

And They're Off! Snap Removal: "A Race to the Courthouse"

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Introduction: At the Starting Gate.

The excitement of a horse race builds as fans watch horses and their jockeys enter the gate, eagerly awaiting the famed call – “And they’re off!” Just like a jockey poised at the starting gate of a horse race, a good defense attorney knows that as soon as a plaintiff files a complaint, the race is on to best position the case before the first turn. One of the greatest practical challenges corporate defendants face in early litigation is the prospect of a hostile forum. Many plaintiffs’ attorneys recognize the value of bringing their lawsuit in state court, a forum often acknowledged as more hostile to large corporations and manufacturers. As a result, defense attorneys must assess the prospect of removal to federal court very early in the life of the case.

Removal is proper pursuant to 28 U.S.C. § 1441 under a limited number of circumstances. A defendant may remove to federal court if: (1) the claim against it is a matter of federal question under 28 U.S.C. § 1331; or (2) under 28 U.S.C. § 1332, if the amount in controversy is greater than \$75,000 and there is complete diversity between the plaintiff and defendants. As many attorneys recall from 1L Civil Procedure nightmares, 28 U.S.C. § 1441 also limits a defendant’s ability to remove an action from state court to federal court even when the requirements of diversity jurisdiction are met.

What if a plaintiff names another defendant that resides in the forum state? 28 U.S.C. §1446(b)(2), known as the forum defendant rule, limits removal as follows:

[a] civil action otherwise removable solely on the basis of the jurisdiction under section 1332(a) of this title may not be removed 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.

So, if a named defendant resides in the forum, the case is not removable, right? Based on 28 U.S.C. § 1332(d)(4)(A)(i)(II), which contains the caveat that a federal district court may not exercise jurisdiction where at least one defendant is a citizen of the state in which the action was filed, that would appear to be the case. But, not so fast....

Focusing on key language included in 28 U.S.C. § 1441(b)(2) – “properly joined and served” – defendants can remove a diversity case to federal court, despite the presence of a forum defendant, under certain circumstances. Using a technique affectionately coined “snap removal,” defendants can still remove a case to federal court with a forum defendant based on diversity grounds – but only if they act quickly.

However, defense attorneys must be mindful of the applicable case law for the federal circuit to which they seek to remove the case. 28 U.S.C. §1446(b)(2)(A) has been

subject to wide interpretation across different jurisdictions. While some circuits permit snap removal under the plain reading of 28 U.S.C. § 1441(b)(2)'s "properly joined and served" language, others disapprove of snap removal as gamesmanship.

Off to the Races: When Should You Consider Removing to Federal Court?

A defense attorney must quickly evaluate whether snap removal is possible, and, if so, advantageous. But, first things first – is it even possible to remove? This consideration requires determining which defendants are forum defendants and whether those defendants have been "properly joined and served." If a forum defendant has been served, the evaluation halts, unless that defendant was improperly joined.

Further, a defense attorney must remember that snap removal does not defeat the core diversity requirements of 28 U.S.C. § 1332. In other words, snap removal does not get one around the complete diversity requirement, only the forum defendant rule. If there is a lack of complete diversity, an attempted snap removal will be remanded, as was the case in *Woods v. Ross Dress of Less, Inc.*, 833 F. App'x 754 (10th Cir. 2021). The growing canon of snap removal case law shows that its application is limited to 28 U.S.C. § 1441's forum defendant rule and cannot circumvent the requirements of diversity jurisdiction. As a result, it appears that snap removal will only be effective if the plaintiff is not a resident of the forum in which she filed an action – if she is, there is a lack of complete diversity between the plaintiff and the forum defendant and snap removal does not help.

Of course, if a forum defendant has not yet been served, a defense attorney should evaluate whether removal would be advantageous to her client. Many state courts are viewed as plaintiff-friendly forums, which can be hostile toward outside defendants. Federal court affords other advantages to the defendant, such as lifetime-appointed judges, more rigorous enforcement of scheduling deadlines, more robust limitations on fact discovery, an improved summary judgment standard, stronger application of *Daubert*, and the unanimous jury verdict requirement. However, there are instances where a defendant might choose to remain in state court, such as if the federal district would include more liberal areas than the state court. An early assessment of whether snap removal is possible and advantageous based on the forum is the initial step.

Rounding the Turn: A Wrinkle in the Game Play.

