

## **Snap to It: “Snap Removal” and Federal Jurisdiction**

It often is more favorable for a defendant to litigate a case in federal court rather than state court. Federal courts, however, are courts of limited jurisdiction. A mechanism called "snap removal" may allow defendants to litigate cases in federal court when removals ordinarily would not be permitted.

Generally, cases in federal court must either raise a federal question or be between parties with complete diversity, meaning that the parties on one side of the case hail from different states than the opposing parties. But even when there is complete diversity, if any defendant is a citizen of the state where the action is pending (that is, the forum state), removal may be prohibited. The forum defendant rule, codified at 28 U.S.C. § 1441(b)(2), provides that a case "otherwise removable solely on the basis of diversity of 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." (Emphasis added.)

But what happens when an in-state defendant in a diversity case is *not* "properly joined and served?" That's where snap removal comes in. Quick-acting defendants across the country have been increasingly able to remove cases from state to federal court when, for example, they are served prior to their forum co-defendants being served, or in some instances, the unserved in-state defendant itself can remove. While Maryland's federal courts are deeply divided on the issue, defendants should be aware that snap removal can be a useful tool to remove cases even when an in-state defendant is named.

### **Recent Federal Court Trends Nationwide**

The Second, Third, and Fifth Circuits have come out strongly in favor of snap removal. The decisions from the Second and Third Circuits allowed removal from the in-state defendants themselves before service, while the Fifth Circuit did not directly address that issue. The Sixth and Seventh Circuits also have approved of snap removals, albeit in footnotes.

The Second Circuit's recent case of *Gibbons v. Bristol-Myers Squibb Co.* is illustrative. 919 F.3d 699, 702 (2d Cir. 2019). In that product liability case, plaintiffs filed suit against Bristol-Myers Squibb (BMS) and Pfizer in Delaware state court. Both BMS and Pfizer are incorporated in Delaware, which normally would prevent them from removing the case to federal court under the forum defendant rule. With the advent of online court dockets, however, it is not uncommon for defendants to become aware that a lawsuit has been filed against them prior to being served with the complaint. Such was the case here, and BMS and Pfizer removed the case to federal court. Plaintiffs filed a motion for remand, arguing that because BMS and Pfizer were sued in their home state, removal was barred. The Second Circuit disagreed, holding that Section 1441(b)(2)'s language is "unambiguous." The court explained that "[e]very exercise in statutory construction must begin with the words of the text," and the words in Section 1441(b)(2) make clear 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 under Section 1441(a) so long as a federal district court can assume jurisdiction over the action." 919 F.3d at 705; *Encompass Ins. Co. v. Stone Mansion Rest. Inc.*, 902 F.3d 147 (3d Cir. 2018) (in accord).

Earlier this year, the Fifth Circuit followed the Second and Third Circuits, concluding that the statute's "plain meaning" permits removal by a forum defendant until that defendant has been "properly joined and served."

*Texas Brine Co. LLC v. Am. Arbitration Ass'n. Inc.*, 955 F.3d 482, 486 (5th Cir. 2020).

Even with the persuasive reasoning from the appellate level, the nation's district courts have splintered on the issue of snap removal both across and within circuits. Many courts, especially after the Second, Third, and Fifth Circuits' rulings, agree that the language of Section 1441(b)(2) "unambiguously" permits removal of an unserved in-state defendant. Other courts, however, have taken a more purpose-driven approach. These courts find that literal interpretation of the statute would create an "absurd" process through which in-state defendants could bypass the forum defendant rule, which could not have been the purpose of Congress. They explain that the purpose underlying removal in diversity cases was to protect out-of-state defendants from potential prejudices in the state courts of the plaintiff's home state, but when the defendant is sued at home, removal is unnecessary. They also explain that the purpose for the "joined and served" language in Section 1441(b)(2) was to prevent plaintiffs from fraudulently joining forum defendants but never serving them solely to defeat federal jurisdiction. When the forum defendants are served, fraudulent joinder is not an issue and therefore removal is inappropriate.

### **What Does This Mean for Maryland?**

The Fourth Circuit has not ruled on the propriety of snap removals, and courts within the District of Maryland are split. Some judges have adopted the statutory construction rationale, ruling that the plain language of Section 1441(b)(2) permits removal when the forum defendant removes before being served, while other judges have applied the purpose-driven rationale and remanded the cases back to state court.

