NO SNAP DECISIONS HERE: FEDERAL DISTRICT COURTS REMAIN DIVIDED OVER PRE-SERVICE "SNAP REMOVAL" EVEN AS APPELLATE COURTS ENDORSE THE PRACTICE

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U.S. Appellate Litigation Alert

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A. THE ISSUE: CAN AN IN-STATE DEFENDANT REMOVE TO FEDERAL COURT BASED ON DIVERSITY JURISDICTION BEFORE RECEIVING SERVICE OF PROCESS, A MOVE KNOWN AS "SNAP REMOVAL"?

A Washington State plaintiff sues Illinois defendants in Illinois state court seeking millions of dollars on state law claims. Realizing that total diversity of citizenship exists, the defendants examine whether they can remove the case to federal court. But the plaintiff has planned for this: She sued the defendants on their home turf, knowing that the "forum defendant rule" in 28 U.S.C. § 1441(b)(2) would doom their removal efforts—or so she thought.

The defendants learn about the lawsuit from an electronic docket alert. They file a notice of removal in federal court, file a copy in state court, and notify the plaintiff—all before she can serve them with process. Now in federal court, the plaintiff moves to remand back to state court. Her motion relies heavily on § 1441(b)(2), which states that "[a] civil action otherwise removable solely on the basis of [diversity] jurisdiction . . . 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."

Under the plain language of the statute, the defendants argue, this rule doesn't apply because the plaintiff had not "properly joined and *served*" them when they removed the case. The plaintiff counters that reading the statute that way encourages shenanigans and undermines a motivating policy of the forum defendant rule, which is to recognize that a resident defendant doesn't need the protection against local bias that diversity jurisdiction is thought to provide.

The issue here is whether the defendants' maneuver—called "snap removal"—violates the forum defendant rule. The term "snap removal" was first used in *Breitweiser v. Chesapeake Energy Corp*., where the court borrowed it from the plaintiff's briefing to describe removal based on diversity jurisdiction that happens before service on an in-state defendant.[1] Federal courts differ widely over the validity of this practice. Some hold that the words "properly joined and served" in § 1441(b)(2) plainly allow snap removal if no forum defendant has been served. Others see it as an unfair tactic that causes strange results and fits poorly with the purpose of the statute.[2]

Splits exist both between and within federal judicial districts: The U.S. District Court for the Central District of California, for example, has said that snap removal "would eviscerate the purpose of the forum defendant rule" by

allowing "removability to turn on the timing of service rather than the diversity of the parties."[3] The Northern District of California, however, "has consistently held a defendant may remove an action" before service, even when the defendant resides in the forum state; yet the Northern District "ha[s] not been perfectly consistent in [its] approach to" snap removal.[4] And the Central District recently endorsed the practice,[5] resulting in decisions in both districts on both sides of the issue. Other federal district courts are also split.[6]

B. THE SECOND AND THIRD CIRCUITS—THE ONLY FEDERAL APPELLATE COURTS TO ADDRESS THE ISSUE DIRECTLY—INTERPRET § 1441(B)(2)'S FORUM DEFENDANT RULE TO PERMIT SNAP REMOVAL.

In August 2018, the U.S. Court of Appeals for the Third Circuit became the first federal appellate court to address whether an unserved forum defendant can remove a diversity case. In *Encompass Insurance Co v. Stone Mansion Restaurant Inc*., the defendant had previously agreed to waive formal service but then refused to return the acceptance-of-service form until after filing for removal.[7] The district court denied the plaintiff's motion for remand and granted the defendant's motion to dismiss. On appeal, the Third Circuit held that the plain text of § 1441(b)(2) precludes removal "on the basis of in-state citizenship only when the defendant has been properly joined and served." The court explained that while diversity-based removal "exists in part to prevent favoritism for in-state litigants and discrimination against out-of-state litigants," the "properly joined and served" language in § 1441(b)(2) is meant "to prevent a plaintiff from blocking removal by joining as a defendant a resident party against whom it does not intend to proceed, and whom it does not even serve." The court reasoned that allowing snap removal did not undermine this policy and affirmed the denial of remand.[8]

In March 2019, the Second Circuit reached the same conclusion in *Gibbons v. Bristol-Myers Squibb Co*.[9] Citing the Third Circuit's decision in Encompass, it ruled that the forum defendant rule "is inapplicable until a home-state defendant has been served in accordance with state law; until then, a state court lawsuit is removable." The court explained that absurdity of results "cannot justify a departure from the plain text of the statute." It also rejected the plaintiff's argument that state law differences in service requirements would lead to inconsistent application, since "state-by-state variation is not uncommon in federal litigation," and allowing snap removal "is neither absurd nor fundamentally unfair."[10]

C. THE SECOND AND THIRD CIRCUIT DECISIONS SUGGEST AN EMERGING CONSENSUS, BUT UNCERTAINTY WILL CONTINUE UNTIL OTHER APPELLATE COURTS WEIGH IN.

