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Federal appellate courts provide long-overdue guidance on removal to federal court by home-state defendants

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A civil action brought in state court over which a federal district court would have jurisdiction may generally be removed by a defendant to the district court where the state action is pending. 28 U.S.C. § 1441(a). However, when the only basis for federal jurisdiction is diversity of citizenship, removal is not permitted "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." 28 U.S.C. § 1441(b)(2). This is the "forum defendant rule," which has been understood to prevent a home-state defendant from removing to federal court based solely on diversity.

Although diversity jurisdiction is commonly understood to protect out-of-state parties from local bias of state courts, home-state defendants may prefer to litigate in a federal forum for any number of reasons, including familiarity with federal judges or federal rules, favorable federal precedent, geographic convenience, or simply gamesmanship. By its terms, the forum defendant rule only applies to defendants who are "properly joined and served," raising the question of whether a home-state defendant who has not yet been served—whether due to the plaintiff's delay, unique state law service requirements or other reasons—is permitted to remove. This question has pitted the plain language of the statute against myriad policy concerns, including avoiding a potentially unseemly race by home-state defendants to remove before service, sometimes only a few hours after filing—a tactic referred to as "snap" removal. Lacking guidance from the circuit courts, federal district courts have split on this question for years—even within individual districts.

Although the forum defendant rule has been on the books since 1948, until relatively recently no federal appellate court had definitively ruled on whether removal to federal court is permissible if the forum defendant has not been served. However, in the last two years, the Second, Third and Fifth Circuit Courts of Appeal have reached this issue and all three have adopted the literal interpretation of the statute, allowing removal if the forum defendant has not yet been served. This procedural quirk also now has garnered Congressional attention.

The following explores courts' divergent interpretations of the forum defendant rule, the rationale of the recent appellate decisions permitting removal before service based on the plain language of the statute, an overview of proposed federal legislation to amend the removal statute and practice considerations for counsel in light of these recent developments.

Federal district courts are deeply divided

The question of whether an unserved forum defendant may remove to federal court has been the subject of numerous federal district court decisions across the country and resulted in deep divisions both between and within individual districts.

Courts upholding removal have relied primarily on the removal statute's plain language. They have reasoned that the statute is clear and unambiguous: Removal is proper if the requirements for diversity jurisdiction are satisfied, *except* when a forum defendant has been "properly joined *and* served." Thus, if service has not yet occurred, the statute does not bar removal.

Further, these courts have reasoned that permitting removal by unserved forum defendants gives effect to every word in the statute, including the phrase "and served." These courts adhere to the principle that when a statute is unambiguous, courts should honor its express language unless literal interpretation would thwart the purpose of the overall statutory scheme or otherwise lead to absurd results. These courts do not view a race to remove before service as rising to the level of "absurd," and believe that concerns about "gamesmanship" are for Congress, not the courts, to fix.

Courts holding that unserved forum defendants may not remove to federal court see the situation quite differently. These courts have held that the "properly joined and served" requirement was intended to prevent fraudulent joinder of defendants to defeat complete diversity, not to create an exception to the forum defendant rule. Further, they conclude that the literal interpretation of the statute creates the absurd result of encouraging a race to the courthouse to remove before service—and that this age of electronic filing and court docket monitoring only encourages such forum shopping.

These courts also are persuaded that permitting removal by a forum defendant is inconsistent with the purpose of the removal statute and diversity jurisdiction, namely, protecting *out-of-state* defendants from bias. Finally, these courts reason that states have inconsistent service requirements, so allowing removal before service creates inconsistencies in the application of a statute that is intended to be uniform in application.

The only federal district court in Wisconsin to consider this issue rejected the literal interpretation of the statute. In that case, the plaintiff filed suit in Wisconsin state court against one in-state defendant and one out-of-state defendant. The defendants removed to the Western District of Wisconsin almost two weeks later, before service occurred. The plaintiff then voluntarily dismissed the suit but refiled in state court against only the home-state defendant later that day. Less than two hours later, the Wisconsin defendant again removed to federal court, alleging it had not yet been served. The district court granted the plaintiff's motion to remand, reasoning that the "properly joined and served" requirement was intended to prevent fraudulent joinder and that the removal statute does not require that service occur before removal.

Three circuit courts adopt literal interpretation

While Congress enacted the forum defendant rule more than 70 years ago, no federal appellate court had definitively weighed in on this split until recently.[1] Since 2018, three federal circuit courts have all adopted the plain language interpretation of the removal statute.

