OH, SNAP! Let's Remove!

Snap Removal and Diversity Jurisdiction

By Amber B. Barlow

Often dubbed a "race to the courthouse," snap removal is currently still a viable tool for defense attorneys to remove a case to federal court.

As a defense attorney representing corporations, one of the first items on your list when you are served with a new state court lawsuit is to determine if the case is removable to federal court. Defendants may remove a case filed in state court to federal court pursuant to 28 U.S.C. §1441, *et seq.*, which states in pertinent part,

> any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

Most corporate defendants prefer a federal forum for several reasons. In general, for corporate defendants, federal courts tend to be a better forum in which to litigate, based on the judges and the jury pool. For example, federal judges are appointed for life by the President of the United States. This appointment eliminates many concerns that federal judges may be persuaded by certain parties and/or corporations to rule in their favor. Corporate defendants also find federal court more of a moderate forum. Federal judges and juries are viewed as generally more hospitable to corporate defendants. Whereas, depending on the state you are in, state court judges are typically elected. Elected officials, including judges, receive campaign financing from local donors. Corporate defendants often see this as a forum where being an out of state defendant will not find equal fairness and opportunity in litigating cases against at-home plaintiffs and plaintiffs' attorneys (i.e., ones who may have donated to state court judges' campaigns). Whatever the motivating reason and whether there is any truth in the thought, the consensus among corporate defendants is that federal court is a better forum for their issues to be litigated.

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The most common grounds for removal are based on diversity of citizenship or federal question jurisdiction. Removal must be sought within a strict time limit of thirty days

> after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within 30 days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

28 U.S.C. §1446(b)(1).

In toxic tort cases, it is common to see a resident plaintiff file suit against several defendants in state court. Most of the time, there are many defendants named in the lawsuit, and the defendants are various corporate defendants that are not residents of the state where the lawsuit is filed. The most obvious ground for removal in these cases would be based on diversity jurisdiction. Federal courts have "original jurisdiction of all civil actions" involving claims that "exceeds the sum or value of $75,000" that are "between citizens of different states." 28 U.S.C. §1332(a)(1). Diversity jurisdiction provides a means by which a non-resident and/or out-of-state defendant may avoid litigating in state court. According to 28 U.S.C. §1441(b), "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." 28 U.S.C. §1441(b) is known as the forum defendant rule, meaning if there are forum defendants named in the lawsuit, the case will not be able to be removed based on diversity grounds. Thus, even if complete diversity exists between all plaintiffs and all defendants, removal has historically not been permitted if any of the defendants are forum defendants. For example, a New York plaintiff files suit against two New Jersey defendants, a Delaware defendant, a Pennsylvania defendant, and a Louisiana defendant in New Jersey state court based on an accident that occurred in New Jersey. Complete diversity seems to exist; however, the two New Jersey defendants are at-home defendants in New Jersey. The "forum defendant rule" would prevent removal here.

As we see routinely in toxic tort cases, while it is common to see many defendants sued, there are usually at least one or two "local" and/or "forum" defendants sued, which defeats complete diversity.

The forum for filing a lawsuit is generally considered to be at the discretion of the plaintiff. The plaintiff has wide variety of forums where they may seek to pursue their claims. Where a defendant is sued is not usually an aspect of litigation that a defendant is able to control. Removal gives defendants some measure of control on where the suit will be litigated, and for a defense attorney, removal statutes provide a vehicle to control where a lawsuit is litigated.

Snap removal is another option and one that more and more defendants are using in 2021. A "snap" removal is one in which a non-resident defendant removes the case to federal court on the ground of diversity jurisdiction, even though one or more resident defendants have been named as defendants in the lawsuit. The key is that "snap" removal must be removed from state court to federal court before any such resident/local/forum defendant has been served. Once any forum defendant has been served then removal is no longer possible under 28 U.S.C. §1441(b)(2).

