard is drawn—*Bell Atlantic Corp. v. Twombly*[61] and *Ashcroft v. Iqbal*.[62] Before *Twombly*, pleading in the federal courts was governed by the rule of *Conley v. Gibson* that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove *no set of facts* in support of his claim which would entitle him to relief."[63] The "no set of facts" test is similar to the "no possibility" standard widely applied in fraudulent joinder cases. *Twombly* "retired" the "no set of facts" rule and replaced it with the plausibility standard.

There is a substantial body of empirical scholarship on the effect of *Twombly* and *Iqbal* on motions to dismiss.[64] The results have been mixed. One study, based on analysis of a large number of cases, found "no (significant) change in the willingness of courts to dismiss cases" as a result of *Twombly*, "even after accounting for selection effects."[65] However, another scholar found a significant increase in dismissals of employment discrimination and civil rights cases after *Iqbal*.[66]

Employment discrimination and civil rights cases are generally grounded in federal law, so fraudulent joinder is rarely an issue. Thus it is hard to know whether the results of this second study would have any bearing at all on the fraudulent joinder context. The first-quoted study included diversity cases, but presumably most of those were filed initially in federal court, so the results may have limited relevance for fraudulent joinder, which by definition comes into play only when a case has been filed in state court.

So any attempt to quantify the likely effect of prong (B) based on existing empirical research is probably doomed to failure. Nevertheless, it seems reasonable to conclude that in some unknowable number of cases, out-of-state defendants will succeed in securing the dismissal (without prejudice) of claims against in-state defendants that would not be dismissed under current law. The effect will be to sustain the removal to federal court in those cases. The question is whether this "somewhat more robust version of the fraudulent joinder doctrine"[67] is justified. To answer the question, it will be useful first to examine the rationales advanced by the bill's supporters and then to consider some of the arguments made by opponents.

V. Two Rationales for a "More Robust" Doctrine

The FJPA "expands the class of situations in which the citizenship of a local defendant can be disregarded in determining whether the case can be removed on the basis of diversity."[68] It does so in pursuit of two goals: to "give out-of-state defendants a better opportunity to secure the neutral federal forum that they would be entitled to if sued alone," and to "help to protect individuals and small businesses from being dragged into court when their involvement in the controversy is peripheral at best."[69]

A. The Neutral Federal Forum for Out-of-State Defendants

As noted at the outset, the right of an out-of-state defendant to remove a case to the neutral forum of a federal court was instituted by Congress to implement the grant of diversity jurisdiction in Article III of the Constitution. The Supreme Court developed the fraudulent joinder doctrine in order to protect that right. But the Court never offered a detailed explanation for the doctrine, and lower courts seldom advert to its Article III foundations.

One exception is an often-quoted opinion of the Seventh Circuit. In *Poulos v. Naas Foods, Inc.*,[70] the court elaborated on the rationale for the doctrine and its grounding in the purpose of diversity jurisdiction:

58 Markup Transcript, *supra* note 1, at 46 (remarks of Rep. Conyers); House Report, *supra* note 4, at 22–23 (Dissenting Views).

59 House Report, *supra* note 4, at 25 (Dissenting Views).

60 *See, e.g.*, Lunn v. Union Pac. R.R., 2006 WL 516776 at *5 (W.D. Mo. Mar. 1, 2006) ("[T]he Court finds . . . that it is possible that Kansas law might impose liability on the resident defendants. Therefore, the Court finds that the joinder of [those defendants] is not fraudulent.").

61 550 U.S. 544 (2007).

62 556 U.S. 662 (2009).

63 Conley v. Gibson, 355 U.S. 41, 46 (1957) (emphasis added). Although the *Conley* Court referred to this as "the accepted rule," it cited only court of appeals cases. *See id.* at n.5.

64 *See* Thomas D. Rowe, Jr., Suzanna Sherry & Jay Tidmarsh, Civil Procedure, Chapter 2 (4th ed. forthcoming 2016). The citations in this paragraph are drawn from that work.

65 William H.J. Hubbard, *Testing for Change in Procedural Standards, with Application to* Bell Atlantic v. Twombly, 42 J. Legal Stud. 35, 57 (2013).

