

Testimony of Kaspar J. Stoffelmayr

Partner, Bartlit Beck LLP

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For a Hearing on

“Examining the Use of ‘Snap’ Removals to Circumvent the Forum Defendant Rule”

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Chairman Johnson, Ranking Member Roby, and Members of the Subcommittee, thank you for the opportunity to testify today.

My name is Kaspar Stoffelmayr. I am a partner in the law firm of Bartlit Beck LLP in Chicago, Illinois. I am testifying today on behalf of Lawyers for Civil Justice, a national coalition of law firms, corporations and defense trial lawyer organizations that promotes excellence and fairness in the civil justice system to secure the just, speedy, and inexpensive determination of civil cases. To be clear, I am not testifying on behalf of my law firm, and the views I express are entirely my own and should not be taken to represent the views of the firm or any of its clients.

A large part of my practice involves the defense of mass tort and product liability cases. This is the type of litigation often associated with so-called “snap” removals (better described as “pre-service removals” for the reasons explained below). I have defended these cases both as outside counsel and as a senior in-house lawyer when I worked for three years as Vice President and Associate General Counsel for Bayer, where I served as the company’s head of litigation in the United States.

My testimony begins with some background to provide context for a discussion of pre-service, or “snap,” removals. This background includes a brief review of the general principles that govern the federal courts’ diversity jurisdiction and the special “forum defendant rule” that applies when diversity cases filed by out-of-state plaintiffs are removed from state court to federal court. I will then discuss some of the considerations that surround pre-service removal, including the purposes that it serves and why, in the rare cases where pre-service removal may lead to anomalous results, no party will suffer

any injustice. While a small number of litigants may be disappointed that, as a consequence of pre-service removal, a presumptively neutral federal court will hear their cases, these parties are not subject to any unfairness or injustice that would weigh in favor of revising statutory language that has served well since its enactment.

A. Background on Diversity Jurisdiction, the Forum Defendant Exception, and Pre-Service Removal

The colloquial term “snap” removal refers simply to the removal of a case from a state court to a local federal court on the basis of the federal court’s diversity jurisdiction when two requirements are satisfied: (1) the plaintiff is not a citizen of the state where they filed the lawsuit and (2) no local defendant has yet been served. While such pre-service removals are relatively uncommon, two appellate courts have examined the question and have concluded that pre-service removal is proper.¹

Because pre-service removal is a particular instance of the more general principles governing federal diversity jurisdiction and the removal of diversity cases, a brief overview of those principles offers useful context for any discussion of pre-service removal.

Article III, Section 2 of the Constitution and 28 U.S.C. § 1332(a)(1) provide that the federal courts have subject-matter jurisdiction over cases involving disputes between “citizens of different States.” It is generally understood that the purpose of the federal courts’ jurisdiction to hear these cases is to provide out-of-state litigants with access to an

¹ *Gibbons v. Bristol-Myers Squibb Co.*, 919 F.3d 699, 705-07 (2d Cir. 2019); *Encompass Ins. Co. v. Stone Mansion Rest. Inc.*, 902 F.3d 147, 153-54 (3d Cir. 2018).

unbiased federal forum that protects them from the unfair advantages or perceived advantages that home-state litigants might enjoy in their local state courts.² Importantly, a federal court’s exercise of diversity jurisdiction has no effect on the law that controls the parties’ claims and defenses. A federal court hearing a diversity case will apply the same substantive legal rules to the dispute (including the same choice-of-law rules) as a state court would apply.³

Federal diversity jurisdiction under 28 U.S.C. § 1332(a)(1) is surprisingly narrow given its broad purpose to provide out-of-state litigants with a neutral federal forum. Among other things, courts have interpreted the general statutory grant of diversity jurisdiction to be limited to cases that meet a requirement of “complete diversity,” meaning that no defendant can be a citizen of the same state as any plaintiff.⁴ It follows from this limitation that a plaintiff may often compel an out-of-state party to defend itself

² *Erie R. Co. v. Tompkins*, 304 U.S. 64, 74 (1938) (“Diversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the state.”). A paper by Charles Cooper and Howard Nielson includes a thorough review of the historical record and concludes that “[t]he history of the framing and ratification of the diversity clause thus makes clear that it was designed to ensure that a party in a dispute with a citizen of a different state would be entitled to litigate that dispute in a presumably neutral federal court rather than in a possibly biased state court.” C. Cooper & H. Nielson, *Complete Diversity and the Closing of the Federal Courts*, 37 Harv. J. L. & Pub. Policy 295, 309 (2014).

