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## PROTECTING THE VICTIMS OF FRAUDULENT JOINDER: HOW CONGRESS AND FEDERAL JUDGES CAN HELP

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### I. Introduction

One of the most famous judges of the last century, Judge Learned Hand, observed, “I must say that as a litigant I should dread a lawsuit beyond almost anything else short of sickness and death.”<sup>3</sup> The innocent victims of fraudulent joinder know this well. They are often small local businesses such as retailers, pharmacies, auto repair shops, or even individuals including store managers and salespeople.

“Fraudulent joinder” is a stepchild of our somewhat unusual mix of constitutional law, statutory provisions, and case law setting the jurisdiction of federal courts. The Framers’

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<sup>3</sup> Learned Hand, *The Deficiencies of Trials to Reach the Heart of the Matter*, 3 ASS’N OF THE B. OF THE CITY OF N.Y., LECTURES ON LEGAL TOPICS 89, 105 (1926).

apprehension regarding the potential for state court bias in favor of local interests led them to establish neutral federal courts.<sup>4</sup> They viewed the availability of the federal courts to decide cases involving citizens of different states as critical to promoting public confidence that such claims would be decided promptly, efficiently, and impartially.<sup>5</sup>

The Founders would not be surprised that plaintiffs’ lawyers continue to prefer to bring their cases before certain state courts where they have a home field advantage, rather than in neutral federal courts today. As former West Virginia Supreme Court Justice Richard Neely candidly observed:

As long as I am allowed to redistribute wealth from out-of-state companies to injured in-state plaintiffs, I shall continue to do so. Not only is my sleep enhanced when I give someone else’s money away, but so is my job security, because the in-state plaintiffs, their families, and their friends will re-elect me . . . . It should be obvious that the in-state local plaintiff, his witnesses, and his friends, can all vote for the judge, while the out-of-state defendant can’t even be relied upon to send a campaign donation.<sup>6</sup>

As a result of such imbalance when deciding civil cases, certain jurisdictions are viewed as “Judicial Hellholes”<sup>7</sup> and the litigation climate in some states is viewed as particularly unfair for businesses when named as defendants.<sup>8</sup>

Due to such foresight, the Constitution provides that federal judicial power extends to controversies “between citizens of different states.”<sup>9</sup> This is known as “diversity jurisdiction.” Based on the letter of the Constitution, federal courts can consider any case that involves citizens of

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<sup>4</sup> See THE FEDERALIST NO. 80 (Alexander Hamilton).

<sup>5</sup> See 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1685 (1833).

<sup>6</sup> RICHARD NEELY, THE PRODUCT LIABILITY MESS: HOW BUSINESS CAN BE RESCUED FROM THE POLITICS OF STATE COURTS 4 (1988).

<sup>7</sup> See AM. TORT REFORM FOUND., JUDICIAL HELLHOLES 2017-2018 (2017), <http://www.judicialhellholes.org/wp-content/uploads/2017/12/judicial-hellholes-report-2017-2018.pdf>.

<sup>8</sup> See U.S. CHAMBER INST. FOR LEGAL REFORM, 2017 LAWSUIT CLIMATE SURVEY: RANKING THE STATES 5 (2017), <http://www.instituteforlegalreform.com/uploads/pdfs/Harris-2017-Executive-Summary-FINAL.pdf>.

<sup>9</sup> U.S. CONST. art. III, § 2.

different states. The U.S. Supreme Court, in an early case, however, confined the federal judiciary’s jurisdiction to cases in which there is “complete diversity.”<sup>10</sup> Complete diversity means that, when a lawsuit is based solely on state law, a federal court will consider it only if every defendant resides in a different state than every plaintiff.

This “complete diversity” requirement can lead to mischief. When a plaintiffs’ lawyer believes that a local court will extend a welcome mat, his or her case has a significantly better chance of success, and the potential for recovery is larger in a state court than a neutral federal court, fraudulent joinder happens.

An attorney whose lawsuit targets a large out-of-state corporation, such as a pharmaceutical manufacturer, automaker, or insurance company, wants (understandably) to avoid the atmosphere of a “neutral” federal court, and place the case in a jurisdiction that is warm and friendly to the plaintiff — state court. All that a plaintiff’s lawyer needs to do to “destroy” complete diversity is name a local business or individual—one that is from the same state as the plaintiff—as a defendant when the real target of the lawsuit is an out-of-state company. In many cases, the plaintiff’s lawyer does not engage in this tactic to impose liability on that local business, but to oust the federal court of jurisdiction.