It is well-established that defendants can remove a case to federal court if all defendants and all plaintiffs are citizens of different states (and the amount in controversy requirement is met). 28 U.S.C. § 1332(a). However, as laid out above, under the forum defendant rule, a civil action that is "otherwise removable solely on the basis of [diversity of citizenship] may not be removed if any of the parties in interest **properly joined and served** as a defendant is a citizen of the State in which such action is brought." 28 U.S.C. § 1441(b)(2) (emphasis added). But what does "properly joined and served" mean? Is it as simple, as defense attorneys contend, that a defendant must receive service of process? Or does that produce an "absurd and

bizarre result?” *Encompass Ins., Inc. v. Stone Mansion Rest., Inc.*, 902 F.3d 147, 152 (3d Cir. 2018).

Snap removal was first mentioned in passing by a federal appellate court in 2001 in *McCall v. Scott*, 239 F.3d 808, 813 n.2 (6th Cir. 2001), spurring a flurry of snap removals across the country. As defendants nationwide raced to the courthouse, federal courts were faced with the dilemma of whether snap removal is a viable strategy or merely a questionable ploy to avoid unfavorable forums. The answer, of course, is a lawyer’s favorite rejoinder – “it depends.”

Federal circuit courts are divided when it comes to permitting snap removal. The Second and Fifth Circuits both approve snap removal under the plain reading of 28 U.S.C. § 1441(b)(2). See, e.g., *Texas Brine Co. v. Am. Arbitration Ass’n*, 955 F.3d 482 (5th Cir. 2020); *Gibbons v. Bristol-Myers Squibb Co.*, 919 F.3d 699 (2d Cir. 2019). For example, in *Texas Brine*, Texas Brine, a Texas plaintiff, sued the American Arbitration Association (the “AAA”) and two of its arbitrators, Anthony DiLeo and Charles Minyard, both residents of Louisiana, in Louisiana state court to vacate an arbitration award granted against it by the AAA. However, before Texas Brine could serve DiLeo or Minyard, the AAA removed the case to the United States District Court for the Eastern District of Louisiana. Based on the plain reading of the “properly joined and served” language contained in 28 U.S.C. § 1441(b)(2), the Fifth Circuit held that the case was “otherwise removable” at the time the AAA filed its notice of removal because neither DiLeo nor Minyard had been served. *Id.* at 486. In other words, the forum defendant rule did not prevent a non-forum defendant from removing a case to federal court if the case was removed before the forum defendant was served.

However, district courts in other jurisdictions have held that courts cannot ignore a named, non-diverse defendant simply because it has not been served at the time of removal. In 2020, the United States District Court for the District of New Jersey held that when applying the forum defendant rule, the “assertion that only the citizenship of defendants who have been served is relevant to the diversity jurisdiction analysis” is incorrect. *Mecca v. Ecosphere, LLC*, No. 20-cv-12769, 2020 U.S. Dist. LEXIS 210076, at *10 (D.N.J. Nov. 10, 2020). In other words, all of the named defendants, whether properly served or not, must be taken into account when determining diversity for removal purposes. A year later, in 2021, the New Jersey federal district court held in *Victorin v. LaSalle* that “diversity is determined for removal purposes based on the citizenship of defendants named in the complaint; a court cannot ignore a defendant simply because that defendant was not yet served.” 2021 U.S. Dist. LEXIS 31196, at *12 (D.N.J. Feb. 18, 2021). Likewise, the Eastern District of Pennsylvania remanded an action removed from state court when complete diversity between the plaintiff and defendant did not exist on the face of the complaint, notwithstanding the plaintiff’s failure to serve the non-diverse forum defendant before removal. *Janaski v. Dettore*, No. 15-0072 (JP), 2015 U.S. Dist. LEXIS 46594, at *1-2 (E.D. Pa. Apr. 9, 2015).