³ “A federal court sitting in diversity applies the law of the state in which it sits, including the state’s choice-of-law rules.” *BB Syndication Servs., Inc. v. First Am. Title Ins. Co.*, 780 F.3d 825, 829 (7th Cir. 2015). This principle has been firmly established at least since the Supreme Court’s decisions in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), and *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941).

⁴ *E.g.*, *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 67-68 (1996). This interpretation of the diversity statute can be traced to the Supreme Court’s early decision in *Strawbridge v. Curtiss*, 7 U.S. 267 (1806). The Supreme Court has also held, however, that the Constitution’s diversity clause is not so limited and extends to cases with only “minimal diversity,” *i.e.*, with just one plaintiff and one defendant from different states. *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 531 (1967) (“Article III poses no obstacle to the legislative extension of federal jurisdiction, founded on diversity, so long as any two adverse parties are not co-citizens.”).

in the plaintiff’s home state court as long as at least one other defendant in the case is a citizen of the same state as the plaintiff. The complete-diversity requirement can thus lead to peculiar and counterintuitive results. For example, if a Missouri plaintiff wishes to sue several out-of-state defendants from Pennsylvania, New York, and Florida, but then adds a single Missouri defendant with only peripheral involvement in the matter, the out-of-state defendants are generally denied a federal forum—whether or not they are affiliated with the local Missouri defendant and whether or not their interests and litigation positions are aligned with those of the Missouri defendant. And if 75 Missouri plaintiffs wish to sue a citizen of Pennsylvania in a Missouri state court, they may be able to deny the Pennsylvania defendant a federal forum by adding just one Pennsylvania plaintiff to their Missouri case, thereby avoiding complete diversity between the parties.⁵

Despite these restrictions on federal jurisdiction imposed by the complete-diversity requirement, no “forum defendant rule” (or, for that matter, “forum plaintiff rule”) further limits regular federal diversity jurisdiction. That is, as long as a case satisfies the requirement of complete diversity (and a minimum amount-in-controversy requirement), a federal court’s jurisdiction does not depend on whether any party happens to be a citizen of the forum state. So, for example, if a serious accident involving a citizen of Pennsylvania occurs on the roads of Missouri, the Pennsylvania citizen would

⁵ Whether a Missouri court could exercise personal jurisdiction to hear the Pennsylvania plaintiff’s claims against a Pennsylvania defendant is another matter that may yet impact the federal court’s exercise of diversity jurisdiction. For example, in *Timpone v. Ethicon*, 2019 WL 2525780 (E.D. Mo. June 19, 2019), a Missouri federal court hearing a case between 99 plaintiffs and a non-Missouri defendant concluded that it lacked personal jurisdiction over the claims of the 96 non-Missouri plaintiffs, permitting the court to exercise diversity jurisdiction over the claims of the remaining three Missouri plaintiffs against the non-Missouri defendant.

have the same access to a Missouri federal court whether the defendant is a local Missouri citizen or a citizen of Florida involved in the same accident. Likewise, a Missouri citizen involved in the accident would have the option to sue Pennsylvania and Florida defendants in a Missouri federal court rather than the local state courts.