The Supreme Court understood this and that is why it recognized an exception to the complete diversity rule for “fraudulent joinder.”<sup>11</sup> Fraudulent joinder allows a federal court to disregard, for jurisdictional purposes, the citizenship of a non-diverse defendant. It allows the federal court to retain jurisdiction by dismissing a non-diverse defendant from the lawsuit, retaining

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<sup>10</sup> See *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 267 (1806). Congress has also limited the subject matter jurisdiction of federal courts to claims involving citizens of different states in which the amount in controversy exceeds \$75,000. 28 U.S.C. § 1332(a) (2011).

<sup>11</sup> See *Wecker v. Nat’l Enameling & Stamping Co.*, 204 U.S. 176 (1907) (recognizing the first fraudulent joinder exception to complete diversity).

jurisdiction over the out-of-state defendant that is the true target of the litigation, and denying a plaintiff's motion to remand to state court.

## II. THE FRAUDULENT JOINDER DOCTRINE: INCONSISTENT AND INEFFECTIVE

Federal courts do not agree on the standard for fraudulent joinder,<sup>12</sup> and it is a source of significant confusion – even within some federal circuits.<sup>13</sup> Courts inconsistently apply standards that range from weak to almost no ability to prevent abuse.

Seemingly, the most common approach requires a defendant to show the plaintiff has “no possibility” of a claim or recovery against the local defendant.<sup>14</sup> In the Fourth Circuit, district courts can retain jurisdiction under this standard only when the plaintiff has no “glimmer of hope” of recovering against the local defendant.<sup>15</sup> This standard allows a federal court to retain jurisdiction in only the most blatantly deficient cases, such as where a plaintiff only names a local small business or salesperson in the caption, makes no individual allegations against them, or does not sufficiently connect the non-diverse defendant to the case.<sup>16</sup>

Other federal courts place a different but similarly high burden when deciding whether to dismiss a local defendant and retain jurisdiction over a multi-state case. Some courts have taken a frivolous claim approach based on Rule 11 of the Federal Rules of Civil Procedure,<sup>17</sup> which is an

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<sup>12</sup> See *City of Neodesha v. BP Corp. N. Am.*, 355 F. Supp. 2d 1182, 1185-86 (D. Kan. 2005) (recognizing the “lack of definitive law” on the standard for fraudulent joinder and conflicting law within the Tenth Circuit).

<sup>13</sup> Several commentators have criticized courts’ divergent and frequently shifting approaches to evaluating fraudulent joinder. See, e.g., Kevin L. Pratt, *Twombly, Iqbal, and the Rise of Fraudulent Joinder Litigation*, 6 CHARLESTON L. REV. 729 (2012); Paul Rosenthal, *Improper Joinder: Confronting Plaintiffs’ Attempts to Destroy Federal Subject Matter Jurisdiction*, 59 AM. U. L. REV. 49, 64-73 (2009) (“Rather than adopting one universal approach, courts attempt to discern fraudulent joinder by applying a collection of amorphous approaches.”); Matthew J. Richardson, *Clarifying and Limiting Fraudulent Joinder*, 58 FLA. L. REV. 119, 121-22 (2006) (recognizing federal circuits “have split over a number of the important issues in defining and applying the doctrine”).

<sup>14</sup> See, e.g., *Hunt v. Nationstar Mortg., LLC*, 684 F. App’x 938, 942 (11th Cir. 2017); *Smallwood v. Ill. Cent. R.R. Co.*, 385 F.3d 568, 573 (5th Cir. 2004) (en banc); *Whitaker v. Am. Telecasting, Inc.*, 261 F.3d 196, 207 (2d Cir. 2001); *Montano v. Allstate Indemnity*, No. 99-2225, 2000 WL 525592, at \*2 (10th Cir. Apr. 14 2000); *Gottlieb v. Westin Hotel Co.*, 990 F.2d 323, 327 (7th Cir. 1993).

<sup>15</sup> *Hartley v. CSX Transp., Inc.*, 187 F.3d 422, 426 (4th Cir. 1999).

<sup>16</sup> See, e.g., *Weidman*, 776 F.3d at 218.

