

Statement of

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House Committee on the Judiciary
Subcommittee on Courts, Intellectual Property, and the Internet

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 inviting me to express my views at this hearing on the practice of “snap removal.”

“Snap removal” is a stratagem used by defendants in civil litigation as an end run around the “forum defendant rule.” That rule, embodied in 28 U.S.C. § 1441(b)(2), prohibits removal of civil actions based on diversity of citizenship jurisdiction “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.” Focusing on the phrase “properly joined and served,” defendants have argued that § 1441(b)(2) allows removal of a diversity action when a citizen of the forum state has been joined as a defendant but has not yet been served. Two courts of appeals and many district judges have accepted this argument; other district judges have rejected it. The conflict in the lower courts has few parallels in its extent and its intensity.

In 2018, when the Third Circuit upheld removal by a forum defendant who had not been served, the court commented: “Reasonable minds might conclude that the procedural result demonstrates a need for a change in the law; however, if such change is required, it is Congress — not the Judiciary — that must act.”¹ I applaud this Subcommittee for taking up the court’s invitation. The issue may seem narrow and technical, but it continues to generate extensive litigation in the lower courts, consuming client funds and court resources without advancing resolution of the underlying claims. Only Congress can set the matter right.

What action should Congress take? One obvious possibility would be to delete the words “and served” from § 1441(b)(2). However, altering the language of a statutory provision that has been in effect for more than 70 years runs a serious risk of disrupting other aspects of the complex law of removal. The better approach is to enact a standalone provision that carefully defines the situation to which it applies and then tells the parties and the court what to do when that situation arises.

¹ *Encompass Ins. Co. v. Stone Mansion Restaurant Inc.*, 902 F.3d 147, 154 (3rd Cir. 2018).

A statutory amendment along those lines has been proposed in an article written by five Federal Courts scholars, of whom I am one.² The proposed amendment would allow the plaintiff to counter snap removal by serving one or more in-state defendants *after* removal. Under the proposal, if the plaintiff takes that step within the time for service of process allowed by the Federal Rules of Civil Procedure, and a motion to remand is made within 30 days thereafter, the district court *must* send the case back to state court. I think that this approach – creating what has been called a “snapback” mechanism – provides the best starting-point for the statutory fix that the Third Circuit invited. This statement explains the basis for that conclusion.

Before turning to the analysis, I will say a few words by way of personal background. I am a professor of law emeritus at the University of Pittsburgh School of Law, where I was appointed in 2005 as the inaugural holder of the Sally Ann Semenko Endowed Chair. I have been studying the operation of the federal courts for more than 40 years. In addition to my academic writings and a coauthored Federal Courts casebook, I have testified at several hearings of the House and Senate Judiciary Committees on various aspects of the federal judicial system.

Of particular relevance here, I have had the privilege of working with Members and staff of the House Judiciary Committee in drafting four pieces of federal courts legislation that were enacted into law with bipartisan support. Three of these bills included provisions dealing with the removal of cases from state to federal court.³ The first was the “Holmes Group fix,” involving jurisdiction over patent and copyright cases; this measure was enacted as part of the Leahy-Smith America Invents Act of 2011.⁴ Next came the Federal Courts Jurisdiction and Venue Clarification Act of 2011 (JVCA), which extensively

² See Arthur D. Hellman, Lonny Hoffman, Thomas D. Rowe, Jr., Joan Steinman, & Georgene Vairo, *Neutralizing the Stratagem of “Snap Removal”: A Proposed Amendment to the Judicial Code*, 9 Fed. Courts L. Rev. 103 (2016). Portions of this statement have been adapted from that article, with thanks to my coauthors for their contributions to a truly collaborative project. Particular thanks to Professor Rowe for extremely helpful comments on earlier drafts of this statement.

³ The fourth bill was the Judicial Improvements Act of 2002, which revised the provisions in the Judicial Code dealing with judicial misconduct and disability. See H.R. Rep. No. 107-459 (2002).

