How to Avoid 'Snap Removals'

Defendants are seizing on opportunities to remove cases to federal court immediately after they are filed—and before plaintiffs can even serve the forum defendant. Here's what to know about this growing trend and steps you can take to keep your case in state court.

By || Danielle Gold and Rayna E. Kessler

Under 28 U.S.C §1441, a defendant may remove a case from a state court to a federal district court only if the federal court has original jurisdiction over that case. When the federal court's original jurisdiction is based on diversity, §1441(b)(2) imposes an additional condition known as the forum defendant rule: "A civil action otherwise removable solely on the basis of the jurisdiction under 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."[1] Thus, the forum defendant rule prohibits removal based on diversity when a defendant is a citizen of the forum state in which the plaintiff originally filed the case.[2] The purpose of the "properly joined and served" language was to prevent fraudulent joinder of an in-state defendant to block other out-of-state defendants from properly removing the case to federal court based on diversity jurisdiction.[3]

Corporate defendants are now using this language to exploit a loophole opened by technological advances to engage in forum shopping and gamesmanship. Many state courts now require complaints to be filed electronically or are in the process of

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implementing an electronic filing system to reduce court costs and make documents more readily available to the public. Corporate defendants have seized on this as an opportunity to remove cases to federal court—within minutes of a case being filed. To accomplish these "snap removals," these defendants have hired people to troll state electronic dockets and immediately file notices of removal before a plaintiff has any reasonable opportunity to serve the forum defendant.

Some plaintiffs have resigned to hiring process servers to sit outside a defendant's headquarters with a laptop and wireless printer to serve the complaint as soon as it is filed and docketed. However, even with such drastic tactics, defendants are still removing cases before plaintiffs can serve the complaint.

As a result, more cases likely will be heard in federal court. To avoid snap removal and rely on the forum defendant rule to litigate a case in state court with an out-of-state plaintiff, plaintiff attorneys must prepare in advance of filing to ensure the complaint can be served immediately on the forum defendant after clicking "upload." The same holds true for cases filed in jurisdictions that have not yet adopted electronic filing—defendants have become more vigilant in monitoring all dockets for purposes of removal. Counsel should serve a copy of the electronically filed complaint on the forum defendant as soon as possible.

Where the Circuits Stand

Over the years, courts have grappled with the application of §1441(b)(2). Defendants consistently argue that the language of the statute is clear, and thus, the plain meaning of the statute controls.[4] However, plaintiffs have relied on case law explaining a basic tenet of statutory construction: that courts should interpret a law to avoid absurd and bizarre results.[5] Most district courts remain divided on whether removal is appropriate before the complaint is served on the named forum defendant. Only a few circuit courts have addressed this issue directly because plaintiffs cannot immediately appeal a decision denying remand.[6] However, defendants have argued that dicta from Sixth and Seventh Circuit opinions control on the issue of pre-service removal pursuant to §1441(b)(2).[7]

In *Goodwin v. Reynolds*, the Eleventh Circuit addressed pre-service removal in the context of whether a defendant's "substantial" right of removal was defeated by the district court granting the plaintiff's motion to dismiss the case without prejudice and refile in state court.[8] However, the underlying facts of *Goodwin* prompted the court to chastise the defendants for the precise type of gamesmanship defendants are now regularly engaging in.[9]

In *Goodwin*, the plaintiff filed her case in Alabama state court and on the same day requested and paid for the service of process on all named defendants by the state court clerk.[10] The plaintiff provided courtesy copies of the complaint to all three named defendants; however, the clerk's office was unable to process the service packages due to staff shortages.[11] Three days after suit had been filed, but before the plaintiff could properly effectuate service on the defendants, the case was removed to federal court.[12]

The Eleventh Circuit explained that "the only reason this case is in federal court is that the non-forum defendants accomplished a pre-service removal by exploiting, first, [p]laintiff's courtesy in sending them copies of the complaint and, second, the state court's delay in processing [p]laintiff's diligent request for service.... Defendants would have us tie the district court's hands in the face of such gamesmanship on the part of Defendants."[13] In finding that the district court did not abuse its discretion in granting the plaintiff's motion, the court concluded that if it were to accept the defendants' argument that the removal statute is intended to protect their right to removal, the statute's "properly joined and served" language would be turned on its head.[14]

Unfortunately, more recent decisions from the Second and Third Circuits have rejected the argument that such defense tactics produce the level of absurd and bizarre results that warrant judicial intervention. Accordingly, both circuits have now issued conclusive opinions that the plain meaning of §1441(b)(2) is to be applied in these situations.

