Early Bird Gets the Federal Forum: Fifth Circuit Joins Other Courts to Approve 'Snap Removal'

A Texan sues a Louisianan and a Mississippian in a New Orleans state courthouse for a multi-million dollar contract dispute. Any first year civil procedure student will tell you that the parties' complete diversity and the case's amount in controversy confers subject matter jurisdiction on the federal courts. But only the A-students will point out that the defendants' right to a federal forum may be destroyed by the "forum-defendant rule," which precludes removal (but not jurisdiction) even with complete diversity when any properly *served* defendant is a citizen of the forum state. A recent Fifth Circuit opinion has affirmed that defendants can save their federal forum with quick action through "snap removal"—removing before the home-state defendant is served.

Why rush to the federal courthouse? There are a variety of reasons, but the Federal Rules of Civil Procedure loom large. The Federal Rules often provide more organization than a state's civil rules of procedure. For example, federal rules provide clear limits on discovery that state rules may lack. They also generally have more stringent standards for TROs (especially those sought *ex parte*). Rule 12 motions combined with the more stringent *Twombly* and *Iqbal* pleading standards also provide more opportunities for an early dismissal. At trial, federal jury pools are likely to be more diverse—federal juries are pulled from all counties covered by the division, whereas state juries are drawn from a single county. Finally, there is the very justification for diversity jurisdiction in the first place—federal courts are historically viewed as more "fair" to out-of-state defendants.[1]

Now, back to law school. You likely remember that the removal statute, 28 U.S.C. Section 1441, allows defendants sued in state court to remove to federal court a case that could have been filed there originally. This includes cases based on diversity jurisdiction (*i.e.*, between citizens of different states with more than $75,000 in controversy). Section 1441(b)(1), however, presents a roadblock. It prohibits removal based on diversity jurisdiction if any of the "*properly joined and served*" defendants are a citizen of the state where the action was filed. Known as the "forum-defendant rule," this statute ties all defendants to state court if any of them are citizens of that state, even if there is complete diversity and a sufficient amount in controversy such that the case could have been filed in federal court.

The plain language of the forum-defendant rule highlights its limitations: it states clearly that the "forum defendants" must not only be joined, but must also be *served*. This plain language suggests that a non-served defendant should not preclude removal. This quick removal before service of a forum defendant is known as "snap removal."

The issue of snap removal has been widely debated among courts and litigants. Plaintiffs generally argue that allowing removal with the presence of a forum defendant (even an unserved one) defeats the purpose of the forum-defendant rule. Defendants adopt a textualist approach, arguing that the statute clearly refers to joined *and served* defendants, not simply defendants. District courts have taken a wide variety of approaches based on several different factors.

Thankfully for our Fifth Circuit audience, the court has recently settled this debate within its borders. In its April 2020 decision in *Texas Brine Co. v. American Arbitration Association*, the Fifth Circuit became the most recent federal appeals court to authorize snap removal.[2] The Fifth Circuit adopted the textualist approach by concluding that the plain meaning of the forum-defendant rule was unambiguous. As a result, removal by a non-forum defendant *before* the forum defendants were served was proper. This

[1] *See Encompass Ins. Co. v. Stone Mansion Rest. Inc.*, 902 F.3d 147 (3d Cir. 2018).
[2] *Tex. Brine Co., L.L.C. v. Am. Arbitration Ass'n*, 955 F.3d 482 (5th Cir. 2020).

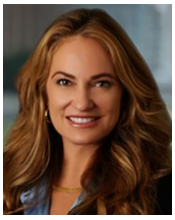
brings the Fifth Circuit in line with the Second,[3] Third,[4] and Sixth[5] Circuits who had previously held that the statute's plain and unambiguous meaning allowed snap removals in cases where a home-state defendant had not been served.

The certainty from this decision should cut down on remand motions based on the forum-defendant rule. Prior to *Texas Brine*, some district courts in the Fifth Circuit engaged in a purpose-based inquiry to determine whether the plaintiff had a reasonable opportunity to serve a forum defendant before the defendant removed. That inquiry seems to have been put to rest in *Texas Brine*, as the Fifth Circuit stated that this inquiry in effect inserts a new exception into the forum-defendant rule not present in the statute. Instead, the court seemingly adopted a bright-line rule that only considers who was fastest. The only relevant inquiry is whether the removing party removed the case before a home-state defendant was served.

Notably, because *Texas Brine* involved removal by an *out-of-state* defendant, the decision left open the question of whether snap removal by an unserved *in-state* defendant is also proper under the statute. While the Fifth Circuit found the fact that the removing defendant in the case was an out-of-state defendant "of some importance" to its decision, it based its holding in large part on the prior Second and Third Circuit decisions that found that snap removal by an unserved in-state defendant was also appropriate. Specifically, the Fifth Circuit quoted with approval a comment made by the Second Circuit 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." This language makes no distinction between whether the removing defendant is an in-state or out-of-state defendant.

As the name suggests, time is of the essence when it comes to properly accomplishing (or preventing) snap removals. For defendants seeking to increase their chances of snap removing a case, it is important to have online docket alerts in place that proactively notify you immediately when your company has been named in a lawsuit, even if service is not accomplished. On the other hand, these cases also demonstrate the importance of promptly effectuating service on any in-state defendant when initiating a state court lawsuit so that plaintiffs can protect the state forum which they have chosen. Regardless of where you sit on the spectrum, be ready to act quickly to protect your chosen forum.

This article was co-authored by Michelle Hartmann, Nicholas Kennedy, C. Thomas Kruse, Allen Al-Haj and Taylor LeMay of Baker McKenzie. [6]



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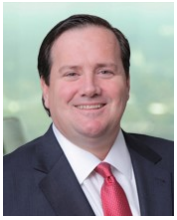

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[3] *Gibbons v. Bristol-Myers Squibb Co.*, 919 F.3d 699 (2d Cir. 2019).
[4] *Encompass Ins. Co. v. Stone Mansion Rest. Inc.*, 902 F.3d 147 (3d Cir. 2018).
[5] *McCall v. Scott*, 239 F.3d 808, 813 n.2 (6th Cir. 2001).
[6] *Baker McKenzie has litigated and is currently litigating issues related to snap removal.*