⁴ For the legislative history, see H.R. Rep. 109-407 (2006), incorporated by reference in H.R. Rep. 112-98 at 81 (2011).

revised the law of removal, particularly the provisions applicable to diversity cases.⁵ Finally, in 2010 and 2011 I worked on the Removal Clarification Act of 2011, sponsored by Congressman Henry C. “Hank” Johnson. That Act amended the federal officer removal statute. Earlier this year, in an amicus curiae brief submitted to the en banc Court of Appeals for the Fifth Circuit, Congressman Johnson quoted my testimony at a hearing on a predecessor bill as evidence of the proper interpretation of disputed language added by the 2011 law.⁶

I. Background

To set the stage for the policy and drafting issues raised by snap removal, it will be useful to provide some background about removal and diversity jurisdiction generally.

A. State and federal courts

In the system of dual sovereignty established by the Framers, power is divided between the national government and the governments of the several states. In the judicial sphere, one consequence of this division of powers is the existence of two sets of trial courts, each of which can hear a wide variety of civil suits between private (non-governmental) parties.

State courts are courts of general jurisdiction. They can hear and determine any case, except in the rare instances where Congress has vested exclusive jurisdiction in the federal courts.

Federal courts are courts of limited jurisdiction. As the Supreme Court recently explained, “Article III, § 2, of the Constitution delineates the character of the controversies over which federal judicial authority may extend. And lower federal-court jurisdiction is further limited to those subjects encompassed within a statutory grant of jurisdiction.”⁷

Two statutory grants – both part of Title 28, the Judicial Code – account for the vast majority of the private civil cases filed in federal court. First, 28 U.S.C. § 1331 grants jurisdiction over civil cases that “arise under” federal law. This is known as “federal question” jurisdiction. Second, 28 U.S.C. § 1332(a)

⁵ For the legislative history, see H.R. Rep. 112-10 (2011).

⁶ En Banc Amicus Curiae Brief of U.S. Congressman Henry C. “Hank” Johnson, Jr., in Support of Appellee and Affirmance at 12, *Latiolais v. Huntington Ingalls, Inc.*, No. 18-30652 (5th Cir. July 12, 2019).

⁷ *Home Depot, Inc. v. Jackson*, 139 S. Ct. 1743, 1746 (2019) (cleaned up).

authorizes federal courts to hear cases in which the amount in controversy exceeds \$75,000 and the suit is “between ... citizens of different states.” This is known as “diversity jurisdiction.” Again to quote the Supreme Court:

Each [of these jurisdictional grants] serves a distinct purpose: Federal-question jurisdiction affords parties a federal forum in which “to vindicate federal rights,” whereas diversity jurisdiction provides “a neutral forum for parties from different States when the claims are grounded in state law.”⁸

The topic of this hearing, snap removal, is relevant only to cases falling within the diversity jurisdiction. In this statement, I will not be saying anything more about federal question jurisdiction.

B. Removal: a central battleground in civil litigation

With very limited exceptions, the jurisdiction of the federal courts is *concurrent* with that of the state courts, so that most of the cases that could be brought in federal court could also be brought in state court. This means that litigants will often have a choice between federal and state court.

Selecting the forum is usually thought of as the prerogative of the plaintiff, and often it is. But in some cases the defendant can override the plaintiff’s choice of state court by *removing* to federal court. The basic rule, set forth in 28 U.S.C. § 1441(a), is that if a case could have been brought in federal court by the plaintiff, it can be removed to federal court by the defendant. One important exception – the forum defendant rule – is central to this hearing and will be discussed in detail later in this statement. For completeness, I’ll note that if the plaintiff sues in federal court, and the federal court has jurisdiction over the case, the case will stay in federal court. There is no removal from federal to state court.

Removal has become a central battleground in civil litigation. The reason is that across a wide spectrum of civil suits, plaintiffs prefer state court; defendants want to be in federal court. Many explanations have been given for these preferences. Some lawyers point to developments in federal practice over the last three decades, including Supreme Court decisions on summary judgment, expert testimony, and pleading. Others emphasize systemic differences between

⁸ Id.

federal and state courts, such as jury pools or pressure on federal courts from criminal caseloads.⁹

Whatever the explanation, the preferences are well known. One consequence is that lawyers are willing to put a good deal of effort – and client funds – into maneuvering over removal. A dramatic example – directly implicating the subject of today’s hearing – can be found in a decision issued by the District Court for New Jersey just last month.