Many circuits have not yet officially weighed in on the issue of snap removal. See, e.g., *HSBC Bank, USA, N.A. v. Fid. Nat’l Title Grp., Inc.*, 2022 U.S. Dist. LEXIS 54707 (D. Nev. Mar. 25, 2022). The Sixth Circuit, for example, has not yet offered its

interpretation of 28 U.S.C. § 1441(b) and snap removal beyond a single sentence footnote in *McCall*. Nonetheless, in 2018, the Northern District of Ohio rejected the literal interpretation of § 1441(b)'s "properly joined and served" language, opining that this interpretation encourages an end run around the forum defendant rule. *El Hassan v. URS Midwest, Inc.*, No. 5:18-cv-1227, 2018 U.S. Dist. LEXIS 197832, at *3 (N.D. Ohio Nov. 20, 2018). In January 2022, the Northern District of Ohio revisited its rejection of snap removal, reasoning that interpreting the forum defendant rule to permit snap removal encourages defendants to engage in impermissible gamesmanship. *Gordon v. Goodyear Tire & Rubber Co.*, 2022 U.S. Dist. LEXIS 673, at *16 (N.D. Ohio Jan. 3, 2022). Likewise, the Seventh Circuit continues to hold out on delivering an explicit ruling regarding snap removal; however, the Northern District of Illinois has condemned snap removal as a "loophole [that] essentially writes the forum-defendant rule out of existence for any defendants with the resources and wherewithal to monitor exhaustively local court filings." *Norwegian Air Shuttle ASA v. Boeing Co.*, 530 F. Supp. 3d 764, 770 (N.D. Ill. Mar. 30, 2021).

Snap removal law is still developing. When practicing in circuits where the law is less than clear on snap removal's viability, a defense attorney should always brush up on the recent case law decided by the federal district court to which she seeks removal.

A final consideration is who can effectuate snap removal. In jurisdictions permitting snap removal, it is common for a non-resident defendant to file for removal. This aligns with the strategy behind snap removal – avoiding favoritism for in-state litigants. However, the Third Circuit has permitted a not-yet-served forum defendant to effectuate removal to federal court. *Encompass Ins.*, 902 F.3d at 147 (allowing a Pennsylvania defendant sued in Allegheny County, Pennsylvania, to remove to federal court). It is more likely than not that other courts permitting snap removal will follow suit. See *Latex Constr. Co. v. Nexus Gas Transmission, LLC*, 2020 U.S. Dist. LEXIS 122244 (S.D. Tex. July 13, 2020) (permitting snap removal by a not-yet-served forum defendant who was the sole defendant named in the case). No matter which defendant seeks removal, it is important to be aware of any wrinkles in play that may arise, especially when forum defendants are named in a complaint or there is not complete diversity.

The Home Stretch: Steps in a Successful Snap Removal.

28 U.S.C. § 1446(b)(2)(A) provides procedural requirements for effectuating snap removal: (1) removal must be joined by all defendants "who have been properly joined and served"; and (2) "[e]ach defendant shall have 30 days after receipt by or service on that defendant of the initial pleading or summons ... to file the notice of removal[.]" After determining if snap removal is viable and benefits her client, a defense attorney should move quickly to accomplish three things before a forum defendant is served. The timing of these three steps is key; if even one step is incomplete before the forum defendant is served, snap removal will likely fail.

First, the removing defendant must file a notice of removal in federal court. Second, the removing defendant must promptly file a notice of removal in State Court. Third, the removing defendant must provide notice to all named defendants. 28 U.S.C. §

1446(d). All defendants who have been properly joined and served at the time the notice of removal is filed must consent to the removal.

Practical Tips and Tricks.

Defense attorneys should have a system in place for anticipating and executing a successful snap removal. Electronic docketing facilitates snap removal by allowing constant monitoring of lawsuits filed against clients. A good rule of practice is to review state court dockets at least once a day to check for any new complaints filed against one's corporate clients. Early detection of a lawsuit may make all the difference in removing to federal court. This is especially true with snap removal, when every second counts.

In certain types of litigation, the same actors are frequently sued in a single action. For this reason, some defense attorneys compile lists of the most commonly served defendants and their counsel so that they can quickly check with a forum defendant to see if they have been served. Having such a list decreases the amount of time needed to identify and contact the various defendants identified in a new complaint. It is advisable to contact each named forum defendant to confirm that they have not been served. Defendants should also be on alert for a plaintiff's counsel who requests a waiver of service, which can sever the possibility of snap removal.

Conclusion.

Despite courts' inconsistent guidance, snap removal remains a viable option, depending on the case law in the district and circuit courts to which a defendant seeks removal. However, time is of the essence. Developing a cohesive strategy early, after evaluating the merits of removal, can lead to a successful run out of the starting gate and give your client a better position down the track.



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