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Neutralizing the Stratagem of "Snap Removal": A Proposed Amendment to the Judicial Code

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TABLE OF CONTENTS

Abstract

The "Removal Jurisdiction Clarification Act" is a narrowly tailored legislative proposal designed to resolve a widespread conflict in the federal district courts over the proper interpretation of the statutory "forum-defendant" rule.

The forum-defendant rule prohibits removal of a diversity case "if any of the parties in interest properly joined and served *as defendants is a citizen of the [forum state]." 28 U.S.C. § 1441(b)(2) (emphasis added). Some courts, following the "plain language" of the statute, hold that defendants can avoid the*

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constraints of the rule by removing diversity cases to federal court when a citizen of the forum state has been joined *as a defendant but has not yet been* served*. This stratagem has been referred to as "snap removal." Other courts reject the stratagem. They take a "purposive" approach, typically reasoning that following the plain language "produces a result that is at clear odds with congressional intent."*

Resolution of the conflict can come only from Congress. The preferable resolution is to neutralize the stratagem of snap removal by requiring district courts to remand cases to the appropriate state court if, after removal, the plaintiff timely serves one or more forum defendants and a timely motion to remand follows. That is the approach taken by the proposed legislation. The legislation also would confirm that the forum-defendant rule is not jurisdictional, endorsing the position taken by all but one of the circuits that have considered the question.

I. Introduction

The "forum-defendant" rule provides that a civil action may not be removed to federal court on the basis of diversity of citizenship jurisdiction "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) (emphasis added). There is a raging conflict in the federal district courts over whether the phrase "joined and served" allows removal of a diversity action when a citizen of the forum state has been *joined* as a defendant but has not yet been *served*. This article discusses the conflict and offers a narrowly tailored proposal to amend Title 28 to resolve the conflict without disrupting other aspects of the law governing removal.

The practice of removing before forum defendants have been served has been called "snap removal," and it is largely a product of the Internet era. *See Breitweiser v. Chesapeake Energy Corp*., 2015 WL 6322625, at *2, *6 (N.D. Tex. Oct. 20, 2015). Defendants monitor state-court dockets electronically, and when they learn of a state-court suit, they quickly file a notice of removal. Sometimes they file before *any* defendants have been served. In other cases, the plaintiff has served a non-forum defendant or defendants, but not yet any forum defendant, at the time of removal.

II. The District-Court Split

Many courts hold that snap removal is permissible. Typically, these courts conclude that the "plain meaning" or "plain language" of section 1441(b)(2) requires this result. *See, e.g., Valido-Shade v. Wyeth LLC*, 875 F. Supp. 2d 474, 478 (E.D. Pa. 2012). As one court explained:

> Although Congress may not have anticipated the possibility that defendants could actively monitor state court dockets to quickly remove a case prior to being served, on the facts of this case, such a result is not so absurd as to warrant reliance on "murky" or non-existent legislative history in the face of an otherwise perfectly clear and unambiguous statute.

North v. Precision Airmotive Corp., 600 F. Supp. 2d 1263, 1270–71 (M.D. Fla. 2009). Other courts, while recognizing that the "plain meaning" of the statute allows snap removal, "decline[] to enforce the plain meaning . . . because doing so produces a result that is at clear odds with congressional intent." *Swindell-Filiaggi v. CSX Corp*., 922 F. Supp. 2d 514, 521 (E.D. Pa. 2013). This "purposive" approach results in a remand to state court.

There are also variations within the two basic approaches; these too have given rise to conflicting decisions. For example, in *Breitweiser*, the court held that the "plain language" approach allows snap removal by *non-forum* defendants, but it said that allowing removal by a *forum* defendant who had not yet been served would be "absurd" and "untenable." 2015 WL 6322625, at *6. Other courts reject this distinction, taking the position that "nothing turn[s] . . . on whether the removing party was a forum defendant or non-forum defendant." *Munchel v. Wyeth LLC*, 2012 WL 4050072, at *4 (D. Del. Sept. 11, 2012).

A different method of line drawing is illustrated by *Gentile v. Biogen Idec, Inc.*, 934 F. Supp. 2d 313 (D. Mass. 2013). The court there held that a non-forum defendant can remove, but only if it does so after "at least one defendant has been served." *Id.* at 322. But other courts allow removal before *any* defendant has been served. *See, e.g.*, *Valido-Shade*, 875 F. Supp. 2d at 476.

