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Removal from State to Federal Court: The Voluntary-Involuntary Rule—Self v. General Motors Corporation

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VOLUNTARY-INVoLTuRy RULE—SELF v. GENERAL
MOTORS CORPORATION

I. INTRODUCTION

In Self v. General Motors Corp.,1 the Ninth Circuit Court of Appeals addressed the issue of continued adherence to the judicially developed "voluntary-involuntary" rule,2 a rule which is applied in determining the propriety of removal of a case to federal court following the dismissal of a resident defendant.3 The court affirmed the validity of the rule.

The purpose of this note is to examine the consequences of judicial adherence to the rule and to explore the possibility that the Ninth Circuit could have more effectively reconciled the competing policies which underlie removal controversies4 through a less rigid application of the voluntary-involuntary rule.

1. No. 75-1572 (9th Cir. Mar. 30, 1978).
2. District courts are given original jurisdiction to hear civil actions in which the "matter in controversy exceeds the sum or value of $10,000, exclusive of interests and costs, and is between citizens of different States." Id. § 1332.
3. The term "resident defendant" will be used herein to denote a defendant who is a citizen of the same state as the plaintiff. The term "diverse defendant" will describe a defendant who is a citizen of a state other than the plaintiff's.
4. Any question of removal raises two competing policy considerations. On the one hand, there is the developing trend toward restricting federal jurisdiction. See Bradley v. Maryland Cas. Co., 382 F.2d 415, 419 (8th Cir. 1967) (Blackmun, J.) (recognizing trend to restrict but stating such "pronouncements [of trend] are not absolute"); Shamrock Oil Corp. v. Sheets, 313 U.S. 100, 107 (1941) (discussing congressional intent to restrict federal jurisdiction by statutory change which allows only defendants to remove); Ennis v. Queen Ins. Co. of America, 364 F. Supp. 964, 966 (W.D. Tenn. 1973) (recognizing trend to restrict and applying the voluntary-involuntary rule to deny removal); Young Spring & Wire Corp. v. American Guar. & Liab. Ins. Co., 220 F. Supp. 222, 228 (W.D. Mo. 1963) (discussing congressional intent to restrict diversity jurisdiction and practical reasons which have led courts to strictly construe statutes to avoid federal jurisdiction). See generally Note, Removal of Suits to Federal Courts after the Statutory Deadline: An Old Formula Re-examined, 60 HARV. L. REV. 959 (1947) [hereinafter cited as Removal of Suits].

On the other hand, there is a recognition by the courts that the federal removal statutes are expressly designed to afford defendants access to a federal forum and to prevent the fraudulent avoidance of federal jurisdiction. Id. at 965. See Beckman v. Graves, 360 F.2d 148, 149 (10th Cir. 1966) (where original jurisdiction lies in federal court, removal is a statutory right unless specifically prohibited by act of Congress).
II. FACTS OF THE CASE

Plaintiff Christine Smith, a California citizen, sued General Motors Corporation (GMC), a citizen of Michigan and Delaware, and Vern Prior, a citizen of California, for injuries sustained in an automobile accident. The suit was filed in a California Superior Court. On the basis of a covenant not to execute judgment given to Prior by plaintiff,\(^5\) GMC attempted to remove the case to federal court, arguing that Prior was no longer a real party in interest and that his joinder was, therefore, fraudulent. The district court remanded, stating that the joinder was not fraudulent\(^6\) and that despite the covenant, Prior was still a party to the suit. Thus, the requirement of complete diversity had not been satisfied.\(^7\) The suit proceeded in state court to final judgment against both defendants.

GMC alone was granted a new trial. Again it filed a petition to re-

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5. In Self v. General Motors Corp., 42 Cal. App. 3d 1, 12, 116 Cal. Rptr. 575, 582 (1974), the California appellate court recognized that as a result of the covenant, Prior was only a nominal defendant who was retained "apparently to prevent removal of the cause by General Motors on diversity grounds." \(\text{Id.}\)

The court explained further that the "plaintiffs' obvious tactic was to minimize the financial responsibility of Mr. Prior and to emphasize that of General Motors," even though Prior was "the obviously liable defendant" and General Motors "the debatably liable defendant." \(\text{Id. at 13-14, 116 Cal. Rptr. at 583.}\)

The plaintiffs' cause of action arose when Prior, who was driving under the influence of alcohol and drugs, hit the plaintiffs' car, which was stopped on the side of the freeway with a flat tire. The impact knocked the car off the shoulder of the road, at which time the gas tank ruptured and the car caught fire. Two people were killed and two others were severely injured. The plaintiff attempted to establish a products liability case against GMC.

By signing the covenant with Prior, the plaintiff was virtually assured of recovering the amount of Prior's liability insurance yet was able to retain Prior as a defendant, thus preventing diversity. Further, the plaintiff, having agreed not to collect any judgment she might receive from the jury above the insurance amount, avoided the necessity of emphasizing Prior's liability to the jury.