Snap Removal as an Option to Get into Federal Court

Snap removals have been coined "a race to the courthouse." Understandably, when trying to remove a case from state court to federal court before the forum defendant has been served, this means the removing defendant must "beat" service. Practically speaking, this requires the removing defendant to know the lawsuit is filed before any service has been effectuated on the forum defendant. In some cases, the forum defendant may be literally a few steps from the state court where the lawsuit was filed, so trying to remove before serving the forum defendant may be very tricky (and usually is in most cases).

In many cases, a successful snap removal requires defense counsel to be on the lookout for state court filings before lawsuits are served. Once you note that a case has been filed in state court and is ripe for removal based on diversity jurisdiction, except for a few forum defendants, the key is to remove to federal court prior to the forum defendant(s) being served. If you are successful in removing to federal court before any forum defendant is served, chances are relatively high that the case will remain in federal court and not be remanded back to state court.

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Snap removal seems like a simple concept and one that has been around for quite some time, so why is it that defense lawyers seem to be zeroing in on it as some "new" and/or "revolutionary" means to removal from state court to federal court?

Is Snap Removal New?

Removal and the forum defendant rule have been the law and in practice for over 200 years, but what is not original to the removal provision is the section in 28 U.S.C. §1441(b)(2) that states that a civil action otherwise removable solely based on 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 the action is brought. 28 U.S.C. §1441(b)(2) was

amended to include this language in 1948, over roughly seventy years ago. *See* 1 Stat. 72, 79–80, codified at 28 U.S.C. §114 (1940) and 28 U.S.C. §1441(b) (1948); *see also* 28 U.S.C. §1441(b)(2).

Practically speaking, snap removals have been available and lawful since 1948, when the legislature required that the forum defendant had to be properly joined *and served* to defeat removal on diversity grounds.

Now that so many courts around the country are electronic, defense attorneys can review the state court dockets multiple times a day to check on recent filings. This is almost the only way to effectuate a successful snap removal.

As touched on earlier, the key to a snap removal is time. A defendant essentially must beat the clock and remove the case from state court to federal court before any of the forum defendants are served. Seemingly, technology and resources play a large hand in this success.

As the consensus in litigation holds true for corporate defendants that the better forum to litigate claims against a corporate defendant is in federal court, corporations are investing in resources to effectuate that end goal. For example, corporate defense counsel regularly monitor state court dockets to track which suits are being filed in state courts. Now that so many courts around the country are electronic, defense attorneys can review the state court dockets multiple times a day to check on recent filings. This is almost the only way to effectuate a successful snap removal.

Although not common (especially since plaintiffs' lawyers are wise to the issue of snap removal), some defendants are tipped off to the filing of a new lawsuit when plaintiff's counsel contacts them to request waiver of service.

Some defendants in certain states may be more successful at snap removals, given the delays of their state service protocols. Some state district courts are quicker and more on top of service of pleadings on named defendants, while others take much longer.

Circuit Court Precedent on Snap Removal

The first reported mention of snap removal by an appellate court was in 2001. *See McCall v. Scott*, 239 F.3d 808, 813 n.2 (6th Cir. 2001) (The Fifth Circuit in *Tex. Brine Co., L.L.C. v. Am. Arbitration Ass'n*, 955 F.3d 482, 485, (5th Cir. 2020), noted that the *McCall v. Scott* case appeared to be the earliest federal circuit court discussion of snap removal). The Sixth Circuit noted that snap removal was allowable under the removal statutes. However, this was in dicta and lacked any real analysis. In the early 2000s, federal district courts saw more snap removals and issued various opinions from favoring snap removals based on a plain language reading of "properly joined and served" to finding that the presence of a forum defendant prevented removal because it destroyed complete diversity.

