August 30, 2019

Rebecca A. Womeldorf, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, DC 20544
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Re: Snap Removal Rule Change Proposal

Dear Ms. Womeldorf:

The American Association for Justice (AAJ) hereby proposes a change to Rule 4 of the Federal Rules of Civil Procedure to address the current tremendous burden on our federal courts associated with the problems and practice of "snap removal."

AAJ is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ's members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions, and frequently utilize the Federal Rules of Civil Procedure, including Rule 4. Throughout its more than 70-year history, AAJ has served as a leading advocate for the right of all Americans to seek legal recourse for wrongful conduct.

What is Snap Removal?

In an effort to evade state court jurisdiction in which they are properly forum defendants, defendants have contorted an interpretation of the Federal Rules to achieve removal to federal court in a practice now commonly known as "snap removal." Defendants utilize this procedure to achieve "more favorable" federal court jurisdiction. Simply put, "[a] snap removal occurs when defendants exploit a loophole in federal law by removing a diversity case involving at least one forum defendant before any defendant has been served…."[1]

A look at the removal statutes illustrates how snap removal operates. Typically, an action filed in state court may be removed to federal court only when the action is between citizens of different states with a sufficient amount in controversy.[2] However, when one of the defendants is a citizen

[1] Valerie M. Nannery, *Closing the snap removal loophole*, 86 U. Cin. L. Rev. 541, 541 (2018), *available at* https://scholarship.law.uc.edu/cgi/viewcontent.cgi?article=1274&context=uclr.
[2] *See* 28 U.S.C. § 1332.

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of the state in which the action is filed and has been properly served, this type of removal is specifically *not* allowed.[3] This is known as the "forum defendant rule."

A recent relative outlier interpretation of this rule, *Encompass Ins. Co. v. Stone Mansion Rest. Inc.*, 902 F.3d 147 (3d Cir. 2018), is now making snap removal possible as defendants are routinely using absurd measures and proliferating an unintended race to the courthouse. Section 1442(b)(2) states that an action 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."[4] Defendants, seeking to evade the very courts in states in which they reap the rewards of being corporate citizens, instead now look to move their case into what they view to be more favorable federal courts, and do so by seizing upon a contorted interpretation of the phrase "properly joined and served as defendants." In practice, defendants actually keep a constant, if not obsessive, watchful eye on online dockets and remove cases immediately when they see that they are a named defendant but *before* they have been formally served with the complaint.

Based on the plain meaning of the phrase "properly joined and served,"[5] some courts have allowed this practice.[6] This practice is snap removal. Enabled by the widespread use of electronic dockets and easy docket monitoring tools, the practice of evading duly proper state court jurisdiction has become astonishingly easy to accomplish.

Proposal

When a defendant monitors state case filings and then attempts to remove a case, that defendant undoubtedly has actual notice that a lawsuit against it has been filed, unbeknownst to the plaintiff. Though the defendant does not yet have formal notice, it nevertheless has been apprised of the lawsuit in such a way that allows it to act in its own interest (i.e. "snap removing" the case to federal court). This practice is antithetical to the purpose of the Federal Rules of Civil Procedure, which require courts and parties to construe, administer, and employ the rules to "secure the just, speedy, and inexpensive determination of every action and proceeding."[7] There is nothing just about allowing a defendant with knowledge of a lawsuit to remove a case to its preferred court before it has been formally served. Instead, this practice leads to added expense and delay for plaintiffs properly filing in their choice of forum.[8]

Studies show that snap removal leads to significant delay in litigation. After a case is removed, plaintiffs who file a motion for remand to attempt to return the case to the proper court "waited at