6. No. 75-1572, slip op. at 1053. Unless the plaintiff fails to state a cause of action against the defendant and under settled state law it is obvious that no cause of action can be stated, joinder is not fraudulent. \(\text{See cases cited in 1A Moore's Federal Practice \& 0.161 [2], at 212 n.5 (2d ed. 1978). A fraudulently joined defendant may be ignored in determining diversity. See Parks v. New York Times Co., 308 F.2d 474, 476-79 (5th Cir. 1962), cert. denied, 376 U.S. 949 (1964). However, if there is any possibility that the plaintiff has stated a cause of action against the resident defendant, the joinder will not be deemed fraudulent. See Note, The Effect of Section 1446(b) on the Nonresident's Right to Remove, 115 U. Pa. L. Rev. 264, 264 n.5 (1966) (hereinafter cited as Nonresident's Right). A defective statement of the plaintiff's cause of action or joinder of a judgment-proof defendant is not proof of fraudulent joinder. See Chicago, R.I. & Pac. Ry. v. Schwabart, 227 U.S. 184, 193-94 (1913); Viles v. Sharp, 248 F. Supp. 271, 272 (W.D. Mo. 1965).}\)

7. It has long been established that a case is not removable if any plaintiff is a citizen of the same state as any defendant in the suit. Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806).
move, arguing that the final disposition against Prior eliminated him from the suit and that complete diversity existed. The district court remanded again, ruling that before Prior's dismissal would be considered final, the state appellate process had to be exhausted.

The California Court of Appeal then heard appeals from both GMC and Smith which, once ruled upon, left the trial court's decision undisturbed. The California Supreme Court refused to hear the case. With the state appellate process thus complete, GMC successfully removed the new trial to federal court. Smith appealed to the Ninth Circuit Court of Appeals, challenging the district court's action in permitting removal in the absence of a voluntary act by the plaintiff dismissing the resident defendant.

III. Development of the Rule

The voluntary-involuntary rule is a simple one. If diversity is created as a result of a voluntary act by the plaintiff, then the diverse defendant is allowed to remove. If, however, dismissal of the resident defendant is the result of a court order or other action not voluntarily undertaken by the plaintiff, then removal is improper.

The rule had its genesis in early cases which developed to fill a statutory gap. An early version of the removal statute provided that a motion to remove could be filed "at the time, or any time before the defendant is required by the laws of the State or the rule of the State court in which such suit is brought to answer" the plaintiff's complaint. Not only did this statute result in a variety of times for filing, since the rules in each state varied greatly, but it ignored situations in which diversity only occurred some time after the initial complaint was filed, or after the proceeding had begun. In Powers v. Chesapeake & Ohio Railway, the Supreme Court addressed this issue.

Powers was the first case to present the Court with the issue of removal by a diverse defendant following the dismissal of all resident defendants which occurred after the expiration of the time prescribed for answering the complaint. Although the facts in Powers revealed a voluntary dismissal by the plaintiff, the Court did not make the voluntary-involuntary distinction. Instead, the Court focused on the time period for filing removal petitions, holding that the statutory time limit

9. Id.
10. 1A Moore's Federal Practice § 0.168 [3.-5], at 468, 469 n.7 (2d ed. 1974).
11. 169 U.S. 92 (1898).
could not be literally applied and, therefore, that a diverse defendant should be allowed to remove after "the action assumes the shape of a removable case in the court in which it was brought."\textsuperscript{12} Hence, in \textit{Powers}, plaintiff's delay in dismissing the resident defendants did not defeat the diverse defendant's right to remove.

In \textit{Whitcomb v. Smithson},\textsuperscript{13} decided two years after \textit{Powers}, the Court did make the voluntary-involuntary distinction and held that the dismissal of the resident defendant must be the result of a voluntary act by the plaintiff in order to render a suit removable.\textsuperscript{14} Thus, a directed verdict for the resident defendant in \textit{Whitcomb} did not make the action removable. Subsequent cases at both the Supreme Court and lower court levels solidified the rule by following \textit{Whitcomb} and treating the voluntary nature of the dismissal as the crucial consideration.\textsuperscript{15} Dismissals by summary judgment,\textsuperscript{16} by demurrer to the evidence,\textsuperscript{17} and on the defendant's motion\textsuperscript{18} were consistently held to be involuntary in nature.

In 1949, the removal procedure statute\textsuperscript{19} was amended to allow a defendant to remove within twenty days of the date on which grounds for removal first become apparent.\textsuperscript{20} The amendment does not specifically mention the voluntary-involuntary rule. This omission initially

\textsuperscript{12} \textit{Id.} at 101.
\textsuperscript{13} 175 U.S. 635 (1900).
\textsuperscript{14} \textit{Id.} at 638.
\textsuperscript{15} \textit{See, e.g.}, American Car & Foundry Co. v. Kettelhake, 236 U.S. 311 (1915) (involuntary nonsuit, not removable); Henly v. Community Natural Gas Co., 24 F.2d 252 (N.D. Tex. 1928) (directed verdict, not removable). \textit{See also} Fogarty v. Southern Pac. Co., 121 F. 941 (S.D. Cal. 1903) (removal permitted following voluntary dismissal of resident defendant by plaintiff; voluntary-involuntary distinction not discussed).
\textsuperscript{17} \textit{See, e.g.}, Kansas City Suburban Belt Ry. v. Herman, 187 U.S. 63 (1902).
\textsuperscript{20} Act of May 24, 1949, ch. 139, § 83, 63 Stat. 101. The twenty-day period was changed to thirty days by the Act of Sept. 29, 1965, Pub. L. No. 89-215, 79 Stat. 887. The statute, in relevant part, reads:

(b) The petition for removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a petition for removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

\textit{Id.}
wrought a number of conflicting approaches to this aspect of removal.\textsuperscript{21} A majority of the courts, however, soon resolved to interpret the amendment as a congressional affirmation of the judicially developed rule.\textsuperscript{22}

Courts have adopted two approaches in applying the voluntary-involuntary rule. The majority in \textit{Self} illustrates the formalistic approach. This approach utilizes neat categories of "voluntary" and "involuntary" and frequently results in summary dispositions of those cases which fall into a voluntary or involuntary category.\textsuperscript{23}

\textsuperscript{21} \textit{Nonresident's Right, supra} note 6, at 267. One approach treats the amendment as superseding the voluntary-involuntary rule; another treats the amendment as codifying the rule; a third interprets the amendment as merely a procedural law which does not speak to the issue of what renders a case removable. \textit{Id.} at 267-71.