Three aspects of this conflict deserve emphasis. First, because district court decisions are not binding even within the same district, different judges within a district can and do reach opposite results on this issue. Two of the decisions cited above (*Valido-Shade* and *Swindell-Filiaggi*) exemplify the conflict within the Eastern District of Pennsylvania. And in at least four other districts, different judges have handed down decisions on both sides of the basic divide:

- District of New Jersey. *See Poznanovich v. AstraZeneca Pharm. LP*, 2011 WL 6180026, at *3–4 (D.N.J. Dec. 12, 2011) ("Courts within this district and elsewhere are sharply split on the issue of pre-service removal (whether by a forum or non-forum defendant), and the decisions generally fall into two camps.") (collecting cases).

- Eastern District of Missouri. *See Perez v. Forest Laboratories, Inc.*, 902 F. Supp. 2d 1238, 1245–46 (E.D. Mo. 2012) (rejecting decisions within the district that "have adhered to the plain meaning of Section 1441(b)(2)").
- District of Delaware. *See Stefan v. Bristol-Myers Squibb Co.*, 2013 WL 6354588, at *2 n.2 (D. Del. Dec. 6, 2013) ("Not only are courts across the nation split, but the District of Delaware is itself split on this issue.") (citing cases).
- Western District of Tennessee. *See Harrison v. Wright Med. Technology, Inc.*, 2015 WL 2213373, at *3 (W.D. Tenn. May 11, 2015) ("Similar to the national landscape, a split exists among the district courts in the Sixth Circuit and the Western District of Tennessee.") (collecting cases).

Whether removal is allowed thus depends on which judge is drawn—typically, by lot—to hear the case.

There are also conflicts between different federal judicial districts within the same state. For example, early in 2016 a judge in the Central District of California noted that courts in the Northern District have adopted the "literal interpretation" approach, while in the Central District the "strong consensus . . . is to focus on the purpose and not the literal language." *Black v. Monster Beverage Corp.*, 2016 WL 81474, at *3 (C.D. Cal. Jan. 7, 2016). In West Virginia, judges in the Northern District have applied the statute's "plain meaning," while a leading case in the Southern District holds that "a literal application of [the] plain meaning . . . creates absurd results" and thus should be rejected. *Compare Bloom v. Library Corp.*, 112 F. Supp. 3d 498, 504 (N.D. W. Va. 2015), *with Phillips Constr. LLC v. Daniels Law Firm, PLLC*, 93 F. Supp. 3d 544 (S.D. W. Va. 2015).

III. Unlikelihood of Supreme Court Resolution

Second, the conflict will not be resolved by the United States Supreme Court at any time in the near future. The Supreme Court takes its statutory-interpretation cases from courts at the appellate level, generally to resolve conflicts between circuits. Today, after years of litigation in the district courts, no court of appeals has yet decided whether snap removal is permissible.[1] This is not surprising. If the district court grants the motion to remand, appellate review is prohibited by statute. *See* 28 U.S.C. § 1447(d). If the district court denies the remand motion, appellate review is theoretically possible, but only after

[1] A footnote in a Sixth Circuit opinion arguably endorses the "plain language" view. *See* McCall v. Scott, 239 F.3d 808, 813 n.2 (6th Cir.), *amended on denial of reh'g*, 250 F.3d 997 (6th Cir. 2001). This has not stopped district courts in the Sixth Circuit from taking the "purposive" approach; they treat the footnote as dictum. *See, e.g.*, *Harrison*, 2015 WL 2213373, at *6.

final judgment. And "after final judgment in a removed case that is not remanded, only the most disappointed and dogged of parties would have sufficient incentive to pursue this threshold issue." *Gentile,* 934 F. Supp. 2d at 316 n.3. Even if the plaintiff were "dogged" enough to pursue the issue, the court of appeals might affirm on the merits without deciding whether the removal was proper.[2] Thus, several more years may elapse before an intercircuit conflict develops, if one ever does.[3]

IV. Undesirability of "Plain-Language" View

Third, most of the courts that follow the "plain language" of section 1441(b)(2) nevertheless recognize that policy arguments weigh heavily against allowing snap removal. For example, in one of the earliest "plain language" cases the court said, "Plaintiffs do raise colorable policy arguments that it is unjust that a properly joined defendant could monitor state court dockets and remove cases prior to being served, and that it makes little sense to provide a federal forum to an in-state defendant upon removal of a diversity case . . . ." *Thomson v. Novartis Pharm. Corp.*, 2007 WL 1521138, at *4 (D.N.J. May 22, 2007). But the court found these arguments insufficient to overcome "the plain language of the statute." *Id.*

