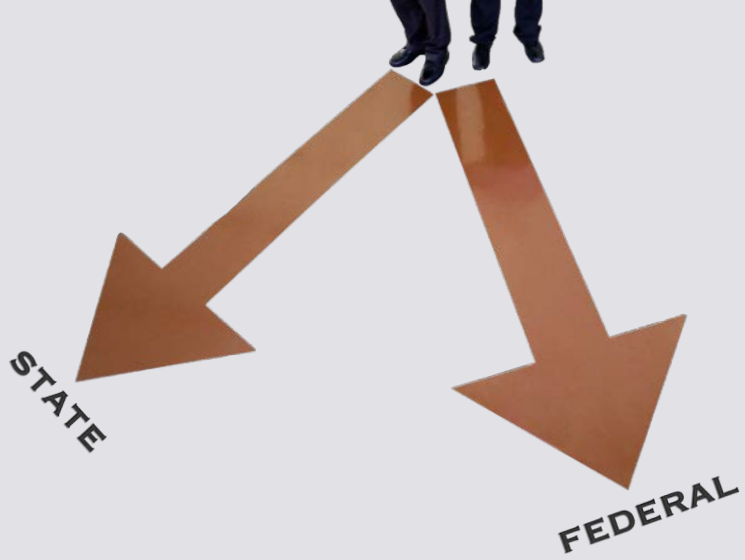
"Snap Removal": Loophole Allowing Cases With In-State Defendants to Remove to Federal Court May Be Closing



In early 2019, the Second Circuit approved the practice of "snap removals," whereby cases that ordinarily would not be capable of removal to federal court because of an in-state defendant can, nevertheless, be removed to federal court on the basis of diversity jurisdiction[1] if the in-state defendant has not yet been served with the summons and complaint. The Second Circuit's decision in *Gibbons v. Bristol-Myers Squibb Co.*, 919 F.3d 699 (2d Cir. 2019), followed a 2018 decision from the Third Circuit, *Encompass Insurance Co. v. Stone Mansion Restaurant, Inc.*, 902 F.3d 147 (3d Cir. 2018), likewise approving of snap removals. While the weight of authority supports the practice of snap removals, some courts have declined to permit the practice, and Congress has proposed legislation aimed at limiting snap removals.[2]

LEGAL AND FACTUAL BACKGROUND GIVING RISE TO SNAP REMOVALS

The underlying tenet of the removal doctrine is that out-of-state defendants should have some recourse against the perceived home-court advantage afforded to a plaintiff litigating in his or her own state court.[3] Such protections were not seen as necessary where the defendant was sued in its own state.

Thus, the "forum defendant rule" makes removal based on diversity jurisdiction unavailable to a defendant sued in its home state: an action "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."[4] By its terms, the forum defendant rule prevents removal where any defendant is a citizen of the state where the action is filed.[5] A 1948 revision added the requirement that an in-state defendant must be served to trigger the forum defendant rule's prohibition on removal. This provision was added to the statute to prevent plaintiffs from strategically naming "sham" defendants whom they never intended to serve solely to prevent removal.

For decades, this provision received little attention. However, with the rise of electronic filing and docket monitoring services, vigilant defendants are becoming aware of lawsuits filed against them before any defendants are formally served with the complaint, allowing them to act quickly to remove an action before an in-state defendant is served.

POTENTIAL LEGISLATION THREATENS TO ELIMINATE SNAP REMOVALS

In November 2019, the U.S. House of Representatives' Subcommittee on Courts considered whether snap removals "exploit modern technology and a supposed statutory loophole."[6] Then, in February 2020, representatives Jerrold "Jerry" Nadler (D-NY) and Henry "Hank" Johnson Jr. (D-GA) introduced HR5801, the Removal Jurisdiction Clarification Act, which would require federal courts to remand cases to state court after a snap removal if (1) the plaintiff moved to remand, and (2) service was completed on the in-state defendant(s) within the shorter of 30 days from removal or the time required for service under state law.[7] The fate of the bill is not certain, but for now, snap removals remain "authorized by the text" of the forum defendant rule.[8]

TAKEAWAY

Given its status, and its recent approval in federal courts, businesses should be aware of, and familiar with, snap removal. Accordingly, parties should diligently monitor court filings and remain cognizant of the potential for snap removal when evaluating jurisdictional issues, both before filing an action or when considering a defense strategy.

If you have any questions regarding snap removal, please contact Deena K. Mueller-Funke, Senior Associate, at (716) 847-7029, dmueller-funke@phillipslytle.com; Ryan A. Lema, Partner, at (716) 504-5790, rlema@phillipslytle.com; or the Phillips Lytle attorney with whom you have a relationship. ■

[1] Diversity jurisdiction exists if no plaintiffs share the same citizenship as any defendant, and the amount in controversy is greater than $75,000. 28 U.S.C. § 1332(a).

[2] *See, e.g., Bowman v. PHH Mortg. Corp.*, No. 2:19-cv-00831 AKK, 2019 WL 5080943, at *5 (N.D. Ala. Oct. 10, 2019) (remanding to state court an action removed before the two Alabama defendants were properly served), *appeal dismissed*, No. 19-14041-HH, 2020 WL 1847512 (11th Cir. Feb. 26, 2020).

[3] *Eicher v. Macquarie Infrastructure Mgmt. (USA) Inc.*, No. 12-cv-5617 GBD, 2013 WL 4038601, at *2 (S.D.N.Y. Aug. 8, 2013) (citing cases).

[4] 28 U.S.C. § 1441(b)(2) (emphasis added).

[5] *Id.*

[6] Press Release, Chairman Nadler Statement for Subcommittee Hearing on "Examining the Use of 'Snap' Removals to Circumvent the Forum Defendant Rule" (Nov. 14, 2019) https://nadler.house.gov/news/documentsingle.aspx?DocumentID=394143.

[7] Congress.gov, H.R. 5801, 116th Cong. (2019-2020), https://www.congress.gov/bill/116th-congress/house-bill/5801 (last visited June 16, 2020).

[8] *Gibbons,* 919 F.3d at 707.