\textsuperscript{22} \textit{See Weems v. Louis Dreyfus Corp.,} 380 F.2d 545 (5th Cir. 1967), in which the court rejected the argument that the voluntary-involuntary rule did not survive the 1949 amendment. The \textit{Weems} court discussed Lyon v. Illinois Cent. R.R., 228 F. Supp. 810 (S.D. Miss. 1964), one of the few cases which treated the rule as having been abolished by the amendment. The \textit{Weems} court criticized the \textit{Lyon} court for failing to consider the significance of the legislative history of the amendment. The history indicated that the amendment was "declaratory of the existing rule laid down by the decisions" and cited \textit{Powers} as an illustration of that rule. H.R. Rep. No. 352, 81st Cong., 1st Sess. 1248, 1268 (1949).

\textsuperscript{23} Inevitably, however, fact situations arise which are more obscure and difficult to categorize. For example, in \textit{Pullman Co. v. Jenkins,} 305 U.S. 534 (1939), a plaintiff brought suit in state court against a diverse defendant and its employee, who was fictitiously named in the complaint and whose citizenship was not alleged. The controversy involving the diverse defendant was not separable from that involving the Doe defendant. When plaintiff failed to serve the Doe defendant, the diverse defendant attempted to remove the case. The Court held that the plaintiff's failure to serve process on the Doe defendant did not justify the removal. The Court presumed that the Doe defendant was a resident of the same state as the plaintiff. It placed the burden on the diverse defendant to prove otherwise, that is, to prove that the controversy was "wholly between citizens of different states."

In \textit{Southern Pac. Co. v. Haight,} 126 F.2d 900 (9th Cir.), \textit{cert. denied,} 317 U.S. 676 (1942), plaintiff sued a diverse railroad and two resident Doe employees who were not served. The court held that the plaintiff, by electing to proceed on the day of the trial in spite of the lack of service upon the resident defendants, committed the voluntary act necessary to render the suit removable. The "act" was the election to proceed when the state court asked the plaintiff if she wanted to begin trial. The failure to serve was merely a voluntary omission and alone did not qualify as a voluntary act, according to the court.

On the other hand, although failure to serve process may be only a voluntary omission not rendering the suit removable, in \textit{New England Oil & Pipe Line Co. v. Broyles,} 87 Okla. 55, 209 P. 312 (1922) plaintiff's failure to appear and the subsequent default judgment for the resident defendant together did constitute a voluntary "act" by the plaintiff, and removal by the diverse defendant was allowed.

In \textit{Halsey v. Minnesota-South Carolina Land & Timber Co.,} 54 F.2d 933 (E.D.S.C. 1932), the court was faced with the situation of a resident defendant who died while the litigation was in progress. The court held that plaintiff had not voluntarily dismissed the defendant and removal was denied.

In \textit{Kincheloe v. Hopkins,} 4 F. Supp. 196 (N.D. Okla. 1933) the resident defendants successfully demurred and plaintiffs requested a new trial against the diverse defendants only.
courts, as well as the dissent in \textit{Self}, advocate an approach, which views judicial efficiency as the substantive rationale behind the rule: \textsuperscript{24} the rule “promotes judicial efficiency by ‘prevent[ing] removal of those cases in which the issue of the resident defendant’s dismissal has not been finally determined in the state courts.’” \textsuperscript{25}

The dissent in \textit{Self} explained the mechanics of the rule which result in efficient judicial administration. Generally, a voluntary dismissal occurs prior to commencement of trial. Removal at this point in time does not involve the risk of duplication of proceedings. In addition, because of its voluntariness, the dismissal is certain to be conclusive, and there is no risk that a diversity-destroying defendant will be reinstated later on appeal. \textsuperscript{26}

Conversely, dismissals by court order or by other acts which are involuntary as to the plaintiff usually occur after commencement of trial. Removal at this point results in a duplication of the part of the proceedings already accomplished and the risk that on a successful appeal by the plaintiff, the resident defendant will be reinstated and the federal court will be divested of its jurisdiction over the case. Further, the removal of the case to federal court would cut off any right to appeal of the resident defendant since the state court is deprived of power to act after removal. \textsuperscript{27}

\section*{IV. REASONING OF THE COURT}

Upon review of the district court’s finding that the suit was removable on the basis of diversity, the court of appeals in \textit{Self} reversed and remanded the case to the district court. The appellate court concluded that resident defendant Prior had not been dismissed from the case by a voluntary act of the plaintiff and, thus, that the prerequisite to removal under the voluntary-involuntary rule had not occurred. \textsuperscript{28}

Addressing

\footnotesize{The court denied removal because an appeal was pending against the resident defendants on the issue of the demurrer. The denial turned on the involuntary nature of the demurrer, ignoring the voluntary act of requesting a new trial against only the diverse defendants.