Encompass and *Gibbons* reflect an emerging dominant (it does not seem quite accurate yet to call it a "majority") approach to the question of whether snap removal violates the forum defendant rule. But while some district courts outside the Second and Third Circuits view these decisions as persuasive authority,[11] others still reject snap removal and will order remand.[12]

At least one such court has offered a textual basis for ordering remand. In *Bowman v. PHH Mortgage Corp*., the Northern District of Alabama asserted that "the statute is more ambiguous than other courts have supposed" and adopted an alternative reading of § 1441(b)(2): "[T]he text tells courts . . . to see if 'any of the parties . . . properly joined and served as defendants is a citizen of the' forum state," said the court. "But what if there are no parties properly joined and served as defendants? The word 'any' as used in the text [of § 1441(b)(2)], is a pronoun" which presupposes that at least one defendant has been joined and served. Thus, said the court, although pre-service removal is generally allowed, if there is an in-state defendant, the case cannot be removed "until at least one defendant has been properly joined and served." The court held that requiring service on at least one defendant before removal fits better with the purpose of the "joined and served" language to prevent plaintiffs from suing sham defendants to block removal. The court also said that the Encompass approach "ignor[es] the larger purpose of the forum defendant rule . . . to deny in-state defendants the needless protection of diversity jurisdiction."[13] The defendant appealed, and the case is pending before the Eleventh Circuit.

Based on the statutory text, it could be argued that *Encompass* and *Gibbons* offer a more compelling reading of § 1441(b)(2) than *Bowman*.[14] Reading the word "any" to presuppose, and thus to require, that at least one defendant has already been served might overlook the statute's other statement that it applies only to cases that are "*otherwise removable* solely on the basis of diversity jurisdiction." If service on a defendant is a prerequisite for diversity-based removal if there is a forum defendant, then the case arguably is not "otherwise removable" and *Bowman's* interpretation falters. Reading the statute to require service on at least one defendant also seems inconsistent with its use of the plural ("parties," "defendants") to describe the class in which a resident defendant's membership will work to preclude removal. One could also argue that *Bowman* views the statute's underlying policy too narrowly: Yes, the forum defendant rule recognizes that diversity jurisdiction is unnecessary to protect a resident defendant, but nothing in the statute seems to indicate clearly an affirmative policy of *denying* that protection. Rather, the statute seeks to balance among the plaintiff's choice of forum, the purpose of diversity jurisdiction, and defeating sham tactics used to block removal. As one court pointed out, "[f]ailing to further a purpose is not equivalent to the purpose's impairment . . . . Interpreting 'joined and served' to permit pre-service removal does not impair an out-of-state defendant's ability to avoid possible prejudices in state court."[15]

Even in judicial districts that permit snap removal, courts have identified additional factors that can impact whether a defendant can successfully execute the maneuver. For instance, defendants should consider the following:

- If service occurs before a defendant completes all the procedural steps for removal—file in federal court, notify adverse parties, and file in state court—snap removal will fail.[16]
- Some courts recognize that the word "joined" in § 1441(b)(2) means that snap removal only works if there are multiple defendants, though other courts disagree.[17]
- Some courts have hinted that they would disallow snap removal if done in a way that denies the plaintiff a chance to effect service,[18] while other courts allow snap removal even if done minutes after the plaintiff files suit.[19]
- Variations in state law regarding service of process can affect how snap removal will work, if at all. For example, Delaware apparently requires a delay between filing and service, while Washington State lets a plaintiff serve first and file later.[20]

Uncertainty on this issue will likely persist until more appellate courts weigh in. Based on the current state of authority, this may not happen quickly.[21] Multiple factors could explain why. Electronic access to state court dockets is a relatively new resource, compared to the federal PACER system. In addition, snap removal may be somewhat less likely than other issues to come up for appellate review, given that orders granting remand are often not reviewable due to statutory constraints,[22] and that orders denying remand are not appealable final judgments.[23] Given the sharp divides among district courts on this issue, however, it is extremely likely that more federal appellate courts will have their say on snap removal. If similar divisions emerge at that level, too, the U.S. Supreme Court may be asked to examine the question.

Some writers have called for Congress to amend the forum defendant rule to expressly prohibit snap removal, arguing that the practice is inconsistent with good public policy.[24] Federal courts of appeal, however, increasingly recognize that the plain language of § 1441(b)(2) permits snap removal, and that even if "the procedural result demonstrates a need for a change in the law," such a change is up to Congress.[25]

Disclosure: DC Wolf was counsel of record in *Monfort v. Adomani, Inc.*

[1] *Breitweiser v. Chesapeake Energy Corp.,* 3:15–CV–2043–B, 2015 WL 6322625, at *2, nn. 5–6 (N.D. Tex. Oct. 20, 2015).

[2] *Compare Regal Stone Ltd. v. Longs Drug Stores Cal., L.L.C.*, 881 F. Supp. 2d 1123, 1127–28 (N.D. Cal. 2012) (recognizing that defendants may "monitor[] state court dockets so that, as soon as a case is filed, they can speedily remove"), with *Perez v. Forest Labs., Inc.,* 902 F. Supp. 2d 1238, 1243 (E.D. Mo. 2012) (voicing disapproval of the same practice).