66 Alexander A. Reinert, *Measuring the Impact of Plausibility Pleading*, 101 Va. L. Rev. 2117 (2015).

67 House Report, *supra* note 4, at 5.

68 *Id.*

69 *Id.*

70 959 F.2d 69 (7th Cir. 1992).

Broadly speaking, the purpose of federal diversity jurisdiction is to provide a neutral forum for lawsuits between parties from different states. . . .

No matter what the plaintiff's intentions are, an out-of-state defendant may need access to federal court when the plaintiff's suit presents a local court with a clear opportunity to express its presumed bias—when the insubstantiality of the claim against the in-state defendant makes it easy to give judgment for the in-state plaintiff against the out-of-state defendant while sparing the in-state defendant.[71]

So the *insubstantiality* of the claim against the in-state defendant is the key to the doctrine, because it creates the opportunity for a state court to act on its "presumed bias" against out-of-state litigants.[72] But there is a disconnect between the rationale as stated by the Seventh Circuit and the statement in the same paragraph (echoed by other courts) that a claim is fraudulent only when it "has *no chance* of success."[73] If the goal is to identify cases in which it would be "easy to give judgment for the in-state plaintiff against the out-of-state defendant while sparing the in-state defendant," the rule would not limit application of the doctrine to situations in which the claim against the in-state defendant is *hopeless*. It would also include situations in which the claim against the in-state defendant is *extremely weak*.

The "plausibility" standard of H.R. 3624 would accomplish that goal, especially in light of the House Report's reliance on the "reasonable likelihood" test drawn from the Supreme Court's decision in *Twombly*.[74] This standard would allow the federal court to retain jurisdiction over a case when the plaintiff has no more than a "glimmer of hope" of imposing liability on the in-state defendant.[75] It would better serve the purpose of the fraudulent joinder doctrine than the more demanding tests generally applied by the courts today.

The soundness of the plausibility/"reasonable likelihood" approach can also be seen by considering the Supreme Court's rationale in *Twombly* and *Iqbal*. As Sixth Circuit Judge Jeffrey Sutton has explained, the Court adopted the plausibility standard to "prevent[] plaintiffs from launching a case into discovery—and from brandishing the threat of discovery during settlement negotiations—'when there is no reasonable likelihood that [they] can construct a claim from the events related in the complaint.'"[76] The underlying concerns are thus twofold. First, discovery "imposes costs—not only on defendants but also on courts and society."[77] Second, the threat of discovery exerts pressure on defendants "to settle even anemic cases."[78]

These may be weighty concerns, but they are matters of policy, with no constitutional underpinnings. In contrast, the out-of-state defendant's removal rights implicate Article III of the Constitution. If plausibility is an appropriate threshold for allowing the plaintiff to engage in (or threaten) discovery, as the Supreme Court believes it to be, it would seem to follow a fortiori that it is also an appropriate standard for determining when the plaintiff should be able to deprive the out-of-state defendant of the removal rights it would have if sued alone.

It is important to note also that the consequence of finding fraudulent joinder under H.R. 3624 is not that the plaintiff is thrown out of court—which is what happens in the Rule 8 pleading context under *Twombly* itself—but rather that his claims against the in-state defendant are dismissed without prejudice. In almost all fraudulent joinder cases, the plaintiff's "real target" is the out-of-state defendant,[79] and the claims against that defendant remain in the federal case for adjudication on the merits. If the plaintiff still wishes to seek redress from the in-state defendant, he is free to do so in state court.

B. The In-State Party as "Diversity-Destroying Pawn"

Although the proponents of H.R. 3624 seek to protect the removal rights of out-of-state defendants, they place at least as much emphasis on a second purpose: to protect *local* individuals and businesses from being dragged into lawsuits when their involvement in the controversy is tangential at best. This idea is novel. It played no role in the Supreme Court decisions that established the fraudulent joinder doctrine, nor can it be found in current case law or academic commentaries.

Novelty, of course, is no reason why Congress should not embrace the idea. Just as Congress is free to depart from the substance of court-made jurisdictional doctrine, it also has the prerogative of reshaping doctrine in order to accomplish a different purpose. But articulation of this particular purpose raises the question: what is the federal interest here? Individuals and small businesses are being sued by citizens of their own state in state court on state-law claims. Even if the claims are feeble or frivolous or brought in bad faith, why should that be of concern to Congress?