25. No. 75-1572, slip op. at 1055 (citing Weems v. Louis Dreyfus Corp., 380 F.2d 545, 546 (5th Cir. 1967) (discussed in note 22 \textit{supra}).


27. \textit{Id.} at 1059-60 (Ely, J., dissenting). The dissent noted further that although the diverse defendant may attempt to remove after the period in which the resident defendant may appeal has elapsed, removal at this point would necessitate inefficient repetition of the evidence.

28. \textit{Id.} at 1057.
the district court's initial remand of the case, the court noted that a
reversal of the decision that the covenant not to execute judgment did
not constitute a voluntary dismissal of Prior was prevented by the fed-
eral rules because the lower court's decision was not clearly errone-
ous.29

The court contended that the Powers-Whitcomb line of cases, which
developed the voluntary-involuntary rule with respect to removal by
diversity, is analogous to the line of cases which addressed the issue of
removability on federal question grounds, a line of cases headed by the
decision in Louisville & Nashville Railroad v. Mottley.30 The Mottley
rule reaffirmed the general rule that jurisdiction is conferred upon a
federal court only if the plaintiff's pleadings reveal a cause of action
based on the laws or the Constitution of the United States. Further, the
Court held in Mottley that if the plaintiff, in his complaint, anticipates
a defense and asserts that such defense is invalid under federal law, the
federal question is not an integral part of the plaintiff's cause of action
and removal must be denied.31

The Self majority cited two cases in particular to support its conten-
tion that, just as Supreme Court decisions bind lower courts to a for-
malistic rule regarding federal question removal, so do the decisions
bind them in diversity removal cases. In Great Northern Railway v.
Alexander,32 although the parties were diverse at commencement of
the suit, removal was prevented by the plaintiff's allegation that the suit
involved Federal Employers' Liability Act (FELA) provisions.33 Plain-

29. Id. at 1053 n.2 (citing FED. R. CIV. P. 52a which states, in relevant part: "In all actions
tried upon the facts without a jury or with an advisory jury . . . [f]indings of fact shall not be
set aside unless clearly erroneous . . . "). As stated by the court in Graves v. Walton
County Bd. of Educ., 410 F.2d 1153 (5th Cir. 1969), the clearly erroneous standard for ap-
pellate review is a strict one. A finding of fact cannot be set aside merely because a review-
ing court disagrees with the lower court's conclusion or construction of the facts, when there
is evidence to support the lower court's finding. However, a finding is clearly erroneous
when, after considering the evidence, a reviewing court is left with a definite and firm con-
viction that a mistake has been committed, that the evidence supporting the finding was
inadequate, or that the lower court's action was prompted by an erroneous view of the law.
See United States v. United States Gypsum Co., 333 U.S. 364 (1948); Arkansas Valley Feed
Mills, Inc. v. Fox De Luxe Foods, Inc., 273 F.2d 804 (8th Cir. 1960). The rule applies to
findings of fact, but a mixed finding of fact and law is subject to review free from the clearly
1968) (holding that the question of whether plaintiff sustained his burden of proving defend-
ant's blasting operations caused alleged damage was mixed question of law and fact).
30. 211 U.S. 149 (1908).
31. Id. at 152.
32. 246 U.S. 276 (1918).
against a railroad employer by an employee if the employee is injured while the railroad is
tiff subsequently failed to prove facts which would have brought the suit under the FELA. Defendant attempted to remove on the basis of diversity, arguing that the suit then stood as if the FELA allegations had never been made. The Supreme Court held that removal was improper because the allegations of the complaint showed a nonremovable cause of action. "[T]he plaintiff may by the allegations of his complaint determine the status with respect to removability of a case, arising under a law of the United States . . . ."34

In Alabama Great Southern Railway v. Thompson,35 the plaintiff brought suit against a diverse railroad and a resident individual defendant. The railroad removed on the grounds that the suit against it was a separable controversy. The Supreme Court held that, although it was unlikely that the plaintiff could recover jointly, "the right to remove depe[n]s upon the case made in the complaint . . . ."36 The complaint itself did not state a "separable controversy wholly between citizens of different States." Thus, plaintiff's cause of action was treated as a joint one for removal purposes, irrespective of whether or not it was later shown that the plaintiff had no right to a joint recovery.37

Both Great Northern, a case arising under the laws of the United States, and Alabama, a case involving diversity removal, reiterate the principle of Mottley and its progeny that the plaintiff's pleadings are determinative for removal purposes. The plaintiff controls the proceedings by his allegations even when the defendant offers proof contrary to such allegations38 or contradicts such allegations in his answer.39

Apparently on the basis of similar language and reasoning, the majority in Self used Great Northern and Alabama to illustrate the "common origins" of the Mottley and Powers lines of authority,40 and it concluded that the voluntary-involuntary rule applies in the same formalistic fashion as the Mottley rule.41

In addition to supporting its opinion with the Mottley analogy, the


34. 246 U.S. at 282.
35. 200 U.S. 206 (1906).
36. Id. at 217.
37. Id. at 218-19.
38. Great Northern Ry., 246 U.S. at 281.
40. No. 75-1572, slip op. at 1056.
41. Id. at 1055-56.
Self majority defended its stand by asserting the demise of the efficiency/finality rationale.\textsuperscript{42} Although that rationale is recognized by some lower courts, it was rejected by the Supreme Court in \textit{Lathrop, Shea & Henwood Co. v. Interior Construction & Improvement Co.}\textsuperscript{43} In \textit{Lathrop}, the Court denied removal in accordance with the voluntary-involuntary rule, even though the state appellate process had been exhausted. The Court thereby implicitly rejected the efficiency/finality rationale.