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[2] That is what happened in *Valido-Shade*, the Eastern District of Pennsylvania case upholding snap removal. After denying the plaintiffs' motion to remand, the district court granted summary judgment to the defendants. The plaintiffs appealed to the Third Circuit, challenging both rulings. The defendants moved for summary affirmance based on the summary-judgment ruling, arguing that there was no need for the appellate court to consider the correctness of the order denying remand because any deficiency in removal was procedural, not jurisdictional. Motion for Summary Affirmance at 11, In re: Diet Drugs Prod. Liab. Litig. (No. 14-4608) (3d Cir.) (Mar. 2, 2015) (on file with co-authors Hellman and Rowe). The American Association for Justice (AAJ) and others filed an amicus brief urging the court of appeals to find that snap removal "is illogical and violates the intent and meaning of the federal removal statutes." Brief *of Amici Curiae* AAJ et al. at 10, In re: Diet Drugs Prod. Liab. Litig. (No. 14-4608) (3d Cir.) (Mar. 17, 2015) (on file with same co-authors). But a panel of the Third Circuit granted the defendants' motion for summary affirmance in a one-line unpublished affirmance order. In re: Diet Drugs Prods. Liab. Litig., No. 14-4608 (3d Cir. Apr. 29, 2015) (on file with same co-authors). The removal issue thus remains unresolved in the Third Circuit.

[3] In theory, the issue also could reach a court of appeals if the district court denied a motion for remand and then certified its order for interlocutory appeal under 28 U.S.C. § 1292(b). A judge in the Northern District of California followed that course of action in 2012. *See* Regal Stone Ltd. v. Longs Drug Stores Cal., LLC, 881 F. Supp. 2d 1123, 1131 (N.D. Cal. 2012). The case was fully briefed in the Ninth Circuit, but the parties entered settlement negotiations a few days before oral argument was scheduled, and the case eventually was dismissed (in July 2015). No other section 1292(b) certifications of this issue have been found. In *Breitweiser*, the case that introduced the term "snap removal" to the judicial lexicon, the court declined to certify its order for interlocutory appeal, saying that there was a consensus among the district courts in the Fifth Circuit to allow the practice when the non-forum defendant removed. 2015 WL 6322625, at *9.

This is not to say that the "properly joined and served" language of section 1441(b)(2) serves no purpose. The language was added in the 1948 revision of the Judicial Code and although study of the legislative history has uncovered no evidence bearing on Congress's actual purpose in using the phrase, several courts have concluded that Congress added the requirement "in order 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." *Sullivan v. Novartis Pharm. Corp*., 575 F. Supp. 2d 640, 645 (D.N.J. 2008). A then-recent Supreme Court decision appeared to countenance such gamesmanship. *See Pullman Co. v. Jenkins*, 305 U.S. 534 (1939). As one court put it, "*Pullman* suggests that a problem courts had identified with the removal power was gamesmanship by plaintiffs in the joinder of forum defendants whom plaintiffs ultimately did not intend to pursue." *Gentile*, 934 F. Supp. 2d at 320.

V. Need for Congressional Resolution

Two conclusions follow from this analysis. First, if the conflict in the lower courts is to be resolved, the resolution must come from Congress. Second, the preferable resolution is to make clear that snap removal will not permit circumvention of the forum-defendant rule as long as the plaintiff serves at least one in-state defendant promptly after removal. This resolution will eliminate the incentive for gamesmanship by defendants, without creating an opening for the kind of gamesmanship by plaintiffs that the 1948 amendment apparently was designed to prevent.

VI. Our Proposed Resolution and Its Benefits

The proposed "Removal Jurisdiction Clarification Act" (RJCA) implements the preferable solution.[4] It does not change the language of section 1441 or any other part of Title 28, because that approach could create a serious risk of inadvertently unsettling other doctrines of removal law. Rather, the proposal accepts the entirety of the Judicial Code in its current form and adds a new provision to be codified as a subsection of 28 U.S.C. § 1447. This new provision would allow the plaintiff to counter snap removal by serving one or more in-state defendants after removal. Under the proposal, if the plaintiff takes that step within the time for service of process allowed by the Federal Rules of

[4] Our proposal deals only with cases in which a forum defendant is properly joined. Thus, it does not address the separate problem of fraudulent or improper joinder. Lack of service upon a fraudulently or improperly joined defendant, at the time of removal, would not affect the propriety of the removal. A finding of such joinder results in a removed case remaining in federal court, if there are no defects in removal procedure. The House has passed a bill to ease the standard for showing fraudulent joinder. H.R. 3624, 114th Cong. (2016); *see* Arthur D. Hellman, *The "Fraudulent Joinder Prevention Act of 2016": A New Standard and a New Rationale*, 17 Federalist Soc'y Rev. --- (forthcoming 2016).