In 2018, the Third Circuit in *Encompass Insurance, Inc. v. Stone Mansion Restaurant, Inc.*, 902 F.3d 147 (3d Cir. 2018), became the first appellate court to rule on the appropriateness of snap removal. In this case, the plaintiff was an Illinois citizen who filed a lawsuit in a Pennsylvania state court against a Pennsylvania corporation. While the plaintiff and the defendant have complete diversity, the forum defendant rule should work to thwart removal to federal court based on diversity jurisdiction. However, the Pennsylvania defendant learned of the plaintiff's intent to sue and timely removed this matter to federal court prior to being served. The plaintiff filed a Motion to Remand, and the trial court denied the remand. The fact that the trial court allowed the snap removal was affirmed by the Third Circuit. The Third Circuit complied with a plain reading of 28 U.S.C. §1441(b)(2) that the defendant had not been served prior to the removal. Thus, not only did the Third Circuit find in favor for a snap removal, but it also found no issue with the forum state defendant as the one to effectuate federal court removal.

In 2019, the Second Circuit in *Gibbons v. Bristol-Myers Squibb Co.*, 919 F.3d 699 (2d Cir. 2019), followed suit and unanimously affirmed snap removal as a procedural vehicle to remove to federal court. Multiple plaintiffs filed suit against two Delaware defendants (pharmaceutical companies) in a Delaware state court. The defendants successfully removed the suit to federal court in New York prior to service. Again, this suit was successfully removed prior to any forum defendants being served. The district court reasoned, using from the text of 28 U.S.C. §1441(b)(2), that removal was proper. The Second Circuit agreed and noted that the statute created no barrier to the removal of this suit to federal court because the forum defendants were not served. The Second Circuit went as far as to note that "the language of the forum defendant rule in section 1441(b)(2) is unambiguous." It is clear that a state court lawsuit is removable under 28 U.S.C. §1441, as long as the federal district court may assume jurisdiction over the action.

In 2020, the Fifth Circuit in *Texas Brine Company, LLC v. American Arbitration Assoc. et al*, 955 F.3d 482 (5th Cir. 2020), finally issued an opinion and joined the Second and Third Circuits approving snap removal and finding for a plain language reading of 28 U.S.C. §1441(b)(2). In this case, a Louisiana plaintiff filed suit against a New York defendant and two Louisiana defendants in Louisiana state court. The New York defendant filed a snap removal from state court to federal court. The Fifth Circuit unanimously found that the plain language of 28 U.S.C. §1441(b)(2) was unambiguous and does not lead to an absurd result. The Fifth Circuit found that the forum defendant rule's procedural barrier to removal was irrelevant in this case because the only defendant that was properly joined and served was the New York defendant, neither of the two Louisiana defendants were served. The panel also noted that

in statutory interpretation, an absurdity is not mere oddity. The absurdity bar is high, as it should be. The result must be preposterous, one that "no reasonable person could intend." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 237(2012). In our view of reasonableness, snap removal is at least rational.

The circuits that have addressed snap removals are overwhelming in favor of them and see no absurdity in a defendant removing a case from state court to federal court on the basis of diversity jurisdiction if the forum defendant has not yet been served. The plain reading of the statue allows for it.

Although the plaintiffs' bar views snap removals as defense "trickery" and the defense taking advantage of absurd results, the circuits so far do not agree. Snap removals are allowed by federal statute and should be used to the defendants' advantage when the case is ripe for such a removal.

In January 2021, the Tenth Circuit in *Woods v. Ross Dress for Less, Inc.*, 2021 U.S. App. LEXIS 1212, *1, 833 Fed. Appx. 754, had a much different opinion on snap removal. Here, an Oklahoma plaintiff filed suit against an Oklahoma defendant and a California defendant in Oklahoma state court. The California defendant removed this case from state court to the United States District Court for the Northern District of Oklahoma on the basis of diversity jurisdiction because, at the time of the removal, the Oklahoma defendant had not been served. The district court denied the plaintiff's Motion to Remand and kept the case in federal court, concluding "that because no 'properly joined and served' defendant was a resident of Oklahoma at the time of removal, Ross's removal was proper under 28 U.S.C. §§1332(a) and 1441." *See Woods v. Ross Dress for Less, Inc.*, 2018 U.S. Dist. LEXIS 200336, *4, 2018 WL 6187511. However, the Tenth Circuit reversed and noted that

> the [district] court erred because [the California defendant] needed to show federal diversity jurisdiction under §1441(a) before §1441(b)(2)'s limitation on diversity-based removal could even come into play. Because there was not "complete diversity between all named plaintiffs and all named defendants," (*citing Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 84 (2005), and no other basis for federal jurisdiction existed, the court lacked removal jurisdiction under §1441(a).