The “forum defendant rule” comes into play only as a special procedural exception to federal diversity jurisdiction when a case is filed in the local state courts of one state by a plaintiff who comes from a different state. Then, even if the plaintiff could have originally filed the lawsuit in federal court based on diversity of citizenship—and the case would have remained in federal court through its conclusion without any question about the court’s subject-matter jurisdiction—the same lawsuit cannot be removed from state court to federal court if any defendant “properly joined and served” is a citizen of the forum state. 28 U.S.C. § 1441(b)(2). The “forum defendant rule” is thus a procedural exception to the regular rules for diversity jurisdiction that further restricts the federal courts’ exercise of that jurisdiction—but only in the removal context—by blocking access to the federal courts in cases where at least one defendant is a citizen of the forum state. The exception works to deny a federal forum to out-of-state defendants even when their interests are opposed to those of the local defendant, as may often be the case, for example, in a tort lawsuit where the defendants are exposed to potential joint-and-several liability.

That brings me to pre-service removal. Pre-service removal occurs when a case filed in state court is removed before a local defendant has been served. In that case, no local defendant has been “properly joined and served” for purposes of the forum

defendant exception of 28 U.S.C. § 1441(b)(2). Accordingly, the forum defendant exception does not apply and, instead, the regular rules for diversity jurisdiction control whether the federal court may hear the case.

It is important to understand that the forum defendant exception and the issue of pre-service removal can come up only if the plaintiff is not a citizen of the state in which they chose to file a state-court lawsuit. Otherwise, the case would involve both a local plaintiff and at least one local defendant. And that would mean a lack of the complete diversity necessary for federal jurisdiction, which cannot be fixed by removal prior to service.⁶

B. Some Considerations Regarding Pre-Service Removal

Courts have recognized that the statutory provision limiting the forum defendant exception to defendants “properly joined and served” guards against the improper use of misjoined local defendants to deny access to the federal courts. Even when a case is clearly subject to federal diversity jurisdiction, the plaintiff may nevertheless attempt to avoid removal to a neutral federal forum by naming an improperly joined “straw man” local defendant to exploit the forum defendant exception. Pre-service removal provides an important tool to address such efforts to deprive an opposing party of its right to proceed in federal court.⁷

⁶ In such a case, out-of-state defendants seeking a federal forum might still argue that the local defendant was improperly joined and should be ignored for purposes of determining diversity jurisdiction. But neither the forum defendant exception, nor the timing of removal before or after service on the local defendant, plays any part in determining whether the federal court may exercise jurisdiction.

⁷ *Encompass Ins. Co. v. Stone Mansion Rest. Inc.*, 902 F.3d 147, 153 (3d Cir. 2018) (“[C]ourts and commentators have determined that Congress enacted the rule to prevent a plaintiff from blocking

The mischief of improperly joined defendants is no less a problem today than it was when Congress added the “properly joined and served” language to the statute in 1948. In product liability cases, for example, plaintiffs often attempt to frustrate an out-of-state defendant’s right to a federal forum simply by naming as an additional defendant a single local party, such as a distributor, against whom the plaintiff has no intention of actually litigating.⁸

The forum defendant exception’s requirement that any local defendant be not just properly “joined” but also actually “served” provides a bright-line rule that courts can easily and objectively apply without wading into potentially complex questions about which defendants are properly joined and which claims the plaintiff actually intends to pursue to a judgment.⁹

As with any bright-line rule, there may be instances in which pre-service removal leads to results that can seem anomalous. The same is true—but on a much larger

removal by joining as a defendant a resident party against whom it does not intend to proceed, and whom it does not even serve.”) (internal quotation marks omitted); *Morris v. Nuzzo*, 718 F.3d 660, 670 n.3 (7th Cir. 2013) (noting that “properly joined and served” provision “provides at least a modicum of protection against the insertion of a ‘straw-man’ resident defendant whose presence blocks removal but against whom the plaintiff does not intend to proceed”); *Stan Winston Creatures, Inc. v. Toys “R” Us, Inc.*, 314 F. Supp. 2d 177, 181 (S.D.N.Y. 2003) (“The purpose of the ‘joined and served’ requirement is to prevent a plaintiff from blocking removal by joining as a defendant a resident party against whom it does not intend to proceed, and whom it does not even serve.”); *see also Gibbons v. Bristol-Myers Squibb Co.*, 919 F.3d 699, 706 (2d Cir. 2019) (provision is designed to “limit gamesmanship”).