<sup>17</sup> See, e.g., *Nelson v. Whirlpool Corp.*, 668 F. Supp. 2d 1368, 1377 (S.D. Ala. 2009); *Sellers v. Foremost Inc.*, 924 F. Supp. 1116, 1118 (M.D. Ala. 1996).

even more difficult standard to meet than showing there is no viable claim. For example, the Third Circuit has found that for a claim to remain in federal court, the claims asserted against the local defendant must be “wholly insubstantial and frivolous.”<sup>18</sup> Other courts, such as those in the Ninth Circuit, find that fraudulent joinder exists “[i]f the plaintiff fails to state a cause of action against a resident defendant, and the failure is obvious according to the settled rules of the state.”<sup>19</sup> Still others, such as the Seventh and Eighth Circuits, have considered whether the plaintiff has provided a “reasonable basis” for the claim or has “any reasonable possibility of success” against the local defendant, under which courts resolve any doubts in favor of the plaintiff.<sup>20</sup> Some courts have required the plaintiff to show a “colorable basis” for the claim.<sup>21</sup> These differences in language are not just semantics. There is evidence that federal judges treat similar cases differently.<sup>22</sup>

With tests as broad as these, it is understandable why some federal district judges may feel that fraudulent joinder has not occurred, and will follow the rule of law, denying a defendant the

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<sup>18</sup> See *Batoff v. State Farm Ins. Co.*, 977 F.2d 848, 852 (3d Cir. 1992). See also *Hricik v. Stryker Biotech, LLC*, 89 F. Supp. 3d 694, 700 (E.D. Pa. 2015) (applying this standard to remand cases brought against manufacturer of medical device that named two local sales representatives as additional defendants despite numerous examples of cases where courts dismissed or found not actionable claims against sales representatives).

<sup>19</sup> *McCabe v. Gen. Foods Corp.*, 811 F.2d 1336, 1339 (9th Cir. 1987). See also *Hunter v. Philip Morris USA*, 582 F.3d 1039, 1043 (9th Cir. 2009); *Hamilton Materials v. Dow Chem. Corp.*, 494 F.3d 1203, 1206 (9th Cir. 2007); *Morris v. Princess Cruises, Inc.*, 236 F.3d 1061, 1067 (9th Cir. 2001).

<sup>20</sup> See, e.g., *Schur v. L.A. Weight Loss Centers, Inc.*, 577 F.3d 752, 764 (7th Cir. 2009) (“[T]he district court must ask whether there is ‘any reasonable possibility’ that the plaintiff could prevail against the non-diverse defendant.”); *Filla v. Norfolk S. Ry. Co.*, 336 F.3d 806, 811 (8th Cir. 2003) (“[T]he district court’s task is limited to determining whether there is arguably a reasonable basis for predicting that the state law might impose liability based upon the facts involved.”). See also *Batoff*, 977 F.2d at 851-52 (reciting the “no reasonable basis” test, but then applying a not “wholly insubstantial and frivolous” standard); *Travis v. Irby*, 326 F.3d 644, 647 (5th Cir. 2003) (equating the “any possibility of recovery” and “reasonable basis” tests).

<sup>21</sup> See, e.g., *Delgado v. Shell Oil Co.*, 231 F.3d 165, 180 (5th Cir. 2000); *Coyne v. Am. Tobacco Co.*, 183 F.3d 488, 493 (6th Cir. 1999).

<sup>22</sup> See, e.g., Jennifer Gibbs, *The Wild West of Improper Joinder in North Texas*, LAW360 (Aug. 17, 2015, 10:59 AM), <http://www.zelle.com/news-publications-394.html> (showing federal court judges in Texas have taken different approaches, leading to different results in deciding fraudulent joinder in insurance coverage disputes); Jessica Davidson Miller & Milli Kanani Hansen, *Fighting Back Fraudulent Joinder in Pharmaceutical Drug and Device Cases*, DRI THE VOICE OF THE DEFENSE BAR (Apr. 13, 2012) (observing that “[s]ome courts – particularly those with a lot of experience in seeing how pharmaceutical and medical device product defect claims normally play out – are highly dubious of efforts to join non-manufacturer parties. Other courts manifest a much narrower view of federal jurisdiction, leading them to more reflexively remand cases regardless of the futility of a plaintiff’s state-law claims again [sic] non-manufacturer parties”).

ability to remove a case involving citizens of different states from state court to federal court. Judge David Hamilton, then a federal district court judge who now serves on the U.S. Court of Appeals for the Seventh Circuit, has characterized the burden of showing fraudulent joinder as “one of the heaviest burdens known to civil law.”<sup>23</sup> Similarly, Judge J. Harvie Wilkinson III, a highly respected judge on the U.S. Court of Appeals for the Fourth Circuit has recognized:

There is a problem with fraudulent jurisdiction law as it exists today, I think, and that is that you have to establish that the joinder of a non-diverse defendant is totally ridiculous and that there is no possibility of ever recovering. That it is a sham. That it is corrupt. That is very hard to do. . . . The problem is that the bar is so terribly high.<sup>24</sup>