In *Encompass Insurance Co. v. Stone Mansion Restaurant Inc.*, the Third Circuit accepted a literal interpretation of the "properly joined and served" language of §1441(b)(2) in finding that the forum defendant's "pre-service machinations" to remove the case to federal court did not constitute an absurd or bizarre result.[15] Like other district courts around the country, courts within the Third Circuit had been split on the application of the forum defendant rule. However, at least one district court had held that §1441(b) barred removal by a forum defendant, regardless of whether it had been served.[16]

Now that *Encompass* controls, this is particularly significant to New Jersey state court practice, for example, when

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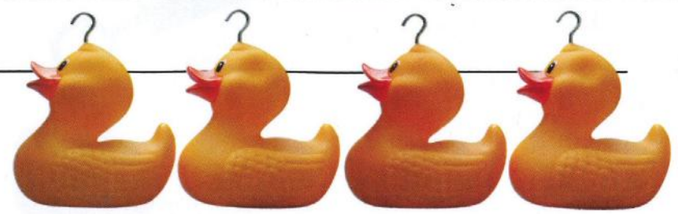

out-of-state plaintiffs have consistently litigated against in-state pharmaceutical and medical device manufacturers. New Jersey federal courts have already applied *Encompass* and upheld pre-service removal by New Jersey defendants in cases filed by out-of-state plaintiffs.[17] District courts outside of New Jersey and Pennsylvania have quickly adopted *Encompass* and, unfortunately, it is anticipated that this will be a growing trend.[18]

Even more recently, the Second Circuit in *Gibbons v. Bristol-Myers Squibb Co.* cited to *Encompass* in upholding the removal of 45 actions filed in Delaware state court to the then-pending Eliquis multidistrict litigation consolidated in the Southern District of New York.[19] The plaintiffs argued that application of the plain meaning of §1441(b)(2) produces an absurd result and will lead to non-uniform application of the removal statute, particularly because Delaware requires a delay between filing and service.[20]

The Second Circuit disagreed and held that absurdity cannot justify a departure from the plain text of the statute, even if it produces results that a court or litigant finds anomalous or unwise.[21] Addressing the plaintiffs' second argument regarding non-uniform application of the forum defendant rule, the court held that state-by-state variation is not uncommon in federal litigation, including in the removal context, and variation alone does not justify departure from the plain text of §1441(b)(2).[22]

Tackling the Problem

When relying on the forum defendant rule for state court jurisdiction, immediate service of a complaint cannot be over-emphasized. As soon as the complaint is filed electronically or otherwise, your process server should be prepared to serve the forum defendant or its agent with copies of the complaint in which they can fill in the docket number. This is particularly true when bringing an action against a large corporation with resources to employ docket trolls to monitor filings made in state court dockets. In fact, defense counsel is now recommending that all "frequently sued parties may want to invest in electronic monitoring of state court dockets to identify suits pre-service and consider removing these cases."[23]

It is also worth noting that a very small minority of states permit service before filing a complaint, commonly referred to as "pocket service."[24] In these jurisdictions, pocket service is a useful way to prevent snap removals.

Be alert to the fact that defense counsel often removes cases that are inappropriate for removal even when relying on the "plain meaning" interpretation and that defendants may fail to comply with the requirements to effect removal.[25] 28 U.S.C. §1446(d) spells out the procedure for removal of cases to federal court.

A recent case highlights those obligations: In *Hardman v. Bristol-Myers Squibb Co.*, the court held the plain meaning of §1446(d) requires defendants to file a notice of removal with the federal court, provide notice to adverse parties, and file a copy of the notice of removal with the state court.[26] In *Hardman*, the plaintiffs had served their complaint on the forum defendants before the defendants filed their removal notice and affidavit of service with the state court.[27] Thus, the court reasoned that the defendants had not complied with all three statutory requirements to effect removal prior to service of the complaint, and the plaintiffs' motion for remand was granted.[28]

Another common scenario is the failure to certify that all defendants who

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are properly joined and served consent to the removal of the action.[29] For example, a forum defendant may have been served before removal, but defense counsel failed to confer with its client before filing the notice of removal. For improper removals such as these, counsel may seek both statutory and Federal Rule of Civil Procedure 11 sanctions.[30] Rule 11 sanctions are the most appropriate when it is clear that defense counsel made no effort to confer with the client before filing the notice of removal.

In addition, the fact that many of these removals happen within minutes of filing the state court complaint—in one case in New Jersey, as little as nine minutes[31]—understandably raises concerns as to whether an attorney is even reviewing the notice of removal papers before filing. Therefore, plaintiff attorneys should actively seek sanctions when there is a clear failure to comply with Rule 11 and thus prevent future improper removals.