Judge Ely, in a footnote to his dissent in \textit{Self}, dismissed the significance of the \textit{Lathrop} opinion:

The Supreme Court's decision in \textit{Lathrop} . . . is rather obscure on the issue of whether the state appellate process had been completed with respect to plaintiff's appeal of the dismissal of the resident defendant. At least three commentators have viewed the holding of this decision, that removal was improper, as ultimately resting on plaintiff's right of state appellate review, a right that had not yet been exhausted.\textsuperscript{44}

Judge Ely criticized the majority's mechanical and formalistic application of the rule to the facts in \textit{Self}. He contended that the facts warranted an approach sensitive to the underlying rationale of the rule. Judge Ely argued that the language in \textit{American Car & Foundry Co. v. Kettelhake}\textsuperscript{45} "indicates that the voluntary-involuntary doctrine is only a rough vehicle of convenience to determine finality of the dismissal."\textsuperscript{46} He reasoned that only where efficiency and comity are of overriding concern should the voluntary-involuntary rule be invoked to deny removal. "Repetition of the shibboleth after the need for it has evaporated elevates the imperfect vehicle over the policies it is designated to carry. The nonresident defendant's right to a federal forum is frustrated for no good reason."\textsuperscript{47}

\textsuperscript{42} See notes 24-27 supra and accompanying text.

\textsuperscript{43} 215 U.S. 246 (1909).

\textsuperscript{44} No. 75-1572, slip op. at 1061 n.7 (Ely, J., dissenting). See Removal of Suits, supra note 4, at 962 & n.21; Note, Federal Practice: Removal After Resident Defendant Is Involuntarily Dismissed, 17 OKLA. L. REV. 336, 337 (1964); Nonresident's Right, supra note 6, at 266 & n.13.

\textsuperscript{45} 236 U.S. 311 (1915).

\textsuperscript{46} No. 75-1572, slip op. at 1061 (Ely, J., dissenting) (emphasis added). The language of \textit{Kettelhake} to which Judge Ely referred includes a paragraph which reads:

[Where there is a joint cause of action against defendants resident of the same State with the plaintiff and a non-resident defendant, it must appear, to make the case a removable one as to a non-resident defendant because of dismissal as to resident defendants, that the discontinuance as to such defendants was voluntary on the part of the plaintiff, and that such action has taken the resident defendants out of the case, so as to leave a controversy wholly between the plaintiff and the non-resident defendant.]

\textit{Id.} (quoting \textit{Kettelhake}, 236 U.S. at 316 (emphasis added by Judge Ely)).

\textsuperscript{47} \textit{Id.} at 1060.
V. Critical Analysis of the Majority's Position

GMC argued that the formal voluntary-involuntary rule should be relaxed. In response, the majority in Self noted that if the court were free to do so, it might be persuaded by the facts involved to modify the rule and permit removal.48 The majority insisted, however, that the court did not have such freedom and was "obliged to follow the formalistic approach adopted by the Supreme Court."49

The dissent disagreed, arguing that the voluntary-involuntary rule is a flexible one and that, in light of the peculiar facts of Self, federal jurisdiction may have been proper. A close examination of the majority's position, together with a review of Supreme Court cases which expressly support the efficiency/finality rationale, reveals support for the dissent's position.

A. Majority’s Use of Supreme Court Authority

The majority relied on the Supreme Court’s opinion in Lathrop,50 construing it as a refutation of the efficiency/finality rationale. In that case, the plaintiff sued a resident railroad and a diverse construction company. A referee dismissed the case with respect to the railroad and the dismissal was affirmed by the Appellate Division of the Supreme Court of New York. After two unsuccessful attempts, the construction company finally succeeded in removing to federal court, where the suit was dismissed for lack of jurisdiction over the construction company.51 The United States Supreme Court, however, reversed and remanded the case, directing the lower court to remand to state court. The Court stated that the removal itself had been improper because of the involuntary nature of the dismissal of the railroad company.52

The dissent in Self contended that the Lathrop opinion does not make clear whether the state appellate process had been exhausted.53 This contention, however, is not supported by a reading of the lower court decisions. The second removal petition filed by the construction company was denied because the appeal of the railroad's dismissal was pending in state court.54 By granting the construction company's third

48. Id. at 1057 n.6.
49. Id.
50. See notes 43 & 44 supra and accompanying text.
52. 215 U.S. at 249-51.
53. See note 44 supra and accompanying text.
petition to remove, the federal court implied that it was satisfied that the appellate process had been completed. The Supreme Court, in reversing, clearly relied upon the involuntary nature of the dismissal of the resident defendant, not upon any lack of finality.\footnote{55}{215 U.S. at 249-51.}