In *Dutton v. Ethicon, Inc.*, 2019 WL 5304169 (D. N.J. Oct. 18, 2019), a non-New Jersey plaintiff, Gilbert, filed suit against a New Jersey defendant, Ethicon, in New Jersey state court.¹⁰ The court recounted the sequence of events as follows:

Gilbert commenced her action on November 30, 2018, at 9:35 a.m., by filing a Complaint against Defendants in the Middlesex County Superior Court. A New Jersey process server was able to personally serve [defendants] by 10:15 a.m., only 40 minutes after filing. As service was being made, Defendants were already in the process of filing their Notice of Removal with the District of New Jersey, which was timestamped at 10:14 a.m.

New Jersey is part of the Third Circuit, which as noted earlier had upheld the practice of snap removal. And, as the District Court’s narrative makes clear, defendants filed their notice of removal with the District Court one minute before the completion of service. So the removal was effective, right? No, it was not. Under 28 U.S.C. § 1446(d), removal is not “effected” until the defendant files a copy of the notice of removal *with the state court*. And in Gilbert’s case the defendants did not file a copy of the removal notice with the New Jersey state court until 11:17 a.m., one hour and two minutes after service was completed. So the forum defendant rule barred removal of the Gilbert action.

The *Dutton* opinion also considered a motion to remand by another non-New Jersey plaintiff, Williams, in a separate case against Ethicon. Williams filed his complaint in Middlesex County Superior Court at 3:10 p.m. on January 7, 2019. Defendants immediately filed their notice of removal with the District of New Jersey; the notice was timestamped at 3:21 p.m. The state court was notified two

⁹ For a brief discussion, see Arthur D. Hellman, *Another Voice for the “Dialogue”: Federal Courts as a Litigation Course*, 53 St. Louis U. L. J. 761, 765-68 (2009).

¹⁰ Plaintiff sued both Johnson & Johnson and its wholly owned subsidiary, Ethicon, both of whom are New Jersey citizens for purposes of diversity jurisdiction. The court referred to the “defendants” in the plural.

minutes later, at 3:23 p.m. Service on the defendants was not made until the following day. The court held that under the Third Circuit’s decision the forum defendant rule did *not* bar the removal.

Maneuvering of this kind trivializes removal jurisdiction and makes poor use of the scarce resources of federal courts. It is entirely appropriate for Congress – and this Subcommittee in the first instance – to seek to reform the law of removal to minimize litigation over forum selection while also seeking to achieve a sound “balance of federal and state judicial responsibilities.”¹¹

C. Diversity jurisdiction and removal

For the general run of state-law claims, there is only one route to federal court, and that is the diversity of citizenship jurisdiction. Section 1332(a) of Title 28 authorizes federal courts to hear cases that do not arise under federal law if two conditions are satisfied: the amount in controversy exceeds \$75,000, and there is diversity of citizenship among the parties.

Section 1332(a) has been interpreted to require “complete diversity” – i.e., a case cannot be brought in federal court under § 1332(a) or removed under § 1441(a) unless no plaintiff is a citizen of the same state as any defendant. The complete diversity requirement means that a plaintiff can defeat removal based on diversity jurisdiction by naming a co-citizen as a defendant. That aspect of removal practice, although very important, is not directly relevant to the topic of today’s hearing, so it will not be discussed further here.

Superimposed on the complete-diversity rule is a limitation that applies only to removal based on § 1332(a). This is the forum defendant rule, codified in 28 U.S.C. § 1441(b)(2). The forum defendant rule is central to today’s hearing, and I shall now discuss it in some detail.

II. The Forum Defendant Rule and “Snap Removal”

The forum defendant rule is often paraphrased as saying that a civil action may not be removed on the basis of diversity jurisdiction if any defendant “is” a citizen of the forum state. Indeed, the United States Supreme Court has used exactly that language.¹² But that is not what the statute says. What the statute says is this:

¹¹ See *Grable & Sons Metal Products, Inc. v. Darue Eng’g. & Mfg.*, 545 U.S. 308, 314 (2006).