If the claims were being asserted against the in-state defendants in standalone lawsuits in state court, it is hard to see

71 *Id.* at 71, 73. As this quotation indicates, this rationale assumes that the plaintiff is a citizen of the forum state. That is the usual pattern in fraudulent joinder litigation, although it was not the case in *Poulos* itself. *See id.* at 71 n.2.

72 The reference to "presumed bias" is unfortunate; it would be more accurate as well as more diplomatic to speak of "*possible* bias." No one thinks that state courts today are generally prejudiced against out-of-state defendants, so that bias could be *presumed*. But the fraudulent joinder doctrine, like diversity jurisdiction itself, is premised on the *possibility* of bias. *See, e.g.*, Hertz Corp. v. Friend, 559 U.S. 77, 85 (2010) (referring to the "basic rationale" of diversity jurisdiction as "opening the federal courts' doors to those who might otherwise suffer from local prejudice against out-of-state parties.").

73 *Poulos*, 959 F.2d at 73 (emphasis added).

74 *See* House Report, *supra* note 4, at 13.

75 *See* Hartley v. CSX Transp., Inc., 187 F.3d 422, 426 (4th Cir. 1999) ("Once the court identifies this glimmer of hope for the plaintiff, the jurisdictional inquiry ends [and the case must be remanded].").

76 16630 Southfield Limited Partnership v. Flagstar Bank, F.S.B., 727 F.3d 502, 504 (6th Cir. 2013) (quoting *Twombly*). Although the discussion in *Twombly* referred to antitrust litigation, the Court made clear in *Iqbal* that the rules adopted in *Twombly* apply to all civil litigation. *See Iqbal*, 556 U.S. at 684.

77 *16630 Southfield*, 727 F.3d at 504.

78 *Twombly*, 550 U.S. at 559.

79 *See* 151 Cong. Rec. 2642 (2005) (remarks of Rep. Goodlatte) (explaining the "primary defendant" provision of the Class Action Fairness Act).

how Congress could justify using its legislative power to police their quality or legitimacy. But that is not what is happening. The claims are being asserted in suits where out-of-state entities are also defendants, and under circumstances where—or so Congress could conclude—the plaintiff's decision to join the two sets of claims is part of a litigation strategy shaped by the rule of complete diversity. That is a rule established by the federal judiciary in interpreting a federal statute, and it is that rule that provides the incentive for asserting the feeble or frivolous or bad faith claims against the in-state individuals and small businesses. The in-state defendants are thus suffering harm as the direct result of a legal regime that is ultimately attributable to Congress.

That is the theory that underlies this second rationale. What about the factual premises? No one would dispute that litigation is burdensome, especially for individuals and small businesses who do not have in-house counsel or a law firm on retainer. As Elizabeth Milito, representing the National Federation of Independent Business, said in her testimony at the hearing on H.R. 3624, when small business owners are sued, they "are forced to incur substantial financial costs in defending their business, they must dedicate their time and energy to the case, and they must deal with the heavy emotional toll that a wrongful suit may cause."[80] But litigation is a feature of American life, and the mere fact that claims prove to be meritless does not prove that the suit was wrongful. According to Ms. Milito, however, the claims at issue here are not simply meritless claims. She gave as an example a "familiar strategy" in the realm of pharmaceutical litigation. The plaintiff's real target is the out-of-state manufacturer, but the complaint also names a local pharmacy "as the diversity-destroying pawn to be a roadblock to the drug manufacturer's removal efforts." She continued: "Plaintiffs in these circumstances rarely intend in good faith to pursue the local independently-owned pharmacy. Rather, they usually dismiss the pharmacy once the case is remanded to state court."[81]

If it were true that in the typical case in which fraudulent joinder is litigated, the plaintiffs dismiss the in-state defendant soon after the case returns to state court, that would be powerful evidence that the local defendants are indeed being used as "diversity-destroying pawn[s]" and that the rule of complete diversity is being abused. But Ms. Milito offered no empirical data on that point.[82]