This is obviously unfair to both local small businesses that are hauled into court in a dispute in which the real target is another business and to out-of-state businesses that are forced to litigate cases involving citizens of different states before a local court in which plaintiffs are perceived to have an advantage. Experience shows that there is even further unfairness, often after the case is brought back to state court since the plaintiff’s lawyer will drop the local defendant from the case or not pursue a judgment against the local defendant at trial. Those who like the current system say the local defendant really has not endured too much. This is simply not true. Even if the local defendant is reimbursed by the large company for its legal expenses, a small business still may have had its reputation tarnished by a local paper that reports the lawsuit (“Fred’s Hardware Sued for Selling Dangerous Product”). Additionally, its owner and employees have lost time at work, and, as Judge Learned Hand so well understood, suffered severe emotional harm from a baseless lawsuit.

## **II. SOLUTIONS TO PROTECT VICTIMS OF FRAUDULENT JOINDER**

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<sup>23</sup> *Strange v. Crum Constr. LLC*, No. IP01-0789-C-H/G, 2001 WL 1160952, at \*1 (S.D. Ind. Aug. 28, 2001).

<sup>24</sup> See 2014 National Convention, *Diversity Jurisdiction from Strawbridge to CAFA – Event Video*, The Federalist Society (Nov. 17, 2014) <http://www.fedsoc.org/multimedia/detail/diversity-jurisdiction-from-strawbridge-to-cafa-event-video> (directing attention to minute 1:08:33 to 1:10:10).

### **A. Congress Can and Should Adopt a Uniform, Balanced Standard**

To protect victims in this situation, Congress has been considering the “Innocent Party Protection Act” (IPPA), which the House of Representatives has twice passed.<sup>25</sup> The bill is now before the United States Senate. It is strongly supported by groups such as the National Federation of Independent Businesses (NFIB) (representing 325,000 small and independent business owners in the United States).<sup>26</sup>

Congress can provide greater clarity in the law and reduce gamesmanship in litigation by codifying an approach to assessing fraudulent joinder through amending the existing federal statute providing for remand to state courts.<sup>27</sup> IPPA provides just such a solution. It has three core elements.

First, the bill requires federal courts to evaluate whether the plaintiff has stated a “plausible” claim against the non-diverse defendant.<sup>28</sup> It would allow an individual or small business named in a lawsuit to get out of a case if a federal district court judge finds that “it is not plausible to conclude that applicable State law would impose liability on that defendant.”<sup>29</sup> This standard is derived from decisions by the U.S. Supreme Court in the context of a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), which requires a complaint to contain sufficient factual matter, accepted as true, to state a claim that is “plausible on its face” and that does not rely on “mere conclusory statements.”<sup>30</sup> It is a standard that is well understood by federal judges and will not create new

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<sup>25</sup> H.R. 725, 115th Cong. (2017).

<sup>26</sup> *Fraudulent Joinder Prevention Act of 2015: Hearing on H.R. 3624 Before the Subcomm. on the Constitution and Civ. Just. of the H. Comm. on the Judiciary*, 114th Cong. (2015) (testimony of Elizabeth Milito, Senior Executive Counsel, NFIB Small Business Legal Center).

<sup>27</sup> See 28 U.S.C. § 1447(c) (2011).

<sup>28</sup> H.R. 725, 115th Cong. § 2 (as referred to Senate on Mar. 13, 2017) (proposing amendment to 28 U.S.C. § 1447(f)(2)(B) (2011)).

<sup>29</sup> *Id.*

<sup>30</sup> *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).



litigation or confusion to implement because it is an approach for evaluating fraudulent joinder already used by some federal courts.<sup>31</sup>

A plausibility standard will continue to allow plaintiffs who have legitimate claims against local defendants to have their cases decided in state court. All it requires is that if a plaintiff asserts that a local store manager, employee, pharmacist, or retailer is liable, for example, then the plaintiff must describe what that person or business did that subjects it to liability under applicable state law. A conclusory allegation or bare assertion that there is a claim would not be enough for a plaintiff to obtain remand of a case to state court. The plausibility standard will reduce the potential for gamesmanship and make litigation more efficient because courts will assess the actual viability of the claim against the local defendant, rather than render remand decisions based on speculation.