Civil Procedure, and a motion to remand is made within 30 days thereafter, the district court must send the case back to state court.

If this provision is enacted, the incidence of snap removal can be expected to diminish sharply, as defendants come to recognize that the stratagem will no longer enable them to circumvent the forum-defendant rule. To the extent that defendants do remove before any in-state defendants have been served, the plaintiff can secure remand by promptly serving at least one such defendant.

One final point deserves mention. The proposed legislation provides that after the plaintiff has served one or more in-state defendants, the district court, "*upon motion* . . ., shall remand the action to the state court from which it was removed." (Emphasis added.) Specifying that the court shall act "upon motion" serves two purposes. First, it confirms that the forum-defendant rule is not jurisdictional. That is the position of all but one of the circuits that have addressed the issue. *See Lively v. Wild Oats Markets, Inc.*, 456 F.3d 933, 940 (9th Cir. 2006) (collecting cases).[5] Thus, in the absence of a timely motion to remand, the case can and will remain in federal court.

By the same token, the language makes clear that the district court may not remand for violation of the forum-defendant rule in the absence of a motion. This resolution is consistent with the view of all circuits that have considered the effect of similar language in 28 U.S.C. § 1447(c).[6] Those courts hold that the first sentence of section 1447(c) does not authorize a district court's *sua sponte* remand of an action based on a defect "other than lack of subject matter jurisdiction." *See Ellenburg v. Spartan Motors Chassis, Inc.*, 519 F.3d 192, 197–98 (4th Cir. 2008) (joining "all of the circuit courts that have considered the question" in concluding that "a district court is prohibited from remanding a case *sua sponte* based on a procedural defect absent a motion to do so from a party"). A few district courts have remanded cases *sua sponte* based on violation of the forum-defendant rule. *See, e.g.*, *Beeler v. Beeler*, 2015 WL 7185518 (W.D. Ky. Nov. 13, 2015).

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[5] Only the Eighth Circuit has held otherwise. Horton v. Conklin, 431 F.3d 602, 605 (8th Cir. 2005) (reaffirming adherence to the minority view). In the Sixth Circuit, the court of appeals has not issued a definitive ruling, and at least three district courts have held that the forum-defendant rule is jurisdictional. *See* Balzer v. Bay Winds Fed. Credit Union, 622 F. Supp. 2d 628, 630–31 (W.D. Mich. 2009) (citing cases). In the Fourth Circuit, district courts have held that the forum-defendant rule is procedural and subject to waiver. *See* USA Trouser, S.A. de C.V. v. International Legware Group, Inc., 2015 WL 6473252, at *3 (W.D.N.C. Oct. 27, 2015) (citing cases).

[6] Section 1447(c) provides in part: "A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a)."

But these decisions are outliers, and they are inconsistent with the nearly unanimous view in the circuits that the forum-defendant rule is not jurisdictional.

VII. Conclusion

We are suggesting a narrowly tailored legislative solution to a procedural problem that has become a bedeviling source of inconsistency about the availability of removal from state to federal court. Out-of-state defendants should not be able to remove otherwise unremovable cases just because they can monitor dockets and get the jump before forum-state defendants are served. Our proposal would resolve that problem in line with the most desirable solution and settle other issues that have arisen in connection with "snap removal," but without disrupting other aspects of the complex law of removal.

The text of the proposed legislation is set forth below.

Draft Statute
New Subsection in 28 U.S.C. § 1447

(f) **Removal before service on forum defendant**

If –

(1) a civil action was removed solely on the basis of the jurisdiction under section 1332(a) of this title, and

(2) at the time of removal, one or more parties in interest properly joined as defendants were citizens of the state in which such action was brought but had not been served, but

(3) after removal was effected, any such defendant was properly served within the time for service of process allowed by the Federal Rules of Civil Procedure,

the court, upon motion filed within 30 days after such service, shall remand the action to the state court from which it was removed.