Certainly it would be useful to have data about the extent to which plaintiffs voluntarily dismiss the local defendant after securing the remand to state court. But given the particular standard embodied in the FJPA, I do not think it is necessary. Take the pharmaceutical litigation discussed by Ms. Milito. Almost invariably, if there is any entity that can be held legally responsible for the plaintiff's injuries, it is the out-of-state pharmaceutical manufacturer. Under the FJPA, the plaintiff will be able to pursue her claims against that defendant no matter how the court rules on the fraudulent joinder argument. She will also be able to pursue her claims against the local pharmacy—and in her preferred state forum—as long as those claims satisfy the standard of plausibility. The FJPA will make a difference only in cases where the claims do not meet the plausibility standard. The bill would thus eliminate the incentive that current law creates for the plaintiff to assert borderline claims and thereby subject the pharmacy to the burdens of litigation simply to keep the case in state court. That is a legitimate exercise of congressional power over federal-court jurisdiction.

In the floor debate on the FJPA, one opponent argued that dismissing the local defendant from the case would disadvantage the plaintiff because "it [would be] easy for the remaining defendant to finger point and blame the absent defendant for the plaintiff's injuries."[83] There are two responses to this argument. First, it would *not* be all that easy to finger point when the district court has found that the claims against the absent defendant do not even rise to the level of plausibility. Second, the out-of-state defendant's ability to finger point would be limited if not indeed foreclosed by the doctrine of judicial estoppel. That doctrine "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase."[84] If, at the jurisdictional stage, the out-of-state defendant has succeeded in persuading the district court that the plaintiff's claims against the in-state defendant are not even plausible, it will probably be estopped from arguing in the merits phase that the in-state defendant bears the responsibility for the plaintiff's injuries.[85] So the case will turn, as it should, on whether the plaintiff can prove the elements of the claims against the out-of-state defendant under the governing state law.

VI. Arguments Against the FJPA

Neither in the Dissenting Views nor in the debate on the House floor did opponents directly challenge the premise of the FJPA: that plaintiffs sometimes assert feeble or unsubstantiated claims against in-state defendants for the purpose of frustrating the removal rights that out-of-state defendants would have if sued alone. Here I will address some of the arguments that opponents of the bill did make.

A recurring theme of the opponents' arguments is that the FJPA is "just the latest attempt to tilt the civil justice system in favor of corporate defendants by making it more difficult for plaintiffs to pursue State law claims in State courts."[86] This may be more rhetoric than argument, but either way it is misplaced. It is true that H.R. 3624 would make it easier for corporate defendants to remove state-law cases to federal court, but if that were the principal aim, there are more direct and more effective ways of accomplishing it. For example, Congress could follow the

80 *House Hearing*, *supra* note 23, at 14 (statement of Elizabeth Milito).

81 *Id.*

82 On the contrary, she cited four cases in which the district courts held that the local defendant *was* fraudulently joined.

83 162 Cong. Rec. H911 (daily ed. Feb. 25, 2016) (remarks of Rep. Jackson Lee).

84 New Hampshire v. Maine, 532 U.S. 742, 749 (2001) (internal quotation omitted).

85 *See* Walton v. Bayer Corp., 643 F.3d 994, 1002–03 (7th Cir. 2011) (finding fraudulent joinder and holding *plaintiff* estopped at merits stage based on her arguments *against* removal).

86 162 Cong. Rec. H908 (daily ed. Feb. 25, 2016) (remarks of Rep. Conyers).

example of the Class Action Fairness Act and allow removal based on minimal diversity.[87] Or Congress could allow removal based on a federal defense. Either measure would do more to facilitate removal by corporate defendants than adjusting the fraudulent joinder doctrine. But they would not directly address the concern that *local* businesses are being dragged into litigation to forestall removal by out-of-state defendants.

Another recurring theme is that incorporating the plausibility standard into the fraudulent joinder inquiry "effectively requires litigation on the merits at the nascent stage of the case."[88] This argument seems to assume that the current approach to fraudulent joinder does *not* involve an inquiry into the merits. However, that assumption blurs the distinction between two senses of "the merits." When we speak of *deciding* a case on the merits, we mean deciding whether the plaintiff wins or loses. That is not what happens in the fraudulent joinder inquiry today, and H.R. 3624 does not change that; it states explicitly that the fraudulently joined claims against the in-state defendants should be dismissed without prejudice.