Second, the legislation wisely clarifies that federal court can and should consider whether the plaintiff, in suing a local defendant, has a “good faith” intention of seeking a judgment against that defendant.<sup>32</sup> This provision is drawn from longstanding Supreme Court precedent<sup>33</sup> and this standard is applied in many,<sup>34</sup> but not all,<sup>35</sup> courts. It applies when objective evidence, such as

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<sup>31</sup> See *infra* notes 42-45 and accompanying text.

<sup>32</sup> H.R. 725, 115th Cong. § 2 (as referred to Senate on Mar. 13, 2017) (amending 28 U.S.C. § 1447(f)(2)(D)).

<sup>33</sup> The Supreme Court has included “no intention to pursue” in its fraudulent joinder analysis. See, e.g., *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 98 (1921) (“[The codefendant] was joined [as a defendant] without any purpose to prosecute the action in good faith as against him and with the purpose of fraudulently defeating the employer's right of removal . . . .”) (finding that that joinder was “a sham and fraudulent.”); *Chi., Rock Island & Pac. Ry. Co. v. Schwyhart*, 227 U.S. 184, 194 (1913) (instructing courts to evaluate “whether there was a real intention to get a joint judgment”).

<sup>34</sup> See, e.g., *In re Briscoe*, 448 F.3d 201, 216 (3d Cir. 2006) (recognizing joinder is fraudulent when there is “no real intention in good faith to prosecute the action against the defendant or seek a joint judgment”) (citations omitted); *Boyer v. Snap-on Tools Corp.*, 913 F.2d 108, 111 (3d Cir. 1990) (holding joinder is fraudulent “where there is no reasonable basis in fact or colorable ground supporting the claim against the joined defendant, *or* no real intention in good faith to prosecute the action against the defendant or seek a joint judgment”) (citations omitted) (emphasis added).

<sup>35</sup> See, e.g., *Triggs v. John Crump Toyota, Inc.*, 154 F.3d 1284, 1290-91 (11th Cir. 1998) (“[A] plaintiff's motivation for joining a defendant is not important so long as the plaintiff has the intent to pursue a judgment against the defendant); *Melton v. Gen. Motors Corp.*, No. 1:14-cv-0815-TWT, 2014 WL 3565682, at \*1, n.9 (N.D. Ga. 2014) (relying on *Triggs* to grant remand even when evidence showed Plaintiff's target was automaker, not local auto dealership).

outcomes in similar litigation, indicates that the plaintiff will not pursue the local defendant.<sup>36</sup> This really goes to the heart of the matter. When fraudulent joinder occurs, the plaintiff's lawyer has not added the local defendant to the case for the purpose of imposing a judgment against that party. To the contrary, the lawsuit contains a papier-mâché claim predicated solely on ousting a federal court of jurisdiction in order to get into a warm and friendly local state court.

Third, the bill clarifies that federal courts can consider information beyond the four-corners of the complaint when evaluating whether the plaintiff has fraudulently joined a defendant. A plaintiff would have the opportunity to submit affidavits or other evidence beyond the pleadings to show a "plausible claim for relief" against the non-diverse defendant. A defendant would also have the opportunity to respond with affidavits or other evidence showing that the plaintiff does not have a viable claim against the local defendant or does not have a good faith intention of seeking a judgment against the local defendant. This section of the bill codifies a widely followed judicial practice.<sup>37</sup>

Having a uniform standard for fraudulent joinder will benefit both plaintiffs and defendants and help the federal courts operate more predictably and fairly.<sup>38</sup> The bill adopts an approach that

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<sup>36</sup> See, e.g., *Bentley v. Merck & Co.*, No. 17-1122, 2017 WL 2311299, at \*3 (E.D. Pa. 2017) (finding plaintiffs fraudulently joined Pennsylvania employee of a New Jersey-based pharmaceutical company where, in a similar case, the parties had agreed to dismiss all claims against her); *Faulk v. Husqvarna Consumer Outdoor Prods. N.A., Inc.*, 849 F. Supp. 2d 1327, 1331 (M.D. Ala. 2012) (denying remand where "collective litigation actions," including failure to attempt to serve local defendant, showed Plaintiff would not pursue the individual local defendant); *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Products Liab. Litig.*, 220 F. Supp. 2d 414, 424 (E.D. Pa. 2002) (finding certain doctors, pharmacies, and drug manufacturers were fraudulently joined where prior litigation and submitted affidavits showed Plaintiffs' had no real intention good faith to seek judgment against them).