A more valid criticism of the \textit{Self} majority's position involves the extent to which it relied upon \textit{Lathrop}. The majority failed, as the dissent pointed out, to review equally pertinent pre- and post-\textit{Lathrop} authority bearing on the question of the Supreme Court's approach to the voluntary-involuntary rule. In \textit{Yulee v. Vose},\footnote{56}{99 U.S. 539 (1879).} for example, the plaintiff, a citizen of New York, sued Yulee, a citizen of Florida, and various New York residents. The complaint was dismissed as to all the defendants. The New York Court of Appeals reversed as to Yulee and remanded his case for a new trial. He then petitioned for removal to federal court. In ruling on the propriety of the removal, the Supreme Court declared that "the controversy, so far as it concerned Yulee, not only could be, but actually had been by judicial determination, separated from that of the other defendants. This . . . gave Yulee a right to the transfer of his part of the suit to the [federal] Court . . . ."\footnote{57}{Id. at 546.} Thus, \textit{Yulee} is an example of removal after an involuntary dismissal of the resident defendant, and after the completion of the appellate process.

Of course, \textit{Yulee}, decided twenty years prior to \textit{Powers},\footnote{58}{See notes 11-12 \textit{supra} and accompanying text.} is not, standing alone, very persuasive when considered in light of the great volume of cases supporting the \textit{Powers-Whitcomb} rule.\footnote{59}{Id. at 11-18 \textit{supra} and accompanying text.} It is fair to say that, despite any position of importance \textit{Yulee} may have had,\footnote{60}{\textit{Yulee} has been cited in few cases. \textit{See}, e.g., Parks v. New York Times Co., 195 F. Supp. 919 (M.D. Ala. 1961), rev'd, 308 F.2d 474 (5th Cir. 1962), cert. denied, 376 U.S. 949 (1964); Stonybrook Tenants Ass'n v. Alpert, 194 F. Supp. 552 (D. Conn. 1961); Mayor of Baltimore v. Weinberg, 190 F. Supp. 140 (D. Md. 1961).} it has been superseded by the \textit{Powers} line of cases. Nevertheless, the \textit{Yulee} decision remains significant in that its spirit, if not its exact letter, was reiterated by the Supreme Court in post-\textit{Powers} cases such as \textit{American Car & Foundry Co. v. Kettelhake.}\footnote{61}{236 U.S. 311 (1915). See also Kansas City Suburban Belt Ry. v. Herman, 187 U.S. 63 (1902) (discussing the prerequisites to removal, particularly the requirement that the controversy be wholly between citizens of different states).} The Court in \textit{Kettelhake} denied removal when the resident defendants were dismissed by an involuntary nonsuit. However, the Supreme Court noted that "the resident defendants had not 'so completely disappeared from the case as to
leave the controversy one entirely between the plaintiff and a non-resident . . . .' 62 The appeal as to the resident defendants was pending. Thus, declared the Court, "The element upon which the decision in the Powers Case depended,—the voluntary dismissal and consequent conclusion of the suit in the state court as to resident defendants,—is not present in this case." 63

On the basis of Kettelhake, one may conclude that the Court in Lathrop had not conclusively rejected finality as an important factor in its approach to the rule. Notwithstanding the assertion of the majority in Self, this factor has continued to play a role in federal court decisions up to the present time. 64

**B. Majority’s Analogy to Mottley**

The majority supported its position by drawing an analogy between the voluntary-involuntary rule and the Mottley rule. 65 Having drawn this analogy, the majority concluded that the voluntary-involuntary rule must be applied in the same formalistic manner that has characterized applications of the Mottley rule. 66 Although the majority’s "common origins" theory is supportable, its conclusion is not convincing.

The Mottley principles have not been as rigidly applied as the majority in Self asserts. The courts have been cognizant of the need to strike a balance between the policy of permitting a plaintiff to control the proceedings and the defendant’s right to be heard in a federal forum. Fairness to both parties requires that a court determine the real nature of the claim asserted in the complaint. 67 Thus, for example, in causes of action over which jurisdiction is vested exclusively in the federal courts, the federal court will ignore the plaintiff’s pleadings and permit removal when the plaintiff has wrongly characterized his cause of ac-

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62. 236 U.S. at 316. See note 46 supra.

63. Id. at 317. The language quoted is so imprecise that both the dissent and the majority in Self could rely on it. The Supreme Court stated that the one "element" on which Powers turned was missing in Kettelhake. However, the Court went on to describe this element as "the voluntary dismissal and consequent conclusion of the suit." (emphasis added). A reading of the two opinions in Self reveals that modern courts regard "voluntary dismissal" and "conclusion of the suit" as two elements.


65. See notes 30-41 supra and accompanying text.

66. No. 75-1572, slip. op. at 1056.

The court will allow the removal petition to supplement the plaintiff's pleadings for the purpose of establishing the federal question. There are other situations in which the court will look beyond the plaintiff's complaint to determine removability. In the case of fraudulent joinder of parties, the court cannot confine its examination to the plaintiff's pleadings inasmuch as the pleadings are the very thing in question.

Obviously, the fact that removal is permitted after commencement of a suit prevents courts from rigidly interpreting the rule to mean that only the allegations of the complaint are relevant for determining removal. The rule must at least be flexible enough to include amended pleadings.

In practice, as even the Self majority concedes, courts might not look to the pleadings at all, but rather to "the context in which they are found" in determining removability. In Southern Pacific Co. v. Haight, for example, the plaintiff never formally amended her pleadings to indicate a dismissal of the resident Doe defendants. The fact that the pleadings included such defendants, plaintiff argued, defeated diversity. The court, however, allowed removal on the basis of her act of announcing her willingness to proceed at the time of trial against the resident defendants.