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[3] *See* 28 U.S.C. § 1441(b)(2).
[4] 28 U.S.C. § 1441(b)(2) (emphasis added).
[5] *Id.*
[6] *See, e.g.*, *Encompass Ins. Co. v. Stone Mansion Rest. Inc.*, 902 F.3d 147 (3d Cir. 2018); *Gibbons v. Bristol-Myers Squibb Co.*, 919 F.3d 699 (2d Cir. 2019); *Selective Insurance Co. of S.C. v. Target Corp.*, 2013 WL 12205696 (N.D. Ill. Dec. 13, 2013) ("Read literally, the forum defendant rule only precludes removal when a forum defendant has been 'properly joined and served.'").
[7] Fed. R. Civ. P. 1.
[8] *See, i.e.*, *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913) ("the party who brings a suit is master to decide what law he will rely upon").

least two months for a ruling on their motions" and "when judges did not rule on the plaintiff's motion…cases remained in federal court for extended periods."[9] This study determined that:

> If a case was remanded to state court after a snap removal, either *sua sponte* or on a motion to remand, it had been in the federal district court for an average of 152 days. The median number of days these remanded cases were in federal district court was seventy-nine. The shortest amount of time a case was in federal court before it was remanded was one day. The longest amount of time was 1,706 days, or almost five years, before the case was remanded.[10]

This further illustrates that even if in the end the plaintiff's choice to file in state court was proper, the defendant, by snap removing a case, has created lengthy delays and still prevented plaintiff from moving their case forward.

Thus, AAJ proposes a change to FRCP 4 to help achieve the intended result of the Rule and stop the specious result brought on by some defendants. Rule 4 provides for waiver of service. The inclusion of a new section in the rule relating to constructive waiver would adequately address issues that arise due to snap removal.

Specifically, under Rule 4(d), AAJ recommends that the following language be added:

> (6) Constructive Waiver. When any defendant has actual notice that a lawsuit has been filed against it, all defendants to the lawsuit will be deemed to have waived service of the summons, provided that formal service takes place within thirty (30) days of any action taken by any defendant so that all defendants have formal notice of the lawsuit and it shall be deemed that such service will relate back to the date of actual notice to any defendant.

The addition of a constructive waiver section to Rule 4 would simply provide that when any one defendant has actual notice that a lawsuit against it has been filed, all defendants will be deemed to have waived service of the summons so that service will relate back to the date of actual notice. Thus, defendants with actual notice who are trolling state filings would no longer be allowed to snap remove the case to federal court under § 1441(b)(2), and removal proceedings would instead be carried out as intended by the rules.

This will be the case providing that service occurs within 30 days of any action taken by any defendant. While under this proposed rule a defendant's attempt to remove indicates actual notice to all defendants and destroys the implicit permission to remove under 28 U.S.C. § 1441(b)(2), the waiver of service, for purposes of preventing snap removal, should still carry with it an obligation to assure that each defendant has formal notice of the lawsuit. Section 1441(b)(2) was enacted so that plaintiffs do not name, and then never serve, an in-state defendant in order to avoid removal, and the proposed rule's requirement of formal service within 30 days

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[9] Nannery, *supra* note 1, at 569.
[10] *Id.* at 571-72.

would satisfy this concern.[11] If service does not occur within 30 days, then § 1441(b)(2) can take effect.

Additional Problems with Snap Removal

As the snap removal practice proliferates and courts wrestle with resolving the rush to the courthouse, inconsistent decisions from the courts have resulted. This inconsistency has created another unintended consequence: plaintiffs who properly file suits based on state law claims in state court now have to navigate relative uncertainty within the courts on the problem of snap removal. What is more, the problems resulting from snap removal span beyond discrepancies in how courts handle this practice. Snap removal undercuts state law, adds to delays in civil litigation, and results in arbitrary consolidation of some cases in federal courts.

The practice of snap removal "(1) produces an absurd result and (2) will lead to non-uniform application of the removal statute depending on the provisions of state law."[12] For example, state law service requirements vary, with some requiring a delay between filing and service.[13] In these states, plaintiffs are automatically put at a disadvantage when filing their cases in state court, as defendants are likely attempt to snap remove the case to federal court before the plaintiff has even been *allowed* to effectuate service.

