

Oh Snap! Fast-Acting Defendants Circumvent the Forum Defendant Rule

By Joseph Fay on April 4, 2023
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Snap removal takes advantage of the plain language provided in the forum defendant rule. This rule precludes removal of a case to federal court where at least one of the named defendants is a citizen of the state where the action was filed. See 28 U.S.C. § 1441(b)(2). Fast-acting defendants found a way to circumvent this rule by employing snap removal: a technique that allows a forum defendant to remove a case to federal court on diversity grounds after the suit is filed in state court but before the forum defendant is served.

Origins of Snap Removal

In 2018, the Third Circuit became the first federal appellate court to address the practice of snap removal with *Encompass Insurance Co. v. Stone Mansion Restaurant Inc.*, 902 F.3d 147 (3rd Cir. 2018). There, the court addressed the issue of whether 28 U.S.C. § 1441(b)(2) permits removal by a forum defendant who removed a case before service. *Id* at 151-154. While looking at the plain language of 28 U.S.C. § 1441(b)(2), the court held

the language of the forum defendant rule in section 1441(b)(2) is unambiguous. Its plain meaning precludes removal on the basis of in-state citizenship only when the defendant has been properly joined and served.

Id at 152.

Following this decision by the Third Circuit Court of Appeals, surrounding Circuit Courts faced a growing number of forum defendants attempting to circumvent the forum defendant rule with snap removal.

In 2019, the Second Circuit became the second federal appellate court to address the practice of snap removal with *Gibbons v. Bristol-Myers Squibb Co.*, 919 F.3d 699, 705 (2d Cir. 2019). The court concluded

[t]he statute plainly provides that an action [may not be removed to federal court on the basis of diversity of citizenship once a home-state defendant has been 'properly joined and served.' [quoting 28 U.S.C. § 1441(b)(2)] ... By its text, then, Section 1441(b)(2) is inapplicable until a home-state defendant has been served in accordance with state law ...

Gibbons, 919 F.3d at 705

In 2020, the Fifth Circuit became the third federal appellate court to address the practice of snap removal with *Texas Brine Co. v. American Arbitration Ass'n*, 955 F.3d 482 (5th Cir. 2020). Looking to the statutory text, the court found the plain language allows snap removal and rejected the plaintiff's assertion that snap removal produces an absurd result. *Id* at 486-87. Agreeing with the Second Circuit in *Gibbons*, the Fifth Circuit emphasized that Section 1441(b)(2) applies when a home-state defendant has been served in accordance with state law. *Id* at 486. Consequently, "[a] non-forum defendant may remove an otherwise removable case even when a named defendant who has yet to be 'properly joined and served' is a citizen of the forum state." *Id* at 487.

Snap Removal and the Seventh Circuit

The practice of snap removal is currently under development in the Seventh Circuit, with the issue undecided in Indiana, a district split in Illinois, and a remanded snap removal in Wisconsin.[1]

In *W. Bend Mut. Ins. Co. v MSPPR, LLC*, 2021 U.S. Dist. LEXIS 24545 (N.D. Ill. Feb. 9, 2021), the court denied plaintiff's attempt to remand an in-state defendant's removal in a diversity case where the defendant removed the lawsuit prior to being served. The court took a plain text approach, concluding that section 1441(b)(2) on its face only applies to "parties in interest properly *joined and served* as defendants." (emphasis added). The *W. Bend Mut. Ins.* opinion captures the recent development of snap removal and states, "Courts outside of the Seventh Circuit are split on the issue, although, for whatever it's worth, decisions that adopt the plain-text approach tend to be more recent." *Id*. This plain-text approach provided viable avenues for home-state removal in the Third, Second, and Fifth Circuit Courts.

The Takeaway for Insurers and Corporations

Generally, corporate entities and insurers are better equipped to promptly accept service. However, the same is not true for corporate employees or insureds. Snap removal provides corporations and insurers the opportunity to litigate cases in a familiar venue at the federal level. As snap removal continues to develop, this tool may be a viable means for defendants to circumvent the forum defendant rule, keep cases local, and decrease the costs of litigation.

[1] See *DC v. Abbott Laboratories, Inc.*, 323 F. Supp. 3d 991, (N.D. Ill. Aug. 29, 2018) (Upheld snap removal when forum defendant removed before it was served); *but see Vivas v. Boeing Co.*, 486 F. Supp. 2d 726, 734-35 (N.D. Ill. 2007) (Rejected snap removal when forum defendant removed before any defendant was served); *Hoffman Bikes, Inc. v. Pacific Cycle, Inc.*, 2017 WL 4174923, at *3 (W.D. Wis. Sept. 20, 2017) (Rejected snap removal when forum defendant removed case before it was served and 1.5 hours after the complaint was filed).

Tags: Federal Forum Provisions, Forum Defendant Rule, Snap Removal