[3] *Mass. Mut. Life Ins. Co. v. Mozilo,* No. 2:12-cv-03613-MRP-MAN, 2012 WL 11047336, at *2 (C.D. Cal. June 28, 2012).

[4] *Loewen v. McDonnell,* No. 19-cv-00467-YGR, 2019 WL 2364413, at *7–8 (N.D. Cal. June 5, 2019).

[5] *Zirkin v. Shandy Media, Inc.*, No. 2:18-cv-09207-ODW (SSx), 2019 WL 626138, at *4 (C.D. Cal. Feb. 14, 2019).

[6] *See, e.g., Blankenship v. Napolitano,* No. 2:19-cv-00236, 2019 WL 3226909, at *4 (S.D. W.Va. July 17, 2019) (discussing split between the Northern and Southern Districts of West Virginia).

[7] *Encompass Ins. Co. v. Stone Mansion Rest. Inc.*, 902 F.3d 147, 150 (3d Cir. 2018).

[8] *Id*. at 152–54 (citations omitted).

[9] *Gibbons v. Bristol-Myers Squibb Co.*, 919 F.3d 699, 707 (2d Cir. 2019).

[10] *Id*. at 705–07.

[11] *See, e.g., Monfort v. Adomani, Inc.,* No. 18-CV-05211-LHK, 2019 WL 131842, at *3 (N.D. Cal. Jan. 8, 2019) ("[T]he Court is persuaded by the reasoning of the Third Circuit . . . ."); Blankenship, 2019 WL 3226909, at *4 (following the *Encompass/Gibbons* approach).

[12] *See, e.g., Teamsters Local 677 Health Servs. & Ins. Plan v. Friedman*, No. CCB-18-3868, 2019 WL 5423727, at *4 (D. Md. Oct. 23, 3019).

[13] *Bowman v. PHH Mortg. Corp*., No. 2:19-cv-00831-AKK, 2019 WL 5080943, at *2–3, *6 (N.D. Ala. Oct. 10, 2019), *appeal docketed*, No. 19-14041 (11th Cir. Oct. 11, 2019).

[14] See also Dechow v. Gilead Scis., Inc., 358 F. Supp. 3d 1051, 1055–56 (C.D. Cal. 2019) (reasoning that the Ninth Circuit's interpretation of similar "joined and served" language in 28 U.S.C. § 1446(b)(2)(A) confirms that the Encompass approach is correct).

[15] *Monfort*, 2019 WL 131842, at *4 (citation omitted).

[16] *Doe v. Valley Forge Military Acad. & Coll.,* No. 19-1693, 2019 WL 3208178, at *6 (E.D. Pa. July 15, 2019) (ordering remand because, though defendant filed notice of removal in federal court before plaintiff effected service, it did not file a copy in state court until after service).

[17] *Compare Tourigny v. Symantec Corp.,* 110 F. Supp. 3d 961, 964 (N.D. Cal. 2015), with Valley Forge, 2019 WL 3208178, at *2 n.3.

[18] *See, e.g., Jacob v. Mentor Worldwide, LLC,* 393 F. Supp. 3d 912, 920–21 (C.D. Cal. 2019) (suggesting that remand may be proper if a defendant removes the case before the plaintiff even has a chance to effect service), *appeal docketed*, No. 19-56391 (9th Cir. Nov. 27, 2019).

[19] *Dutton v. Ethicon, Inc*., — F. Supp. 3d. —, 2019 WL 5304169, at *7 (D.N.J. 2019).

[20] *Compare Gibbons*, 919 F.3d at 706, *with* Wash. Super. Ct. Civ. R. 3(a).

[21] Two earlier cases indirectly addressed the issue in dicta. *See Goodwin v. Reynolds,* 757 F.3d 1216, 1221 (11th Cir. 2014) (disapproving of snap removal as "gamesmanship"); *McCall v. Scott,* 239 F.3d 808, 813 n.2 (6th Cir. 2001) (although plaintiff had waived its argument against snap removal, that argument lacked merit).

[22] 28 U.S.C. § 1447(d) provides that "[a]n order remanding a case . . . is not reviewable on appeal or otherwise . . . [absent certain exceptions for civil rights cases and those involving the U.S. government]." The limits this statute places on appellate review, however, are narrower than its text might suggests. *See Baker v. Kingsley*, 387 F.3d 649, 653–54 (7th Cir. 2004) (this statute only bars review of remand premised on lack of jurisdiction or defects in removal procedure).

[23] *See, e.g., Encompass*, 902 F.3d at 151 (identifying the district court's dismissal under Fed. R. Civ. P. 12(b)(6) as the jurisdictional basis for reviewing the denial of remand).

[24] *See generally* Valerie M. Nannery, *Closing the Snap Removal Loophole*, 86 U. CIN. L. REV. 541 (2018).

[25] *Encompass*, 902 F.3d at 154.