<sup>37</sup> See, e.g., *Legg v. Wyeth*, 428 F.3d 1317, 1320-23 (11th Cir. 2005) (holding district court erred in refusing to consider affidavits submitted by local sales representatives supporting assertion that representatives were fraudulently joined); *Mills v. Allegiance Healthcare Corp.*, 178 F. Supp. 2d 1, 5-6 (D. Mass. 2001) ("In analyzing a claim of fraudulent joinder, a court is not held captive by the allegations in the complaint.").

<sup>38</sup> One reason for the significant inconsistency in the standards courts apply when evaluating fraudulent joinder is that it is relatively rare that this issue reaches the appellate level because federal law precludes review of remand orders. See 28 U.S.C. § 1447(d); see also *Nerad v. AstraZeneca Pharm., Inc.*, 203 F. App'x 911, 913-14 (10th Cir. 2006) (finding Court was precluded from reviewing remand order in product liability case in which defendant pharmaceutical company alleged plaintiff fraudulently joined sales representative and citing similar rulings in other circuits).

remains deferential to plaintiffs with legitimate claims who want their case decided in a local court. The new standard, however, will allow federal courts to decide cases where there is no viable claim against an individual or business named as a defendant only to thwart federal jurisdiction.

The federal legislation makes only modest, but warranted, changes to the existing system. It does not expand the diversity jurisdiction of the federal courts. It will only impact a small subset of diversity jurisdiction cases that are removed from state court, involve multiple defendants, and require an assessment of fraudulent joinder. As such, the changes made by the bill should not significantly impact the number of cases decided in federal court. The bill does not dictate any results, nor does it tilt a judge's decision on removal one way or another. Rather, the bill simply allows judges to consider additional relevant information in making their decisions. It will result in a more realistic examination of whether a plaintiff has a viable claim against a local defendant and intends to pursue a judgment against that person or small business. If enacted, the bill will reduce the opportunity for gamesmanship in federal courts.

The bill proposes the type of change that federal judges should support. For example, Judge Wilkinson has commented that “making the fraudulent joinder law a little bit more realistic . . . appeals to me [and] . . . addresses some real problems.”<sup>39</sup> He expressed support for addressing this problem by amending the removal statute “at the margins” to make it “more specific” as “exactly the kind of approach that I like because it is targeted.”<sup>40</sup> That is precisely how IPPA addresses this issue.

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<sup>39</sup> Hon. J. Harvie Wilkinson III, 4th Cir., Panel presented by The Federalist Soc'y at the 2014 Nat'l Lawyers Convention, Diversity Jurisdiction from *Strawbridge* to CAFA, 1:09 - 1:09:30 (Nov. 14, 2014), <https://fedsoc.org/commentary/videos/diversity-jurisdiction-from-strawbridge-to-cafa-event-video?autoplay=1> (last visited Nov. 29, 2017).

<sup>40</sup> *Id.* at 1:07:07- 1:08:40 (Judge Wilkinson was responding to a suggestion to amend the statute to permit federal jurisdiction based on the “primary defendant,” viewing this approach as preferable to a minimal diversity approach rooted in the Constitution).

## **B. Federal Courts Can Protect Victims of Fraudulent Joinder**

Courts need not wait for legislative action to develop a more balanced and consistent approach to evaluating fraudulent joinder. After all, IPPA's provisions are drawn from fraudulent joinder jurisprudence; they are not a legislative creation.

Most importantly, courts can adopt a plausibility standard for deciding fraudulent joinder. After the predecessor of IPPA passed the House of Representatives, but failed to be considered in the Senate, the U.S. Court of Appeals for the Fifth Circuit adopted a requirement that a plaintiff's lawyer in naming a local defendant in a diversity of citizenship case show that his or her claim against that defendant meets the plausibility standard.<sup>41</sup> Recognizing confusion and inconsistency in the law, the court reasoned that "by uniformly applying the federal pleading standard, we ensure that the scope of federal subject matter jurisdiction does not differ serendipitously from state to state and district to district, because of nothing more than an accident of geography."<sup>42</sup> While the Fifth Circuit is the first federal appellate court to take this approach, several district courts have done so for years.

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Some who wish to cling to the current piñata of different fraudulent standards in different courts claim the plausibility standard would be hard to apply. This has not born out in practice. Lower courts within its jurisdiction have found no difficulty applying the Fifth Circuit's adopted

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<sup>41</sup> Int'l Energy Ventures Mgmt., LLC v. United Energy Grp., Ltd., 818 F.3d 193, 200-01 (5th Cir. 2016).