Rulings from Judge Russell, Judge Bennett, and the late Judge Titus have each expressed approval of snap removals based on the literal language of the statute. For example, a 2015 opinion from Judge Russell found that "the inquiry ends with the plain language" of the statute, meaning that because the in-state defendant, Johns Hopkins Hospital, had not yet been served, it could remove the matter to federal court. *Al-Ameri v. The Johns Hopkins Hosp.*, No. CV GLR-15-1163, 2015 WL 13738588, (D. Md. June 24, 2015).

On the other hand, rulings from Judge Blake, Judge Bedar, Judge Chuang, and Judge Hollander remanded cases where snap removal was attempted. For example, Judge Blake recently called snap removals "an apparent loophole in the forum defendant rule" through which the defendant was attempting to avoid "adjudication in Maryland state court" in defiance of "common sense," which would lead to "absurd results contrary to the purpose of the statute." *Teamsters Local 677 Health Servs. & Ins. Plan v. Friedman*, No. CV CCB-18-3868, 2019 WL 5423727, at \*3 (D. Md. Oct. 23, 2019).

### **What Does This Mean for Defendants?**

Snap removal may offer a mechanism for moving a case from state to federal court even with an in-state defendant but taking advantage of this process requires several considerations.

### **How Quickly Can Defendant Act?**

Snap removal is only available before an in-state defendant is "properly joined and served." Timing is crucial, as this avenue is closed immediately upon proper service. Accordingly, defendants should assess whether an in-state defendant has been served and whether snap removal is appropriate in the case at hand. In a multi-defendant lawsuit where one of the defendants is a forum defendant, a foreign defendant should consider whether it is in a position to, and whether it is advantageous to, remove prior to service upon the in-state defendant.

To have snap removal as an option, companies may wish to monitor online state court dockets to learn when they have been sued. This can be done by subscribing to various docket monitoring services, such as Courthouse News Service. Care should be taken to ensure compliance with other removal deadlines, namely the 30-day removal clock of 28 U.S.C. § 1446(b)(1), which requires, in part, removal within 30 days of the receipt "through service or otherwise" of a copy of the initial pleading.

### **Would a Federal Forum Be Preferable?**

When a lawsuit is filed in state court, the defendant should quickly consider whether a federal forum would be more advantageous. In making that determination, defendants should consider the type of case involved, the judges in the competing courts, the pace in which cases move in the courts, and the procedural and evidentiary rules that would govern in each court. As discussed herein, removal is not necessarily limited to when a federal question is involved or when there is complete diversity without a forum defendant. Snap removal may be a means through which a defendant, even an in-state defendant, also may have its case heard in federal court.

### **Potential Judge Assignment**

Given the deep division in Maryland's federal courts on the issue of snap removal, defendants should give careful consideration regarding the prior rulings of the potential assigned judge and the judge's prior opinions regarding snap removal.

### **Appeal**

Appellate rulings on snap removals are exceedingly rare. One reason for the dearth of such authority is that an order remanding a case generally is not appealable. 28 U.S.C. § 1447(d). However, courts are able to certify interlocutory appeals pursuant to 28 U.S.C. § 1292(b). Even litigants facing long odds at the district court level might consider removing and then requesting a certified interlocutory appeal, especially in jurisdictions like the Fourth Circuit, which has not yet ruled on the practice.

### **Proposed Legislation**

Earlier this year, the House introduced a bill entitled the "The Removal Jurisdiction Clarification Act of 2020," H.R. 5801 that effectively would do away with snap removals. If the bill were to pass as drafted, federal courts would be required to remand snap removal cases if (1) the in-state defendant is served "within 30 days after filing of the notice of removal ... or within the time specified by State law for service of process, whichever is shorter;" and (2) a motion to remand is timely filed.

In-house and outside counsel should monitor this legislation and any amendments to it, especially if the bill is reintroduced in the next Congress.

### **Conclusion**

Snap removal can be an intriguing opportunity for defendants, including in-state defendants, to remove cases to federal court based on the language of 28 U.S.C. § 1441(b)(2). To date, every circuit to directly rule on snap removals has approved of the practice. The Fourth Circuit, however, has not spoken to snap removals, leading to a deep division within Maryland's federal court. Taking advantage of snap removal requires quick-thinking and rapid response, and defendants should keep snap removal as an option even when an in-state defendant is named.

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