But we also talk about "the merits" of a case in a looser sense, signifying any consideration of the validity of the claim under the applicable law. The fraudulent joinder inquiry does address "the merits" in that sense, but it does so with or without the FJPA. If the court says the plaintiff has "no possibility" of recovery from the in-state defendant, that is addressing the merits of the claim. It says that the claim definitely has no merit. The FJPA would tell courts to ask the same kind of question, but using a less demanding standard. Instead of saying that joinder is fraudulent only if it is *not possible* that state law will impose liability on the spoiler, it says that joinder is also fraudulent if it is *not plausible* that state law will impose liability on the spoiler. The latter is not any more about "the merits" than the former.

Beyond this, much of the attack on the FJPA's use of the plausibility standard is really an attack on the Supreme Court's embrace of the standard in *Twombly* and *Iqbal*. It is therefore worth pointing out that *Twombly* was decided by a 7-2 margin, and that in *Iqbal* the dissent for four Justices (by the author of the *Twombly* opinion) accepted the plausibility standard and disputed only its application.

Another argument is that the FJPA "imposes the burden of proof" on plaintiffs.[89] That is not so. As the House Report points out, when the removing party asserts that an in-state or co-citizen defendant has been fraudulently joined, the removing party must persuade the court that one or more of the criteria discussed above have been satisfied. "If the removing party does not carry its burden, then the motion to remand must be granted."[90]

Finally, the opponents of H.R. 3624 assert that the bill "raises serious federalism concerns" and "infringes state sovereignty." There are two variations on this argument. First, the Dissenting Views emphasize that "the Federal courts generally disfavor Federal jurisdiction and read removal statutes narrowly."[91] That is true, but it is hardly an argument for why *Congress* should refrain from adopting a more robust doctrine of fraudulent joinder. The reason federal courts have been reading removal statutes narrowly is that the courts think that is what Congress wants. If Congress broadens the grounds for removal, courts must follow suit, as indeed the Supreme Court has recognized. In 2014, the Court adverted to "a purported 'presumption' against removal" and said: "We need not here decide whether such a presumption is proper in mine-run diversity cases. It suffices to point out that no antiremoval presumption attends cases invoking CAFA, which Congress enacted to facilitate adjudication of certain class actions in federal court."[92] If Congress enacts the FJPA, it will be to "facilitate adjudication of certain [non-class] actions in federal court."

Opponents also argue that the FJPA would "deny state courts the ability to decide and, ultimately, to shape state law in many cases." It is not clear whether the reference here is to the claims against the out-of-state defendant or the claims against the in-state defendant. If the former, that is a routine feature of diversity jurisdiction. If the latter, the concern is unrealistic for the general run of fraudulent joinder cases. State law is shaped by state-court appellate decisions. By hypothesis, the claims against the in-state defendant are marginal at best. The likelihood that these marginal claims would be decided on the merits at the trial level and ultimately decided by an appellate court seems quite remote.

VII. Conclusion: Diversity Removal in Perspective

Supporters and opponents of the FJPA often seem to be talking past one another; one might almost think they were talking about different pieces of legislation. But if we focus on the underlying premises rather than the particular arguments, we see that what really divides the two sides is a fundamental disagreement about removal based on diversity of citizenship and its role in the American legal system. For opponents of H.R. 3624, diversity removal is an anomaly in the law, to be kept under tight restraints and made available only when absolutely necessary. In this view, the requirement of complete diversity is a desirable and almost unassailable part of the legal regime. In contrast, for supporters of the bill, diversity removal is an integral part of the judicial system established by the Constitution and the Judiciary Act of 1789. The anomaly, if there is one, is the complete-diversity rule—a rule that perhaps should be abrogated because it is contrary to "the original understanding of the Framers."[93]

It will come as no surprise to anyone who has read this far that I do not share the opponents' jaundiced view of removal based on diversity of citizenship. Full discussion is beyond the

87 *See Federal Jurisdiction Clarification Act: Hearing Before the Subcommittee on Courts, the Internet and Intellectual Property of the U.S. House of Representatives Committee on the Judiciary*, 109th Cong. 38–39 (2005) (statement of Arthur D. Hellman).