¹² See, e.g., *Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 84 (2005) (“Defendants may remove an action on the basis of diversity of citizenship if there is complete diversity ..., and no

A civil action otherwise removable solely on the basis of the jurisdiction under section 1332(a) of this title 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. 28 U.S.C. § 1441(b)(2) (emphasis added).¹³

Focusing on the phrase “properly joined and served,” defendants have argued that § 1441(b) allows removal of a diversity action when a citizen of the forum state has been joined as a defendant but has not yet been served.

A. Varieties of snap removal

The practice of removing before forum defendants have been served has been called “snap removal,”¹⁴ and it is largely (though not entirely) a product of the Internet era. Defendants monitor state-court dockets electronically, and when they learn of a state-court suit, they quickly file a notice of removal.¹⁵ Sometimes they file before *any* defendants have been served. In other cases, the plaintiff has served a non-forum defendant or defendants, but not yet any forum defendant, at the time of removal. In the first case to reach a court of appeals, there was only one defendant, and that defendant knew about the lawsuit because of correspondence between the plaintiff’s and defendant’s lawyers.¹⁶

There is some disagreement about precisely which practices should be encompassed within the term “snap removal.” For example, one recent decision suggests that “snap” removal occurs only when the defendant removes “before [plaintiffs] had a *reasonable opportunity to serve* the forum defendant.”¹⁷ An

defendant is a citizen of the forum State.”). The Court’s opinion was by Justice Ginsburg, widely regarded as the Court’s expert on civil procedure and federal jurisdiction.

¹³ Section 1441(b) was rewritten by the Federal Courts Jurisdiction and Venue Clarification Act of 2011 (JVCA), but the “properly joined and served” language was not changed.

¹⁴ The term was popularized by an opinion issued in 2015. See *Breitweiser v. Chesapeake Energy Corp.*, 2015 WL 6322625, at *2, *6 (N.D. Tex. Oct. 20, 2015).

¹⁵ See Danielle Gold & Rayna E. Kessler, *How to Avoid “Snap Removals,”* Trial, July 2019, at 54 (“Corporate defendants ... have hired people to troll state electronic dockets and immediately file notices of removal before a plaintiff has any reasonable opportunity to serve the forum defendant.”).

¹⁶ *Encompass Ins. Co. v. Stone Mansion Restaurant Inc.*, 902 F.3d 147 (3rd Cir. 2018).

¹⁷ *Howard v. Crossland Const. Co.*, 2018 WL 2463099 at *3 (N.D. Okla. June 1, 2018) (emphasis added). The court noted that plaintiff had “ample time” to serve the in-state defendant. See also *Gorman v. Schiele*, 2016 WL 3583640 at *6 (M.D. La. May 20, 2016) (recommending denial of motion to remand because forum defendant had not been served at

empirical study of snap removals “excluded cases in which the *removing* defendant was served before removal.”¹⁸ In this statement, the term will be used to refer to any case in which one or more properly joined defendants are citizens of the forum state, but a defendant removes based on diversity of citizenship jurisdiction before any forum-state citizen has been served.

B. The conflict in the lower courts

There is a raging conflict in the lower federal courts over the permissibility of removing a diversity action when a citizen of the forum state has been joined as a defendant but has not yet been served. Many courts hold that removal under those circumstances is permissible. Typically, these courts conclude that the “plain meaning” or “plain language” of § 1441(b)(2) requires this result. See, e.g., *Valido-Shade v. Wyeth LLC*, 875 F. Supp. 2d 474, 478 (E.D. Pa. 2012). As one court explained:

Although Congress may not have anticipated the possibility that defendants could actively monitor state court dockets to quickly remove a case prior to being served, on the facts of this case, such a result is not so absurd as to warrant reliance on “murky” or non-existent legislative history in the face of an otherwise perfectly clear and unambiguous statute.