It is well-settled that the plaintiff chooses the initial forum by filing an action. There are procedural protections in place should the defendant feel that the plaintiff's choice is improper. In the situations described and contemplated herein, however, actions were unarguably *properly* brought before state courts; thus, snap removal is not, and should not be considered, one of those protections. Nevertheless, snap removal is often described as a "loophole," "tactic," and way for defendants to "evade" state court jurisdiction and state law. For example, attorneys are now advising that "Given this [Third Circuit] holding, frequently sued parties may want to invest in electronic monitoring of state court dockets to identify suits pre-service and consider removing these cases to federal court before being served."[14]

This type of gamesmanship should not be permitted, and can easily be remedied by the Federal Rules of Civil Procedure.

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[11] *See Delaughder v. Colonial Pipeline Co.*, 360 F. Supp. 3d 1372, 1380-81 (N.D. Ga. 2018).

[12] *Encompass*, 902 F.3d at 705. Moreover, there are often added costs to plaintiffs due to this practice. For example, it costs almost twice as much to hire a process server to do immediate service on a defendant, which becomes necessary to avoid snap removal scenarios.

[13] For example, in Pennsylvania service of process must be commenced by the relevant county's sheriff's office, who has 30 days to effectuate service. *See, e.g.*, Pa. R. Civ. P. 400(a) ("...original process shall be served within the Commonwealth only by the sheriff"). Service by sheriff cannot be expedited to beat snap removal that occurs within minutes. In New Jersey, litigants must wait until a Track Assignment Notice is issued by the court clerk before they are permitted to serve a filed complaint upon a defendant; the clerk has 10 days to issue the Notice. *See* N.J.R.C.P. 4:5A-2.

[14] Katie A. Fillmore, *Third Circuit recognizes viability of "snap removal" by in-state defendant*, ABA (Feb. 5, 2019), *available at* https://www.americanbar.org/groups/litigation/committees/products-liability/practice/2019/third-circuit-recognizes-viability-of-snap-Removal-by-in-state-defendant/.

Snap Removal in the Courts

Courts have demonstrated not only a divide over whether this practice should be accepted, but also as to the reasons why or why not. Even those courts that have approved of snap removal seem to suggest that their hands are tied and that the practice may "produce[ ] results that a court or litigant finds anomalous or perhaps unwise."[15]

The recent trend involves defense attorneys utilizing two opinions from the United States Courts of Appeals in the Third and Second Circuits to escalate and legitimize immediate snap removal practices nationwide.

In August 2018, the Third Circuit in *Encompass Ins. Co. v. Stone Mansion Rest. Inc.* considered whether Defendant Stone Mansion's pre-service removal is barred by the forum defendant rule. The court explained that "Encompass … argues that the District Court misinterpreted the forum defendant rule, ignoring its intent and construing it 'in a manner that necessarily would create a nonsensical result.'" The Third Circuit rejected this argument, and found the text of the forum defendant rule to be "unambiguous" because its plain meaning precludes removal on the basis of in-state citizenship only when the defendant has been properly joined and served. Only in a scenario where application of the plain meaning of the statute would lead to "absurd or bizarre results" should a court avoid the plain language. The court held that, therefore, pre-service removal in that set of circumstances is not inherently in violation of the forum defendant rule.[16]

In March 2019, the Second Circuit also addressed the practice of pre-service removal in *Gibbons v. Bristol-Myers Squibb Co.*, ultimately finding that removal before service is proper under the plain language of § 1442(b)(2).[17]