Thus, the Tenth Circuit is of the opinion that when diversity jurisdiction is the basis for removal, complete diversity must exist at the time the action is filed in state court and at the time the case is removed to federal court, and a defendant's citizenship is part of the diversity analysis regardless of whether the defendant has been served.

While there have been over one hundred district court cases around the country addressing snap removals from 2020 to present, the other circuits are remaining quiet on addressing the viability of snap removals head on.

Overall, snap removals are favored by the circuit courts of appeals and should be used to the defense's advantage.

Benefit of Snap Removal for Toxic Tort and Mass Tort Defendants

Defense counsel practicing in the area of toxic tort and mass tort often find their clients in forums that are not favorable to out-of-state corporate defendants. Procedural laws are in place that grant plaintiffs great leniency in choosing which forum to allege their claims. So much so that some cases are finding themselves in the same jurisdictions around the country because those jurisdictions are known to be "plaintiff friendly."

The plaintiffs' bar has become very crafty and hard working at keeping toxic tort cases out of federal court. Some may argue that the plaintiffs' bar is working just as hard to keep toxic tort cases into state court as the defense bar is working to get toxic tort cases into federal court. Unless you are a defendant representing a client that has federal contracts with the federal government to which you have a federal defense and are able to remove on federal question jurisdiction, most defendants named in toxic tort suits are looking to complete diversity as a means to removal.

Most toxic tort cases are not cases that are filed by one plaintiff against one defendant or even cases filed by one plaintiff and three defendants. Most of these cases are filed by one or several plaintiffs against ten or as many as thirty-plus defendants. Most of these cases are filed in state court, even though the plaintiffs and defendants usually are completely diverse in citizenship. Often, at-home plaintiffs will name at least one at-home defendant in the statue court lawsuit to defeat jurisdiction. While removal based on fraudulent joinder is possible, it comes with a very high burden on the removing defendants and a short time frame to remove.

The circuits that have addressed snap removals are overwhelming in favor of them and see no absurdity in a defendant removing a case from state court to federal court on the basis of diversity jurisdiction if the forum defendant has not yet been served. The plain reading of the statue allows for it.

Even more difficult for defendants in toxic tort cases, forum defendants in some jurisdictions play along with plaintiff's counsel, knowing they are the forum defendant tying plaintiffs to state court. These play-a-long defendants remain quiet throughout the litigation and are usually dismissed prior to trial. This tactic is incredibly difficult for defendants to overcome. Essentially, you have a case where complete diversity exists but for the forum defendant(s) but not enough evidence to prove fraudulent joinder.

In toxic tort cases, snap removals are becoming the defendants last hope in having these cases tried in a federal forum. The Second, Third, Fifth, and Sixth Circuit opinions on the plain language of "properly joined and served" makes it more important for defense counsel to find the toxic tort cases filed in state court prior to any forum defendant being served.

To determine if the forum defendants have been served, the attorney planning to remove can do several things to ensure service has not been effectuated, such as (1) call and ask counsel for the forum defendant; (2) check the court docket to determine if service has been noted; (3) call the sheriff's office to determine if a sheriff return has been executed.

Most defense firms in 2021 have resources and plans in place to monitor the state court electronic docket systems. Now that most courts around the country are electronic, this makes it easier to monitor lawsuits filed in state court on a daily basis and is something that all attorneys representing defendants in toxic tort cases should do.

How Plaintiffs Defeat Snap Removal

Because the plaintiffs' bar has caught on to defendants' use of snap removal in recent years, the plaintiffs' bar have adopted ways to make snap removal impossible altogether. Most parties not on the defense side view snap removal as trickery and unfair gamesmanship.