North v. Precision Airmotive Corp., 600 F. Supp. 2d 1263, 1270–71 (M.D. Fla. 2009). Other courts, while recognizing that the “plain meaning” of the statute allows snap removal, “decline[] to enforce the plain meaning . . . because doing so produces a result that is at clear odds with congressional intent.” *Swindell-Filiaggi v. CSX Corp.*, 922 F. Supp. 2d 514, 521 (E.D. Pa. 2013). This “purposive” approach results in a remand to state court.

There are also variations within the two basic approaches; these too have given rise to conflicting decisions. For example, in *Breitweiser* – the case that gave currency to the term “snap removal” – the court held that the “plain language” approach allows snap removal by *non-forum* defendants, but it said that allowing

time of removal and stating: “The instant case does not seem to be a ‘snap removal,’ as over four months had passed between filing of the Petition in state court and removal.”).

¹⁸ Valery M. Nannery, *Closing the Snap Removal Loophole*, 86 U. Cin. L. Rev. 541, 559 n. 114 (2018) (emphasis added). The author explained: “The text of § 1441(b)(2) and the weight of authority support the removal of diversity cases by an out-of-state defendant that has been served or has otherwise submitted to the state court’s authority despite the presence of a properly joined forum defendant [who has not been served].” *Id.*; see also *id.* at 551.

removal by a *forum* defendant who had not yet been served would be “absurd” and “untenable.” *Breitweiser*, 2015 WL 6322625, at *6.¹⁹ Other courts have rejected this distinction, taking the position that “nothing turn[s] . . . on whether the removing party was a forum defendant or non-forum defendant.” *Munchel v. Wyeth LLC*, 2012 WL 4050072, at *4 (D. Del. Sept. 11, 2012).

A different method of line drawing is illustrated by *Gentile v. Biogen Idec, Inc.*, 934 F. Supp. 2d 313 (D. Mass. 2013). The court there held that a non-forum defendant can remove, but only if it does so after “at least one defendant has been served.” *Id.* at 322. But other courts allow removal before *any* defendant has been served. See, e.g., *Valido-Shade*, 875 F. Supp. 2d at 476.

A striking feature of the conflict is that because district court decisions are not binding even within the same district, different judges within a district can and do reach opposite results on this issue. Two of the decisions cited above (*Valido-Shade* and *Swindell-Filiaggi*) exemplify the conflict that existed within the Eastern District of Pennsylvania. And in at least four other districts, different judges have handed down decisions on both sides of the basic divide.²⁰ Whether removal is allowed thus depends on which judge is drawn—typically, by lot—to hear the case. There are also conflicts between different federal judicial districts within the same state.²¹

C. The court of appeals decisions

Until 2018, no court of appeals had resolved the question of whether snap removal is permissible. In that year, the Third Circuit decided *Encompass Insurance Co. v. Stone Mansion Restaurant, Inc.*, 902 F.3d 147 (3d Cir. 2018). The court held unanimously that the “plain meaning” of § 1441(b)(2) “precludes removal on the basis of in-state citizenship only when the defendant has been properly joined and served” (emphasis added), and that there was no reason to depart from that plain meaning.

The court explained that Congress adopted the “properly joined and served” language “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.” Permitting removal before service on the in-state

¹⁹ A similar distinction was drawn by another district judge in *Smethers v. Bell Helicopter Textron Inc.*, 2017 WL 1277512 (S.D. Tex. April 4, 2017).

²⁰ For citations to the cases, see Hellman et al, *supra* note 2, at 105-06.

²¹ For examples, see *id.*

defendant, the court said, “does not contravene the apparent purpose” of the language, nor does it “render the statute nonsensical or superfluous.” The court gave three reasons for this conclusion:

[Our interpretation] (1) abides by the plain meaning of the text; (2) it envisions a broader right of removal only in the narrow circumstances where a defendant is aware of an action prior to service of process with sufficient time to initiate removal; and (3) it protects the statute’s goal without rendering any of the language unnecessary.

