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Fast and Furious: Forum Defendants, Snap Removal and 28 U.S.C. §1441(b)

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There are a number of reasons why defendants generally, or insurers specifically, may prefer to litigate matters in federal court. First, the pleading standards required by federal courts are generally more stringent than in state courts, which: (1) gives insurers a better understanding of their insureds' legal and factual arguments; and (2) makes the utility of early motion practice more easily foreseeable.

Second, while state courts are seen as providing a "home court" advantage to their in-state insureds, federal courts are viewed as less partisan and above the fray. Courts across the country recognize that the diversity statute (which, along with the removal statute, allows cases pending in state court to be "removed" to—and litigated in—federal court) exists in part to prevent favoritism for in-state litigants, and discrimination against out-of-state litigants. See, e.g., *J.A. Olson Co. v. City of Winona, Miss.*, 818 F.2d 401, 404 (5th Cir. 1987) (noting that diversity jurisdiction and removal exist to protect out-of-state defendants from in-state prejudices).

Third, discovery in federal courts—both fact and expert—is more rigorously managed, and the procedures more fully fleshed out, than in state courts.

But removal is not available to everyone. For most cases not involving questions of federal law, there must be "complete diversity," that is, that no defendant is a "citizen" of a state in which any plaintiff is also a citizen. Insurance companies, most of which are corporations, are generally citizens of their principal place of business (i.e., the "nerve center" of their operations, colloquially known as a PPB) and the state in which they are incorporated. See 28 U.S.C. §1332(c)(1); see also *Hertz v. Friend*, 559 U.S. 77 (2010) (corporation's principal place of business is the place where a corporation's officers direct, control, and coordinate the corporation's activities, i.e., the "nerve center" of its operations); *Americold Realty Tr. v. Conagra Foods*, 577 U.S. 378 (2016) (unincorporated entities, such as limited liability companies, are citizens of all states where each of their members or partners is a citizen).

The removal statute, 28 U.S.C. §1441(b), contains another but perhaps lesser-known restriction: A suit that is "otherwise removable

solely on the basis of [diversity of citizenship] 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." This has come to be known colloquially as the "forum-defendant rule."

Consider the following hypothetical. A Delaware corporation with its PPB in New York sues four of its insurers in state court in California for property damage and related time element losses. Insurer A is a Texas corporation with a PPB in Idaho, Insurer B is a Texas corporation with a PPB in California, Insurer C is incorporated and has its PPB in Illinois, and Insurer D is a California corporation with a PPB in Connecticut. None has been served with process.

There is complete diversity here; none of the insurers is a citizen of either Delaware or New York. But two of the insurers (B and D) are

California citizens, and because the suit was brought in California state court, they are forum defendants. Can they remove, and if so, how?

The forum defendant rule contains four key limiting words. Under the statute's plain language, removal is precluded only when the forum defendant is "properly joined and served." But what happens if a defendant removes *before* service on a forum defendant? Resourceful defense counsel have tried, effectuating what is referred to as a "snap removal." As explained by one federal court in the Northern District of Texas: "The hallmark of a snap removal is its timing: a snap removal occurs (1) just after the state court case has been filed, and (2) just before the plaintiff has the opportunity to serve any forum defendants. This particular timing of events creates a possible loophole in the forum-defendant rule based on the 'properly joined and served' language. This loophole has been used by both forum and nonforum defendants with variable rates of success for each." *Breitweiser v. Chesapeake Energy*, 2015 WL 6322625, at *3 (N.D. Tex. Oct. 20, 2015) (cleaned up).

To date, three federal circuit courts have—to varying extents—endorsed this practice, and three more have indicated (in dicta) their approval of it.

First came the Third Circuit. In *Encompass Insurance v. Stone Mansion Restaurant*, 902 F.3d 147 (3d Cir. 2018), a forum state defendant agreed to accept service electronically, but prior to being served, removed what was then a state court action to federal court. The plaintiff unsuccessfully moved to remand and dismiss the action, then appealed to the Third Circuit.

	Incorporated In	PPB
Plaintiff	Delaware	New York
Insurer A	Texas	Idaho
Insurer B	Texas	California
Insurer C	Illinois	Illinois
Insurer D	California	Connecticut

Finding the statute unambiguous, and seeing no contrary legislative intent, the Third Circuit concluded that under the plain language of the statute, the requirement that a forum defendant be "properly joined and served" was literal. Thus, where a forum defendant removed an action *prior to* being served, the Third Circuit concluded that this removal was proper.

Enterprising defendants with quick trigger fingers or sophisticated court tracking software (or their counsel) can continue to interpret the removal statute as its plain language requires, and remove cases to federal court prior to service on a forum defendant.

A year later, the Second Circuit reached the same conclusion in *Gibbons v. Bristol-Myers Squibb Company*, 919 F.3d 699 (2d Cir. 2019). There too, the forum state defendant was the removing party. And yet, the Second Circuit found that removal was proper. Citing the Third Circuit's case from the previous year, the Second Circuit held: "'The language of the forum defendant rule in Section 1441(b)(2) is unambiguous.' The 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*.' By its text, then, Section 1441(b)(2) 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."