In toxic tort cases where the same group of defendants are typically sued by various plaintiffs for allegations of toxic torts, plaintiffs have begun filing suit in state court against the forum defendants. Once the forum defendant is served, plaintiffs then file a supplemental and amending complaint to add the non-forum defendants. With this tactic, there is no opportunity for the non-forum defendants ever to pull off a snap removal successfully.

Plaintiffs are also fighting snap removals, but making the argument that when a removing defendant removes, the federal court at that time must have original jurisdiction. If the parties are not completely diverse at the time of removal, no matter if a forum defendant is served at that point or not, original jurisdiction does not exist.

Because most of the circuit opinions currently favor snap removals, plaintiffs will work diligently to ensure that those forum defendants are served almost immediately after filing a lawsuit in state court.

Tips and Tricks for a Successful Snap Removal

Snap removals are a tool that defense lawyers have to combat a plaintiff's forum shopping and filing a certain type of lawsuit against certain defendants in state courts that favor plaintiffs and those types of claims, i.e., asbestos cases in Madison County, Illinois. First and foremost, snap removals also are available for forum defendants just as much as non-forum defendants. The key is that some defendant must remove to federal court prior to the forum defendant being served, even the forum defendant on its own. It is also important to note that the removing party does not have to be formally served to remove.

Removal must take place within thirty days of having received "through service or otherwise, … a copy of the initial pleadings setting forth the claim for relief upon which" this action is based. 28 U.S.C. §1446(b)(2). This statutory provision has been interpreted by the United States Supreme Court to mean that the removal period begins when a defendant is formally served, rather than in receipt of a complaint through informal means. *Murphy Bros. v. Michetti Pipe Stringing*, 526 U.S. 344, 354–56 119 S. Ct. 1322, 1328–29 (1999). However, service is not a prerequisite for removal. *Delgado v. Shell Oil Company*, 231 F.3d 165, 177 (5th Cir. 2000); *Southern Breeze, LLC v. NK Newlook, Inc.*, 2011 WL 2550739, FN 7, 2011 U.S. Dist. LEXIS 68432, FN 7 (E.D.La. June 27, 2011); *Defrancesch v. Employers Mutual Casualty Co.*, 2007 WL 3172103, *1, 2007 U.S. Dist. LEXIS 80019, *3 (E.D.La. October 29, 2007); *Leech v. 3M Company*, 278 F. Supp. 3d 933, 942 (E.D.La. September 29, 2017); *LeBlanc v. DISA Global Sols., Inc.*, 2017 U.S. Dist. LEXIS 184385, *8–9 (M.D.La. October 5, 2017); *Nunez v, U.S. Xpress Leasing*, 2018 U.S. Dist. LEXIS 97069, *4 (W.D.La. June 7, 2018). Thus, there is not really a time frame per se during which a snap removal must be filed because the very essence of a snap removal is that the removing party removes to federal court prior to the forum defendant(s) being formally served.

To determine if the forum defendants have been served, the attorney planning to remove can do several things to ensure service has not been effectuated, such as (1) call and ask counsel for the forum defendant; (2) check the court docket to determine if service has been noted; (3) call the sheriff's office to determine if a sheriff return has been executed. The difficulty, of course, that that these methods for determining service are not always accurate and/or up to date. For example, a defendant may remove to federal court based on snap removal only to find out that the forum defendant was actually served five minutes before the Notice of Removal was filed. If this occurs, the forum defendant was technically served prior to the case being removed from state court to federal court, so snap removal would not be successful.

Snap removals require consent from all served defendants, so in toxic court cases where there are ten plus named defendants, this can and most likely will be a lengthy process. Practically, this means contacting each and every named de-

fendant to determine if they have been served and if they consent to removal from state court to federal court. This can (and most likely will) be a tedious and lengthy process.

In toxic tort cases where the same defendants are routinely named in these lawsuits, it is a good idea as a defense counsel to have a list of the common defendants and their counsel on hand. This will at least cut down on some of the time it takes to perfect a snap removal.