However, the *Encompass* court was permitting a method of pre-suit removal that is distinguishable from what defendants are currently practicing. In *Encompass*, the defendant removed the case *days* after it was filed.[18] The key issue in *Encompass* was whether the defense counsel's verbal agreement to accept service precluded his ability to remove the case before service was completed. Contrarily, defense attorneys are now snap removing filings within minutes and claiming *Encompass* permits the tactic. This particular snap removal practice hasn't yet been ruled on by a federal appellate court, but seems to be the type of "bizarre and absurd" result the *Encompass* court warned about, as snap removal – within minutes – functionally eviscerates the purpose of the forum defendant rule by prohibiting plaintiffs from filing a complaint in state court and diligently serving the forum defendant before an immediate electronic removal.[19] In effect, without the requested revision to Rule 4, forum defendants will continue to use *Encompass* and *Gibbons* as immunity from the forum defendant rule.

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[15] *Gibbons*, 919 F.3d at 705.
[16] *Encompass*, 902 F.3d 147 (3d Cir. 2018).
[17] *Gibbons*, 919 F.3d 699 (2d Cir. 2019).
[18] *Gibbons* also does not appear to involve snap removal within minutes of a complaint filing.
[19] Notably, the *Encompass* court specifically referenced the failure of the briefs to address a "race-to-the-courthouse removal scenario" or whether "the practice is widespread." *Encompass*, 902 F.3d at 154 n.4.

While these are the only two U.S. Courts of Appeals that have addressed snap removal, district courts have come to varying results. For example, the Southern District of West Virginia, Eastern District of Virginia, and District of New Jersey all held that a forum defendant cannot remove when it has not yet been served, and allowing otherwise would render the forum defendant rule meaningless.[20] In the Northern District of Illinois, the court found that removal was allowed, but also that remand was proper after the forum defendant was served.[21] Recently, in the Northern District of Georgia, the court declined to extend the *Encompass* ruling to the case at bar and remanded a case where snap removal occurred within 90 minutes of filing.[22] Other district courts have come to conclusions more similar to the Third and Second Circuits, or reached results that fall somewhere in the middle.[23]

The simple change to the Federal Rules of Civil Procedure proposed herein would prevent such absurd results, reduce gamesmanship, prevent delay, and allow the forum defendant rule to operate as was intended.

AAJ thanks the Committee for its time and consideration of this request.

Sincerely,

Bruce Stern
President
American Association for Justice

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[20] *Phillips Constr., LLC v. Daniels Law Firm, PLLC*, 93 F. Supp. 3d 544, 553 (S.D. W. Va. 2015) ("The Court is persuaded by those opinions that find the plain meaning . . . permits pre-service removal by a resident defendant, but a literal application of this plain meaning is contrary to congressional intent and creates absurd results"); *Campbell v. Hampton Rds. Bankshares, Inc.*, 925 F. Supp. 2d 800, 810 (E.D. Va. 2013) ("A removing defendant has actual notice of the case, and has become involved by seeking removal."); *Sullivan v. Novartis Pharm. Corp.*, 575 F. Supp. 2d 640 (D.N.J. 2008) (Court looked past plain meaning of § 1441(b) to give effect to purpose of *forum defendant rule* and warned of potential "gamesmanship – a hastily filing of a notice of removal" as being "demonstrably at odds with Congressional intent"). *See also* In *Vivas v. Boeing Co.*, 486 F.Supp.2d 726, 734 (N.D. Ill. 2007) ("Combining [these statutes] to allow a resident defendant to remove a case before a plaintiff even has a chance to serve him would provide a vehicle for defendants to manipulate the operation of the removal statutes.").

[21] *Grimard v. Montreal, Maine and Atlantic Ry., Inc.*, 2013 WL 4777849 (N.D. Ill. Sept. 5, 2013).

[22] *See Delaughder v. Colonial Pipeline Co.*, 360 F. Supp. 3d 1372 (N.D. Ga. 2018).

[23] *See FTS Int'l Servs., LLC v. Caldwell-Baker Co.*, 2013 WL 1305330 (D. Kan. Mar. 27, 2013) (finding that the statute requires both joinder and service, but holding that cases are not removable until at least one defendant has been served).