In *Encompass Insurance Co. v. Stone Mansion Restaurant Inc.*, 902 F.3d 147 (3d Cir. 2018) and *Gibbons v. Bristol-Myers Squibb Co.*, 919 F.3d 699 (2d Cir. 2019), the Third and Second Circuits affirmed decisions denying remand following removal by unserved forum defendants. Both courts held that the forum defendant rule is unambiguous and prohibits removal *only* in situations in which the home-state defendant has been served in accordance with state law. They explained that to the extent the "properly joined and served" language was intended to prevent fraudulent joinder, Congress did so with an easily administered rule that by its terms requires service. Likewise, the courts both rejected the argument that applying the literal interpretation of the removal statute creates "absurd" results. The Second Circuit also rejected concerns about the non-uniform application of the statute due to differences in state service laws, noting that state-by-state variation is not unusual in federal courts. As the Third Circuit added, if the statute needed revision, "it is Congress—not the Judiciary—that must act."

[1] In 2001, the Sixth Circuit appeared to adopt the view that an unserved forum defendant could remove, but it did so with little reasoning and its statement arguably was *dicta*. *See McCall v. Scott*, 239 F.3d 808, 813 n.2 (6th Cir. 2001).

The Fifth Circuit recently joined the Second and Third Circuits in *Texas Brine Co. v. American Arbitration Ass'n*, -- F.3d --, No. 18-31184, 2020 WL 1682777 (5th Cir. Apr. 7, 2020). In that case, there were three defendants, two forum defendants and one citizen of another state. As an added twist, unlike the Second and Third Circuit cases, in *Texas Brine* the non-forum defendant (not the forum defendants) removed the case to federal court two days after the case was filed, during a period when, under state law, service could be accomplished only by the sheriff and before the forum defendants were served. The Fifth Circuit approved this "snap removal"—defined by the court as "removal prior to service on all defendants"— considering "both plain meaning and absurdity." Specifically, the court concluded that "[t]he forum-defendant rule's procedural barrier to removal was irrelevant because the only defendant 'properly joined and served,' . . . was not a citizen of Louisiana, the forum state." The court also rejected plaintiff's absurdity argument because "snap removal is at least rational." The court further found the rule of strictly construing the removal statute inapplicable because "the text is unambiguous."

Congress considers snap removal

In the wake of recent court decisions upholding the practice of snap removal, Congress also now is paying attention. On November 14, 2019, the House Subcommittee on Courts, Intellectual Property, and the Internet conducted a hearing on snap removal, during which House Judiciary Chairman Jerry Nadler decried the practice as "gamesmanship" that violates "the spirit and the intent of the federal removal statute," "tilt[s] the legal playing field in favor of large corporations" and drains judicial resources.[2]

Then, in February 2020, Representative Nadler co-sponsored legislation to amend the removal statute to prevent snap removal. The proposed legislation would require federal courts to grant motions to remand in diversity cases that were removed before service on a forum defendant provided that the home-state defendant was served within the shorter of (a) the time for service under state law or (b) thirty days from removal.[3] The bill remains in subcommittee, so whether Congress will overrule the circuit courts by amending the removal statute is yet to be seen.

Practice considerations

There is better support than ever for defendants considering snap removal—at least for now. Whether representing a plaintiff or a defendant, attorneys must consider the possibility of removal from state court before service on the forum defendant.

To preserve an element of surprise, plaintiffs who wish to protect their chosen forum and remain in state court may wish to guard their intention to file suit rather than threatening litigation through pre-suit settlement demands. Additionally, plaintiffs should plan a service strategy before filing and effect service as quickly as state law permits. For example, nothing in Wisconsin's service law requires a delay between filing and service. If a home-state defendant nonetheless is able to remove before service, unless the case was filed within the Second, Third or Fifth Circuits, there is ample authority in most districts to marshal in support of a motion to remand.

Individuals or businesses on notice that a lawsuit is imminent likewise should consider whether, assuming diversity requirements are met, a federal forum is preferable. If so, they should monitor dockets and have counsel ready to act when a complaint is filed. While some federal judges have found such snap removals distasteful, the recent appellate authority provides new affirmation of the practice's legitimacy. Even in Wisconsin, with only a single district court decision coming down against removal, the interpretation of the removal statute that prevents snap removal is hardly entrenched. At least until a competing appellate decision arrives—or until Congress amends the removal statute—the literal interpretation of the forum defendant rule is likely to emerge as the majority view in district courts, and U.S. Supreme Court review is unlikely without a circuit split.

Updated from an article entitled "Removal to Federal Court by Home-State Defendants" that originally appeared in Wisconsin Lawyer (Jan. 2020), the official publication of the State Bar of Wisconsin, 93 Wis. Law. 32.

[2] *Examining the Use of 'Snap' Removals to Circumvent the Forum Defendant Rule Before the Subcomm. on Courts, Intellectual Property, and the Internet*, 116th Cong. (statement of Rep. Jerrold Nadler).

[3] *See H.R. 5801*, 116th Cong. (2d Sess. 2020).