The unanimous decision to allow snap removal in *Encompass Insurance* was particularly noteworthy because the case presented the issue in an unusual, and arguably extreme, setting. In the more typical case, the plaintiff sues both in-state and out-of-state defendants, and the out-of-state defendant removes before in-state defendant has been served. Here, there was only one defendant – a citizen of the forum state. As a policy matter, that is the weakest situation for allowing removal. Yet the Third Circuit allowed it without hesitation. The ruling would apply a fortiori to cases in which the plaintiff sues both in-state and out-of-state defendants.

A few months after the decision in *Encompass Insurance*, the question of snap removal came before a second court of appeals. In *Gibbons v. Bristol-Myers Squibb Co.*, 919 F.3d 699 (2nd Cir. 2019), the Second Circuit agreed with the Third Circuit’s interpretation of the forum defendant rule. “By its text,” the court stated, § 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.” Like the Third Circuit, the court found no reason to depart from the plain meaning of the statute. The court acknowledged that “it might seem anomalous to permit a defendant sued in its home state to remove a diversity action,” but the court found that applying the plain text did not produce an absurd result. The court even suggested that the plain-text interpretation might serve a policy purpose. The court explained:

Allowing a defendant that has not been served to remove a lawsuit to federal court “does not contravene” Congress’s intent to combat fraudulent joinder. In fact, Congress may well have adopted the “properly joined and served” requirement in an attempt to both limit gamesmanship and provide 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.

Since *Gibbons*, no other court of appeals has considered the permissibility of snap removal. And several district judges have rejected the reasoning of *Encompass Insurance*, with one judge saying that the language of § 1441(b) did not prevent the court “from undoing Defendants’ gamesmanship.” *Delaughder v. Colonial Pipeline Co.*, 360 F. Supp. 3d 1372 (N.D. Ga. 2018).²²

Against this background, there is every reason to think that the conflict in the lower courts will continue until the Supreme Court resolves it or Congress acts to clarify the law. The Supreme Court is not likely to consider the issue until there is a conflict between *circuits*, but even if that were not so, the proper allocation of responsibility between state and federal courts is primarily a matter for Congress. This Subcommittee should not hesitate to devise a legislative “fix” rather than waiting for the Supreme Court to definitively interpret the language of the current statute.

III. The Need for a “Change in the Law”

As noted earlier, the Third Circuit, after adopting the “plain language” interpretation of § 1441(b)(2), added: “Reasonable minds might conclude that the procedural result demonstrates a need for a change in the law; however, if such change is required, it is Congress — not the Judiciary — that must act.”²³ But what should that change be?

As far as I am aware, no one has suggested that Congress should codify the result in *Encompass Insurance* and allow removal of a diversity action when a citizen of the forum state has been joined as a defendant but has not yet been served. Legislation along those lines would be particularly anomalous in light of the wide variation in state laws on service of process. As the Second Circuit pointed out, “allowing home-state defendants to remove on the basis of diversity before they are served [would] mean that defendants sued in some states – those that require a delay between filing and service, like Delaware – will be able to remove diversity actions to federal court while defendants sued in others – those that permit a plaintiff to serve an action as soon as it is filed – will not.”²⁴

²² See also *Bowman v. PHH Mortgage Corp.*, 2019 WL 5080943 *5 (N.D. Ala. Oct. 10, 2019) (holding that the statute “require[es] at least one defendant to have been properly joined and served before removal when an in-state defendant is involved”); *Timbercreek Asset Mgmt., Inc., v. De Guardiola*, 2019 WL 947279 (S.D. Fla. Feb. 27, 2019) (agreeing with *Delaughder*)

²³ *Encompass Insurance*, 902 F.3d at 154.

²⁴ *Gibbons*, 919 F.3d at 706. The court found that this policy consideration was not sufficient to overcome “the plain text” of the statute. *Id.*

But it would also be a mistake to abrogate the service requirement. Congress established the forum defendant rule based on the premise that there is no risk of state-court bias against an out-of-state defendant as long as at least one in-state defendant is a party on the same side.²⁵ But if the in-state party is only a nominal defendant, with no real role in the lawsuit, the premise is undercut, and the risk of bias against the out-of-state defendant could be very real. Thus, as the Third Circuit explained, Congress adopted the “properly joined and served” language “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.”²⁶ Of course failure to serve is not a perfect proxy for what is sometimes called fraudulent joinder. But as the Second Circuit noted, it provides a bright-line rule that is “easily administered.”