70. See, e.g., Smoot v. Chicago, R.I. & Pac. R.R. Co., 378 F.2d 879, 881-83 (10th Cir. 1967) (court may look beyond pleadings to determine if joinder, though fair on the face of the complaint, is a sham to prevent removal); McLeod v. Cities Service Gas Co., 233 F.2d 242, 246 (10th Cir. 1956) (may show fraudulent joinder by any means available if proved with certainty). But see Bohanan v. Atchison, T. & S.F. Ry. Co., 289 F. Supp. 490 (W.D. Okla. 1968) (if the joinder was fraudulent, that fact was or should have been apparent to defendant from face of plaintiff's complaint; knowledge subsequently acquired by deposition was of no consequence in determining removability).
71. See, e.g., Evangelical Lutheran Church v. Stanolind Oil & Gas Co., 251 F.2d 412, 414-16 (8th Cir. 1958) (for purposes of determining whether separate and independent claim exists, rule limiting examination to "plaintiff's pleadings" does not mean to "plaintiff's complaint," unless only a complaint has been filed; time for removing runs from date of plaintiff's replies).
72. No. 75-1572, slip op. at 1057. Accord, Landmark Tower Assocs. v. First Nat'l Bank of Chicago, 439 F. Supp. 195, 196 (S.D. Fla. 1977) (the district court "should be guided by the principle that 'in practice, the federal courts usually do not limit their inquiry to the face of plaintiff's complaint, but rather consider the facts disclosed on the record as a whole in determining the propriety of removal.' ") (quoting Villarreal v. Brown Express, Inc., 529 F.2d 1219, 1221 (5th Cir. 1976)).
73. 126 F.2d 900 (9th Cir.), cert. denied, 317 U.S. 676 (1942).
diverse defendant, without having served the Doe defendants. The court viewed her election to proceed as, in effect, a dismissal of such defendants.\(^7^4\) Thus, the court clearly looked beyond the plaintiff's pleadings to find diversity.

If the majority in \(Self\) had recognized the flexibility it is afforded in applying the voluntary-involuntary rule, and had reviewed the context in which the elimination of the resident defendant, occurred, it might have avoided a "continued wooden adherence"\(^7^5\) to a rule—the application of which was not justified by the facts. Although Prior, the resident defendant, was still named in the complaint as a defendant, he had actually been eliminated from the suit as a result of the final judgment against him and the covenant not to execute judgment.

C. Review of the Covenant

The majority in \(Self\) declared that rule 52a of the Federal Rules of Civil Procedure,\(^7^6\) which precludes full review of a finding of fact unless such finding is clearly erroneous, prevented a full review of the district court's decision that Prior remained a party to the action notwithstanding the covenant not to execute judgment given to him by plaintiff. It is not altogether clear, however, that such a question is purely one of fact.\(^7^7\) Certainly the question whether a covenant was signed is one of fact. But the legal effect of a covenant on the status of the parties thereto perhaps best fits within a murky category identified by one commentator as "the product of applying law to fact."\(^7^8\)

Unfortunately, "both federal and state cases clash hopelessly in classifying law application by a trial judge as a factual or legal matter. . . . Even single circuits, ignoring conflict in their own opinions, have applied Rule 52(a) inconsistently. . . . This is particularly true of the Ninth Circuit."\(^7^9\)

Had the court of appeals fully reviewed the issue of the covenant, it

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\(^{74}\) Id. at 902-05.
\(^{75}\) No. 75-1572, slip op. at 1060.
\(^{76}\) See note 29 supra.
\(^{77}\) If the question is not purely one of fact, it is not subject to the clearly erroneous restriction and may be reviewed. See note 29 supra.
\(^{79}\) Id. at 1022-23 & n.26 (footnotes omitted). Further, Weiner warns that "the appellate court may simply declare, without further comment, that the question is one of law or one of fact. Presumably, if the court feels that a trial judge's determination should be reversed, it will classify it as a legal conclusion, thereby making reversal easier." Id. at 1022 (footnotes omitted). Conversely, if the legal conclusion is called a finding of fact, the appellate court can avoid deciding legal issues when it agrees with the result of the trial. Id. at 1022 & n.20.
probably would have concluded that the district court was correct in deciding that the covenant alone did not constitute a voluntary dismis-
sal. However, had the appellate court followed the approach taken in Southern Pacific Co. v. Haight,80 and examined the context of the diversity issues before them, it might have held that the covenant, in conjunction with the final judgment against Prior, did constitute a vol-
untary dismissal.81

In the recent case of Bumgardner v. Combustion Engineering, Inc.,82 a federal district court ruled that the dismissal of a resident defendant by a covenant which becomes final, permits removal by the remaining di-
verse defendant. There, the court allowed removal after a covenant not to execute judgment was given by the plaintiff to the resident defend-
ant. The court held that the settlement constituted a voluntary discon-
tinuance of the action against that defendant. The court cited Gable v.
Chicago, Milwaukee, St. Paul & Pacific Railroad83 as persuasive au-
thority. Gable involved a similar settlement between the plaintiff and the resident defendant.84 In holding that removal was proper after such a voluntary act by the plaintiff, the court concluded that “there is no difference between extinguishing a controversy by a voluntary dis-
missal in court and extinguishing it by a settlement of the controversy out of court. Indeed, the settlement even more finally extinguishes the controversy than the dismissal.”85 In Self, although there was a judg-
ment on the merits, all avenues of appeal had been exhausted and, as a result of the covenant, the finality of the case against Prior was conclu-
sively established. As stated in the dissent, “Prior’s continued joinder [was] a sham and should [have been] ignored in determining diver-