Plaintiff attorneys can no longer depend on the forum defendant rule to keep a case in state court without preparations for immediate service of the complaint. While plaintiffs are being deprived of their rights to the appropriate forum and the acts of removal are impinging on states' rights, more courts likely will choose to apply the plain meaning of 28 U.S.C. §1441(b)(2). Be expeditious with service, and seek sanctions when applicable to protect your clients' rights. ■

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NOTES

1. 28 U.S.C. §1441 (Westlaw current through P.L. 116–17). This was enacted in 1948 and revised by the Federal Courts Jurisdiction and Venue Clarification Act of 2011.
2. *See, e.g., Sullivan v. Novartis Pharms. Corp.*, 575 F. Supp. 2d 640, 642 (D.N.J. 2008).
3. *Id.*
4. *Terry v. J.D. Streett & Co.*, 2010 WL 3829201, at * 2 (E.D. Mo. Sept. 23, 2010); *Harvey v. Shelter Ins. Co.*, 2013 WL 1768658, at *2 (E.D. La. Apr. 24, 2013); *Chace v. Bryant*, 2010 WL 4496800, at *2 (E.D.N.C. Nov. 1, 2010); *Graff v. Leslie Hindman Auctioneers, Inc.*, 299 F. Supp. 3d 928, 936–38 (N.D. Ill. 2017).
5. *In re Kaiser Aluminum Corp.*, 456 F.3d 328, 338 (3d Cir. 2006); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982).
6. *See, e.g., In re Briscoe*, 448 F.3d 201, 211 (3d Cir. 2006) (appeal of remand decisions are subject to the final judgment rule and thus cannot be appealed until there is some final disposition of the case) (citing *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 74 (1996)).
7. *See McCall v. Scott*, 239 F.3d 808, 813 n.2 (6th Cir. 2001) ("Where there is complete diversity of citizenship . . . the inclusion of an *unserved* resident defendant in the action does not defeat removal under 28 U.S.C §1441(b)) (citations omitted); *Morris v. Nuzzo*, 718 F.3d 660, 670 n.3 (7th Cir. 2013) ("District courts have interpreted §1441(b)(2)'s 'properly joined and served' provision as creating a service-based exception to the forum defendant rule, meaning that a properly served out-of-state defendant will not be prevented from removing a case when the plaintiff has named but not yet served a resident defendant.") (citations omitted).
8. *Goodwin v. Reynolds*, 757 F.3d 1216, 1219–20 (11th Cir. 2014).
9. *Id.* at 1221.
10. *Id.* at 1218.
11. *Id.* at 1218 n.5.
12. *Id.* at 1218.
13. *Id.* at 1221.
14. *Id.*
15. 902 F.3d 147, 153–54 (3d Cir. 2018).
16. *See Fields v. Organon USA Inc.*, 2007 WL 4365312, at *5 (D.N.J. Dec. 12, 2007).
17. *See Anderson v. Merck & Co. Inc.*, 2019 WL 161512, at *2 (D.N.J. Jan. 10, 2019) (citation omitted); *Breitner v. Merck & Co. Inc.*, 2019 WL 316026, at *5 (D.N.J. Jan. 24, 2019).
18. *See, e.g., Monfort v. Adomani, Inc.*, 2019 WL 131842 (N.D. Cal. Jan. 8, 2019); *Dechow v. Gilead Sciences, Inc.*, 358 F. Supp. 3d 1051 (C.D. Cal. Feb. 8, 2019); *Zirkin v. Shandy Media, Inc.*, 2019 WL 626138 (C.D. Cal. 2019).
19. 919 F.3d 699, 704–7 (2d Cir. 2019).
20. *Id.* at 705.
21. *Id.*
22. *Id.* at 706.
23. Katie A. Fillmore, *Third Circuit Recognizes Viability of 'Snap Removal' by In-State Defendants*, ABA Practice Points (Feb. 5, 2019), https://tinyurl.com/y2f9dths.
24. *See* Minn. R. Civ. P. 3.01(a); S.D. Codified Laws §15-2-30 (West 2019); N.D. R. Civ. P. 3; N.D. Cent. Code §16.1-16-04, §28-01-38 (West 2019).
25. *See Crawford v. Barr Pharms., Inc.*, 2008 WL 4117873, at *4 (D.N.J. Aug. 29, 2008) (defendants' removal was improper when defendants were served with the complaint and summons but not the track assignment notice pursuant to N.J.R. 4:4-4).
26. 2019 WL 1714600, at *3 (S.D.N.Y. Apr. 17, 2019).
27. *Id.* at *2.
28. *Id.* at *4.
29. 28 U.S.C. §1446(b)(2)(A) (Westlaw current through P.L. 116–17).
30. 28 U.S.C. §1447(c) ("[a]n order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal"); *see also Rivas v. Bowling Green Assoc., L.P.*, 2014 WL 3694983, at *1 (S.D.N.Y. July 24, 2014) ("Mindful of the power vested solely in the hands of the removing party, lawmakers have subjected a notice of removal to the strictures of Rule 11.).
31. *Galvez v. Johnson & Johnson*, No. MID-L-136-19 (N.J. Super. Ct. Middlesex Cnty.). The case was removed to the District of New Jersey, No. 3:19-cv-00112.