For removal to be successful, the removing defendant must do three things before the forum defendant is served: (1) file the Notice of Removal in federal court; (2) file the Notice of Removal in state court; and (3) notify all named defendants that the Notice of Removal has been filed pursuant to 28 U.S.C. §1446. Specifically, §1446(d) states,

> promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such state court, which shall effect the removal and the state court shall proceed no further unless and until the case is remanded.

Certain district courts have ruled that each of these three steps must be completed prior to service on the forum defendant. *See Dutton v. Ethicon, Inc.*, 423 F. Supp. 3d 81, 86, 2019 U.S. Dist. LEXIS 180567, *5, 2019 WL 5304169.

The timeline of successfully completing all three steps is crucial to the survival and success of the snap removal. For example, in *Hardman v. Bristol-Myers Squibb Co.*, 2019 U.S. Dist. LEXIS 65553, 2019 WL 1714600, an out of state defendant filed a Notice of Removal in the United States District Court for the Southern District of New York at 2:24 p.m., prior to service of any forum defendant. The forum defendants were served that same day at 3:51 p.m. At 7:05 p.m., the removing defendant filed the Notice of Removal in the state court. The federal district court held that "[r]egardless of the temporal proximity and 'prompt' nature of the Notice of Removal, the service of the Forum Defendants, and filing of notice with the state court, Forum Defendants…were served prior to the [removing] Defendants completion of all three statutory requirements under Section 1446(d)…. The analysis ends there." *Hardman v. Bristol-Myers Squibb Co.*, 2019 U.S. Dist. LEXIS 65553, *13, 2019 WL 1714600.

Removing defendants must beat the clock on timing. In *Brown v. Teva Pharmaceuticals*, 414 F. Supp. 3d 738 (E.D. Penn. October 23, 2019), the plaintiff filed suit in state court at 10:06 a.m. At 1:55 p.m., defendants filed a Notice of Removal in the United States District Court for the Eastern District of Pennsylvania. On the same day at 2:15 p.m., the plaintiff served the forum defendants, and the removing defendants filed the Notice of Removal in state court at 4:11 p.m. The federal district court granted the plaintiff's Motion for Remand and noted that "timing was everything, and plaintiff has won the race."

Will Snap Removal Continue to Be an Option?

Some view snap removal as a congressional issue and one that needs to be cleared up by an amendment to the statute—so much so that certain legislators in the United State House of Representatives have taken an interest in changing the statutory language to prevent snap removals. In fact, on November 14, 2019, the U.S. House Committee on the Judiciary Committee, Subcommittee on Courts, Intellectual Property, and the Internet held a hearing on "Examining the Use of 'Snap' Removals to Circumvent the Forum Defendant Rule." Chairman Jerrold Nadley, a New York Democrat, stated in his opening statement that snap removals are just an attempt to exploit modern technology and a supposed statutory loophole. On February 7, 2020, the House (Mr. Johnson of Georgia (for himself, Mr. Nadler, Ms. Dean, Ms. Garcia of Texas, Mr. Cartwright, Mr. Raskin, Mr. Swalwell of California, Mr. Cohen, Ms. Schakowsky, Ms. Norton, Mr. Rush, Mrs. Watson Coleman, and Mr. Espaillat)) introduced a bill titled the Removal Jurisdiction Clarification Act of 2020 (H.R. 5801) that proposes to regulate the use of snap removals. The bill

> requires federal courts to remand to state court, upon motion, civil actions that are removed to federal court solely on the basis of diversity jurisdiction, if a citizen of the state where the action has been brought has joined as a defendant but has not yet been served. Such actions must be remanded if such a defendant is served within the eligible time period.

See **https://www.congress.gov/bill/116th-congress/house-bill/5801/**. On March 10, 2020, the bill was referred to the Subcommittee on Courts, Intellectual Property, and the Internet. To date, there has been no further action taken on H.R. 5801.

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To date, the bill remains pending in the House. Whether Congress will take action to change the statute to prevent snap removals remains unknown.

In the meantime, and until the statute is amended and/or the Supreme Court takes up the issue, defense counsel should "make it snappy" and "race to the courthouse" to remove state court actions to federal court where forum defendants have not yet been served. FD