88 Markup Transcript, *supra* note 1, at 54 (remarks of Rep. Cohen).

89 Susan Steinman, *Help Fight Corporate Forum Shopping*, Trial, Apr. 2016, at 16 (internal quotation marks omitted).

90 *House Report*, *supra* note 4, at 11.

91 *Id.* at 26 (Dissenting Views).

92 Dart Cherokee Basin Operating Co. v. Owens, 135 S. Ct. 547, 554 (2014).

93 *House Report*, *supra* note 4, at 5 n.9.

scope of this article, but two points deserve mention. First, the complete-diversity rule derives from an opinion (to be sure, an opinion by Chief Justice Marshall) that is very brief and very cryptic, providing no justification or explanation for the limitation on diversity jurisdiction that it imposes. Justices who served with Marshall later reported that he "repeatedly expressed regret that [the decision] had been made, adding, whenever the subject was mentioned, that if the point of jurisdiction was an original one, the conclusion would be different."[94] This does not necessarily mean that the rule should be abrogated—only that Congress should not regard it as sacrosanct when particular abuses are brought to its attention.

Second, even if it is wrong to presume that state-court judges and juries are biased against out-of-state defendants because they are from *out of state*,[95] it is still possible that litigation practices in state systems reflect an institutional bias against out-of-state defendants as *defendants*. Over the last three decades, the Supreme Court, through rulemaking and adjudication, has substantially dismantled the elements of federal practice that put pressure on defendants "to settle even anemic cases."[96] But state systems may have retained or even strengthened those elements. To the extent that they have done so, defendants sued in state court may legitimately believe they will receive a "juster justice" in the federal court.[97]

In this light, it seems to me that the FJPA is best seen as a modest step toward the ideal that Hamilton articulated in Federalist No. 80—"that in order to [maintain the] equality of privileges and immunities to which the citizens of the union will be entitled, the national judiciary ought to preside in *all* cases in which one State or its citizens are opposed to another State or its citizens." H.R. 3624 is modest in at least two respects. It does not abrogate the complete-diversity rule, nor does it shift the burden of proof to the plaintiff when fraudulent joinder is asserted. Rather, it enables the out-of-state defendant to have its case heard in the neutral federal forum if it can show that the plaintiff's claims against the in-state defendants do not satisfy the standard of plausibility. This adjustment of the fraudulent joinder doctrine provides a better balance of the competing interests than the versions of the doctrine now applied in the lower federal courts.[98]

94 Louisville, C. & C. R. Co. v. Letson, 43 U.S. (2 How.) 497, 555 (1844).

95 *See supra* note 72.

96 *See supra* note 78 and accompanying text. Landmarks include Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) (reinvigorating summary judgment as "an integral part of the Federal Rules as a whole"); Daubert v. Merrell Dow Pharms., 509 U.S. 579 (1993) (delineating "gatekeeping" role for judge in assessing expert evidence); amendments to the Federal Rules of Civil Procedure limiting the scope of discovery as of right; and of course *Twombly* and *Iqbal*. Not surprisingly, opponents of the FJPA tend to view these developments differently.

97 *See* Henry M. Hart, *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 513 (1954) ("Why is it an offense to the ideals of federalism for federal courts to administer, between citizens of different states, a juster justice than state courts, so long as they accept the same premises of underlying, primary obligation and so avoid creating uncertainty in the basic rules which govern the great mass of affairs in the ordinary processes of daily living? Was Hamilton wrong in saying that the assurance of the due administration of justice to out-of-state citizens is one of the great bonds of federal union?") (footnotes omitted).

98 It would also be desirable for Congress to enact legislation to neutralize a counterpart stratagem used by defendants—removing cases to federal court before a local defendant has been served to avoid the constraints of the forum defendant rule. The practice has been referred to as "snap removal." *See* Breitweiser v. Chesapeake Energy Corp., 2015 WL 6322625 at *2 (N.D. Tex. Oct. 20, 2015).