<sup>42</sup> *Id.* at 208. Some federal courts, however, continue to look to more relaxed pleading standards applied in state courts when deciding fraudulent joinder, rather than the federal plausibility standard. *See, e.g.*, Hunt v. Nationstar Mortg., LLC, 684 F. App'x 938, 942 (11th Cir. 2017).

<sup>43</sup> *See, e.g.*, Davis v. State Farm Lloyds, No. 3:15-CV-0596-B, 2015 WL 4475860 (N.D. Tex. July 2015); Strizic v. Nw. Corp., No. CV 14-40-H-CCL, 2015 WL 1275404, at \*3 (D. Mont. Mar. 19, 2015); Plascencia v. State Farm Lloyds, No. 4:14-CV-524-A, 2014 U.S. Dist. LEXIS 135081 (N.D. Tex. Sept. 25, 2014); Beavers v. DePuy Ortho., Inc., 2012 WL 1945603, at \*3 (N.D. Ohio May 30, 2012); Okenkpu v. Allstate Tex. Lloyd's, 2012 WL 1038678, at \*7 (S.D. Tex. Mar. 27, 2012).

plausibility standard.<sup>44</sup> Other federal courts should take notice of this result and the fact that the standard works. The standard protects local businesses against lawsuit abuse while preserving a plaintiff's right to bring a legitimate lawsuit. Further, it gives out-of-state businesses sued by an in-state plaintiff the constitutionally protected benefit of a neutral life appointed federal judge to decide the case. This is where federal courts do not have to “wait for Congress” to remedy a wrong. They can do it themselves and not fear that such action will either swamp their courts with new cases or result in endless litigation over the meaning of plausibility.

### **III. A REPLY TO A LEARNED PROFESSOR'S OPPOSITION TO FRAUDULENT JOINDER REFORM**

Andrew Popper, a highly-respected American University law professor, recently published an article in the *Rutgers Law Record* opposing efforts in Congress to address fraudulent joinder.<sup>45</sup> Professor Popper's article, however, is more a broadside attack on “tort reform” than a principled evaluation of the state of fraudulent joinder doctrine and the modest changes that IPPA makes to bring greater consistency and balance to the law.

Professor Popper broadly argues that the Framers of the Constitution viewed state courts as the “primary forum” for protecting the rights and interests of citizens and sought to strictly limit the

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<sup>44</sup> See, e.g., *Reid v. Jo-Ann Stores, LLC*, No. CV H-17-2260, 2017 WL 6508382, at \*3 (S.D. Tex. Dec. 20, 2017) (finding family-owned sewing machine retailer that leased a small area within a national crafts store was fraudulently joined in slip-and-fall case); *Gutierrez v. Allstate Fire & Cas. Ins. Co.*, No. 3:17-CV-0636-D, 2017 WL 2378298, at \*3 (N.D. Tex. June 1, 2017) (finding claims against local insurance adjuster in lawsuit alleging insurer improperly denied insurance claim following storm not plausible); *Giles v. Wal-Mart La. LLC*, No. 16-cv-2413, 2016 WL 2825778, at \*5-6 (E.D. La. May 13, 2016) (finding no plausible slip-and-fall claim against local store manager or local entity that leased store property); *Lowery v. Wal-Mart Stores Texas, LLC*, No. 4:17-cv-0166, 2017 WL 999259, at \*4-5 (S.D. Tex. Mar. 15, 2017) (finding no plausible claim against local store manager in slip-and-fall case); *Thomas v. Exxon Mobil Corp.*, No. CV 16-15750, 2017 WL 371467, at \*2 (E.D. La. Jan. 26, 2017) (finding in toxic tort action that complaint lacked sufficient facts specific to local gasoline seller and that boilerplate statements regarding defendants' knowledge of health hazards failed to meet plausibility standard).

<sup>45</sup> See Andrew Popper, *On The Necessity of Preserving Access to State Courts and Civil Justice: Rediscovering Federalism & Debunking “Fraudulent” Joinder*, 44 RUTGERS L. REC. 160 (2017).

power of the federal courts.<sup>46</sup> While his article repeatedly invokes the constitution, it conspicuously omits any acknowledgment of Article III, Section 2. As discussed earlier in this article, Article III, Section 2 provides that the federal judicial power extends controversies “between citizens of different states.”<sup>47</sup> The Framers were so concerned that state court biases in favor of local interests would undermine confidence in the judiciary to impartially decide disputes that they addressed it explicitly in the Constitution itself.