80. 126 F.2d 900 (9th Cir.), cert. denied, 317 U.S. 676 (1942). See notes 73-74 supra and accompanying text.
81. This would not be unlike situations in which a diverse defendant and the plaintiff stipulate to the joinder of a resident defendant. Because the diverse defendant has agreed to the joinder, he cannot be heard to complain that diversity has been destroyed. See 1A Moore’s Federal Practice ¶ 0.161[1], at 209 (2d ed. 1978). Similarly, the plaintiff who executes and obtains the benefits of a covenant not to execute judgment should not be al-
lowed to complain when, as a result, diversity between the genuinely interested parties is created.
83. 8 F. Supp. 944 (W.D. Mo. 1934).
84. The document signed in Gable was a covenant not to sue which, the Bumgardner court held, has the same legal effect as a covenant not to execute judgment. 432 F. Supp. at 1292.
85. 8 F. Supp. at 946. The court in Gable cautioned that it is not enough to show that a settlement exists because a settlement can always be contested. Rather, the party seeking removal must present clear and convincing proof that the settlement is binding and final. Id. at 946-47.
The issue of the covenant never arose, however, because the court, while indicating its misgivings in this case, adhered to a formalistic approach to the rule. The apparent weaknesses of the majority's argument that it was strictly bound by Supreme Court authority to act as it did suggest that there were other unspoken factors which tipped the scale in the plaintiff's favor in the balancing of competing policies.

Judge (now Justice) Blackmun wrote in *Bradley v. Maryland Casualty Co.*, that the court "recognize[s] that there may be a trend toward restriction, rather than enlargement, of federal diversity jurisdiction . . . and that removal statutes are to be strictly construed" against federal jurisdiction.

Although the judicial interest in restricting diversity jurisdiction remained unexpressed in *Self*, another court focused on it in *Ennis v. Queen Insurance Co. of America*. In *Ennis*, although removal was allowed in light of a fraudulent joinder, the court indicated that it was unsympathetic to the voluntary-involuntary rule, a rule which, in the interests of restricting diversity jurisdiction, prevents removal even in factual situations in which judicial efficiency is not furthered by an application of the rule.

The current discussion in the legal community and Congress regarding the restriction of diversity jurisdiction focuses on several considerations, including heavily congested federal court trial dockets.
Professor Moore noted in his treatise on federal practice:

It is . . . well to remember that the determination of the sufficiency of defendants' compliance with the procedural provisions [of § 1446] is often influenced by two factors: a desire on the part of some judges to avoid further burdening their trial dockets; and the undeniable fact that to remand is usually safer than to retain.95

Understandably, a conservative approach to removal is called for in certain situations. In *Young Spring & Wire Corp. v. American Guarantee & Liability Insurance Co.*96 the court explained, "[I]f removal is permitted in a doubtful case and the defendant who removed suffers an adverse judgment he may attack the removability of the case on appeal and secure a reversal on the grounds of lack of jurisdiction of the District Court."97 Preventing such reversals is clearly a legitimate reason for strictly construing removal statutes.

But the fact remains that the law affording a defendant a federal forum has not yet been changed, and if the requirements of the statute are met, the right to remove is absolute.98 The fact that the federal courts are overburdened does not warrant the undermining of a federal law by the judiciary. The district court should exercise care in protecting a party's statutory right to a federal forum, particularly in light of present statutory law declaring that a district court's remand order is not reviewable on appeal, except in certain civil rights cases.99

VI. Conclusion

The criticisms of the majority's approach in strictly adhering to the voluntary-involuntary rule give rise to consideration of alternative approaches which would have more consistently reflected the policies which underlie the rule, and which would have permitted federal jurisdiction on the facts presented.

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95. 1A Moore's Federal Practice ¶ 0.168, at 445 (2d ed. 1978).
97. Id. at 228.
First, the court could have retained the rule in its strict form and, nevertheless, could have held that removal was proper in that the execution of the covenant, together with the finality of the judgment against Prior, was sufficient to support federal diversity jurisdiction.

Second, the court could have seized this opportunity to apply the rule more flexibly, as the dissent in *Self* suggested. A flexible approach would allow federal diversity jurisdiction when it appears that considerations of efficiency and comity are satisfied. Under this approach, a litigant’s access to federal court would be protected except at the expense of efficiency. For example, removal might be denied when it would result in the repetition of part of the state court proceedings.

The majority’s position is clearly supported by the case law, which reflects a rigid adherence to the voluntary-involuntary rule. The suggested alternatives are, admittedly, a departure from this rigid adherence. However, such a departure is supported by a minority of the courts. Perhaps the court’s failure to adopt a more flexible approach to the rule might also indicate the absence of a judicial conviction that the defendant in *Self* was entitled to a federal forum. Seen in this light the conclusion of the majority and the absence of such a conviction may best be understood in light of the current trend toward limiting diversity as a ground for federal jurisdiction.

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