⁸ *See, e.g.*, H.R. Rep. 114-422, at 2-4 (noting “abuse” by “trial lawyers who fraudulently sue local defendants, even though the plaintiff’s claims against those defendants have little or no support in fact or law, because suing them allows the trial lawyers to keep their case in a preferred state court forum” and describing the various “go-to local defendants” frequently named to avoid diversity jurisdiction).

⁹ *Gibbons v. Bristol-Myers Squibb Co.*, 919 F.3d 699, 706 (2d Cir. 2019) (the “properly joined and served” requirement “provide[s] a bright-line rule keyed on service, which is clearly more easily administered than a fact-specific inquiry into a plaintiff’s intent or opportunity to actually serve a home-state defendant”).

scale—about the complete diversity requirement and the forum defendant exception itself. But that is no basis for doing away with the salutary provision permitting pre-service removal when the anomalous results are infrequent and can result in no injustice to the disappointed plaintiffs.

The limited empirical evidence available suggests that pre-service removal is relatively rare. A recent paper located just 221 instances of attempted pre-service removal over a plaintiff's objection in the entire federal court system during the three-year period from 2012 to 2014.¹⁰ In only 19 cases over three years did a federal court's decision to permit pre-service removal result in the removal of a case to federal court that otherwise would have remained in state court. Putting aside the 68 cases in which federal jurisdiction was proper on other grounds (based on either federal-question or federal-officer jurisdiction), the survey's results mean that even if every pre-service removal attempt had been completely successful between 2012 and 2014 (although many were not successful), it would have affected the selection of a federal forum versus a state forum in at most 153 cases over three years. That comes to only 51 cases per year and represents 0.00018% of all civil cases filed in the federal courts during the same period.¹¹

¹⁰ V. Nannery, *Closing the Snap Removal Loophole*, 86 U. Cin. L. Rev. 541 (2018). While the author notes that her count may understate the true number of pre-service removals, which cannot be ruled out, she describes a methodology that appears comprehensive and should capture virtually all of the cases in which the plaintiff objected to removal by filing a motion to remand.

¹¹ According to the Administrative Office of the United States Courts, during the same 2012-2014 period, there were 851,260 new civil filings in the federal courts. See U.S. Courts, *Statistical Tables for the Federal Judiciary*, <https://www.uscourts.gov/statistics-reports/analysis-reports/statistical-tables-federal-judiciary>.

While the plaintiffs in those cases may have been unhappy for tactical reasons to be in a federal court rather than in the state court they initially chose, there was no resulting unfairness or injustice that would justify rewriting statutory language that has served the courts well for decades.

Any argument that these plaintiffs enjoyed a privilege to pursue their claims in their local state courts is belied by the fact that pre-service removal comes up only when the plaintiff, contrary to normal practice, has elected to file a lawsuit in a state court outside of the plaintiff's own home state. These are "litigation tourists" shopping for what they hope to be the most favorable state-court forum, not ordinary plaintiffs who simply filed a lawsuit in their local state court system. Nor can they complain that removal to federal court resulted in any change to the law governing their claims. As explained above, federal courts hearing diversity cases apply exactly the same substantive legal rules as a state court would apply. And I am not aware of any reason to believe that federal judges are systematically less competent or more biased than their state-court counterparts. If this small group of plaintiffs has a complaint at all, it appears to be only that they were deprived of some unfair advantage that they hoped to achieve by avoiding federal court.

Naturally, there may be individual cases in which a litigant believes that a state court would have moved more quickly than a federal court. There are likewise individual cases in which a federal court is the faster tribunal. None of this represents a problem specific to pre-service removal. While there may well be room to improve the efficiency of litigation in our federal courts, reform efforts directed at improving the administration

of civil justice in the federal system should be for the benefit of all parties who litigate before those courts, who number in the hundreds of thousands, not just the handful of litigants in cases where pre-service removal happens to have occurred.

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Thank you again for the opportunity to testify today. I would be happy to answer any questions.