Further, Professor Popper’s article states that the Federal Rules of Civil Procedure (FRCP) govern removal from state court to federal court.<sup>48</sup> Although the article states that protection of defendants against fraudulent joinder is “covered thoroughly and effectively under the FRCP,”<sup>49</sup> fraudulent joinder is *not* addressed by the federal rules. The U.S. Supreme Court’s adoption of the fraudulent joinder doctrine in the early 1900s preceded the FRCP in 1938,<sup>50</sup> and it remains an area of court-developed law. The FRCP addresses joinder of parties<sup>51</sup> and provides that the rules generally apply to removed actions,<sup>52</sup> but the FRCP does not address what courts call “fraudulent joinder.” In addition, federal diversity jurisdiction and the removal process, both of which are relevant to fraudulent joinder, are set by Congress in the U.S. Code, not found in the FRCP.<sup>53</sup>

While the article asserts that the federal legislation “is not supported by any credible empirical evidence,”<sup>54</sup> as shown earlier and repeatedly observed in academic scholarship, federal courts apply inconsistent and unduly burdensome standards when deciding whether a plaintiff has

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<sup>46</sup> *Id.* at 170.

<sup>47</sup> U.S. CONST. art III, § 2.

<sup>48</sup> Popper, *supra* note 46, at 178.

<sup>49</sup> *Id.* at 179.

<sup>50</sup> *See generally* Wecker v. Nat’l Enameling & Stamping Co., 204 U.S. 176 (1907).

<sup>51</sup> FED. R. CIV. P. 20 (2007).

<sup>52</sup> FED. R. CIV. P. 81(c)(1) (2009).

<sup>53</sup> 28 U.S.C. § 1332(a) (2012); 28 U.S.C. § 1441(b) (2012).

<sup>54</sup> Popper, *supra* note 46, at 181.

fraudulently joined a non-diverse defendant to avoid the jurisdiction of the federal courts. Nor does the article address why application of a plausibility standard, the standard already routinely applied by federal courts when evaluating a motion to dismiss and applied by some courts in the fraudulent joinder context, is unfair to plaintiffs.

Professor Popper views the fraudulent joinder doctrine as providing only a safeguard for national corporations from local courts that will inherently favor local plaintiffs, but there is a flip side of the coin: it protects individuals and small businesses that are pulled into these lawsuits when there is no viable claim against them. The principal purpose of the federal legislation is to protect those people and local businesses. For example, Elizabeth Milito, testifying on behalf of the NFIB Small Business Legal Center, observed that under the current system “plaintiffs actually have perverse incentive to bring weak or attenuated claims against small business defendants for the sake of defeating federal jurisdiction,” siphoning time, money, and energy from their businesses and the emotional toll of defending against an unfounded lawsuit.<sup>55</sup>

Finally, Professor Popper’s article suggests that the federal legislation is undermined by a 2016 Supreme Court of California decision, *Bristol-Myers Squibb Co. v. Superior Court of California*.<sup>56</sup> That case considered whether California courts lack specific jurisdiction to entertain product liability claims brought by plaintiffs who were not California residents and whose claims had no connection to California. The article asserts that the state high court ruling shows it is more efficient for a single court to hear the claims of hundreds of plaintiffs from different states than for individual courts to decide them.<sup>57</sup> Shortly after publication of Professor Popper’s article, the U.S. Supreme Court

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<sup>55</sup> Milito Testimony, *supra* note 27, at 11.

<sup>56</sup> Popper, *supra* note 46, at 183-184 (citing *Bristol-Myers Squibb Co. v. Super. Ct. of Cal.*, 1 Cal. 5th 783, 811 (Cal. 2016)).

<sup>57</sup> *Id.*

reversed this ruling by an 8-1 vote.<sup>58</sup> It recognized that the California court's approach violated the procedural due process rights of defendants because the out-of-state plaintiff's alleged injuries occurred and the sales of the product in question took place outside of the state of California.<sup>59</sup> The U.S. Supreme Court's decision highlights the unfairness (and unconstitutionality) of state courts deciding claims that are unrelated to any material facts that occurred in that state. Efficiency, whether in the context of personal jurisdiction or fraudulent joinder, cannot trump due process.

## **CONCLUSION**

Fraudulent joinder, when allowed, causes both financial harm and emotional pain to individuals and small businesses. Fraudulent joinder also violates larger businesses' constitutional right to have their cases heard in a neutral federal court. Congress should act and the President should sign legislation to curb fraudulent joinder. Until that occurs, federal courts should follow the wise path of the Fifth Circuit and strive toward the same goal.

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<sup>58</sup> *Bristol-Myers Squibb Co.*, 137 S. Ct. at 1784.

<sup>59</sup> *See id.* at 1781.