After the Second and Third Circuits' decisions, the Fifth Circuit analyzed a similar issue. *Texas Brine Co. v. Am. Arb. Ass'n*, 955 F.3d 482 (5th Cir. 2020). There, and unlike in *Encompass* and *Gibbons*, a non-forum defendant removed prior to any of the forum defendants being served. The plaintiff sought remand, and the district court denied the plaintiff's motion. The Fifth Circuit upheld the district court's ruling, holding that 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." But, unlike *Encompass* and *Gibbons*, the Fifth Circuit did not say whether it would have reached the same conclusion had a forum defendant removed.

Three other circuit courts have (arguably in dicta) also addressed this issue: the Sixth, Seventh, and Eleventh Circuits.

In *McCall v. Scott*, 239 F.3d 808 (6th Cir.), the Sixth Circuit held that "where there is complete diversity of citizenship, [] the inclusion of

an *unserved* resident defendant in the action does not defeat removal under 28 U.S.C. §1441(b)."

In *Morris v. Nuzzo*, 718 F.3d 660 (7th Cir. 2013), the Seventh Circuit, citing a well-regarded treatise, noted that §1441(b)(2)'s "properly joined and served" provision creates "a service-based exception to the forum defendant rule, meaning that a properly served out-of-state defendant will not be prevented from removing a case when the plaintiff has named but not yet served a resident defendant."

And in *Goodwin v. Reynolds*, 757 F.3d 1216 (11th Cir. 2014), the district court had concluded that "the forum-defendant rule applies only if a forum defendant has been 'properly joined and served,'" which the Eleventh Circuit assumed was correct.

Still, results are decidedly more mixed at the trial court level in districts in which the appellate courts have not weighed in. For example, in the District of Massachusetts, a judge interpreting a prior version of the removal statute concluded that the removing party must have been served with process prior to removal. *Gentile v. Biogen Idec*, 934 F. Supp. 2d 313, 316 (D. Mass. 2013) (concluding that "Section 1441(b) requires at least one defendant to have been served before removal can be effected"); see also *Adams v. Beacon Hill Staffing Grp.*, 2015 WL 6182468 (D. Mass. Oct. 21, 2015) (same). Similarly, a judge in the Central District of California refused to allow snap removal, contending that the plain meaning of the statute would "eviscerate the purpose of the forum defendant rule [and held that a court] may not adopt a plain language interpretation of a statutory provision that directly undercuts the clear purpose of the statute." *Massachusetts Mut. Life Ins. Co. v. Mozilo*, 2012 WL 11047336, at *2 (C.D. Cal. June 28, 2012). But another, in the Northern District of California, allowed a similar removal, holding that "the clear and unambiguous language of the statute only prohibits removal after a properly joined forum defendant has been served." *Regal Stone Ltd. v. Longs Drug Stores California*, 881 F. Supp. 2d 1123, 1127 (N.D. Cal. 2012).

Even within the same federal district, courts are divided. One judge in the District of Maryland concluded that subject to a number of inapplicable exceptions, "the inquiry ends with the plain language," which allows for snap removal. *Al-Ameri v. The Johns Hopkins Hosp.*, 2015 WL 13738588, at *1 (D. Md. June 24, 2015). Another disagreed, holding that applying the plain language of the statute would "encourage[] gamesmanship," "create absurd results," allow for the "exploiting of a perceived technicality," "take advantage of a loophole," and be an "end run around the predicates for removal." *Teamsters Loc. 677 Health Servs. & Ins. Plan v. Friedman*, 2019 WL 5423727, at *3 (D. Md. Oct. 23, 2019) (citing cases). And yet, practically speaking, a plaintiff wishing to remain in state court need only serve the forum defendant prior to any non-forum defendant.

Indeed, state authorities are taking matters into their own hands, modifying service rules to allow for faster service in an attempt to enable plaintiffs to remain in state courts. Compare Pa. R.C.P. No. 400 (effective until March 31, 2022) (requiring in most cases service by the sheriff) with Pa. R.C.P. No. 400 (effective April 1, 2022) (allowing service by a "competent adult" in "a civil action in which there is a complete diversity of citizenship between all plaintiffs and all defendants, and at least one defendant is a citizen of Pennsylvania"). And in February 2020, a bill was introduced in Congress—since abandoned and not re-introduced—"to establish a procedure for remand of a civil action that has been removed before service on a forum defendant, and for other purposes." See Text, H.R.5801, 116th Congress (2019-2020): Removal Jurisdiction Clarification Act of 2020, H.R.5801, 116th Cong. (2020).

For now though, enterprising defendants with quick trigger fingers or sophisticated court tracking software (or their counsel) can continue to interpret the removal statute as its plain language requires, and remove cases to federal court prior to service on a forum defendant.

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