This analysis suggests that the goal of the legislation should be to restore the symmetry that Congress intended in the operation of the rule. Plaintiffs should not be able to prevent removal of a diversity case by joining as a defendant an in-state party against whom they do not intend to proceed, and whom they do not even serve. Defendants should not be able to evade the forum defendant rule by removing before the plaintiff has had a *chance* to serve the in-state defendant. The “change in the law” should retain the service requirement, but configured in a way that does not reward gamesmanship by either side or make removability depend on “the vagaries of state law service requirements.”²⁷

IV. Designing a “Fix”

The goal, then, is to restore the *symmetry* that Congress intended in the operation of the forum defendant rule. How should that be done?

A. Text editing versus standalone legislation

To begin, it would not be adequate to simply delete the words “and served” from § 1441(b)(2) as it now stands. Doing so would encourage the gamesmanship that Congress intended to prevent when it added the words in 1948. Plaintiffs would once again be able to prevent removal of a diversity case by joining as a

²⁵ I am somewhat skeptical about this premise, particularly when the out-of-state defendant is the principal “target” of the complaint. See *infra* Part V. However, for purpose of this discussion I am assuming the validity of the premise.

²⁶ *Encompass Insurance*, 902 F.3d at 153.

²⁷ See *Gibbons*, 919 F.3d at 706.

defendant an in-state party against whom they do not intend to proceed, and whom they do not even serve.

Moreover, deletion of the “and served” language would not necessarily eliminate litigation over compliance with the forum defendant rule. To be sure, an out-of-state defendant could not attempt snap removal. But if the plaintiff has asserted insubstantial or thinly grounded claims against the forum defendant, the out-of-state defendant might remove anyway based on an argument that the local defendant has been *improperly* – i.e. fraudulently – *joined*.²⁸ Litigating that question is likely to be more difficult and costly than litigating snap removal.²⁹

More important, any attempt to change the law through what might be called “text editing” – adding, deleting, or changing words in existing text – runs a serious risk of inadvertently unsettling other doctrines of removal law. Removal law is complex and interconnected. The statutory language provides only a framework; most of the law is contained in a vast corpus of decisions, many dealing with issues that have never reached the Supreme Court.

It is just not possible to anticipate all of the consequences of revising a statutory provision of broad applicability. For example, Congress amended the basic venue statutes in 1988, only to find that further revisions were required in 1990 and again in 2011.

The preferable approach is to write a standalone provision that first defines the situation that it covers and then tells parties and courts what to do in that situation. A good example is 28 U.S.C. § 1441(c) as revised by the Federal Courts Jurisdiction and Venue Clarification Act of 2011 (JVCA). That subsection deals with removal of civil actions filed in state court that join federal and state claims.

²⁸ Although the fraudulent joinder doctrine is more frequently applied to defendants who share citizenship with the plaintiff, it also comes into play when the “spoiler” is a citizen of the forum state, and the doctrine is generally applied in the same way. As a district court in Missouri observed a few years ago, “The standards for determining whether a *resident* defendant is fraudulently joined are the same as the standards for determining whether a diversity-destroying defendant is fraudulently joined.” *Byrd v. TVI, Inc.*, 2015 WL 5568454 (E.D. Mo. Sept. 21, 2015) (emphasis added). Accord, *In re Ethicon, Inc., Pelvic Repair Sys. Prods. Liab. Litig.*, 2013 WL 6710345 at *3 n. 2 (S.D. W. Va. Dec. 19, 2013) (“In *Musewicz*, the issue is diversity of citizenship, while in *Hammons* and *Delacruz*, the issue is the home state defendant rule. However, the fraudulent joinder analysis remains the same in both instances.”).

²⁹ In some cases in which courts have allowed snap removal, the court noted that it did not need to address the defendant’s alternative argument that the “spoiler” had been fraudulently joined. E.g., *Howard v. Crossland Const. Co.*, 2018 WL 2463099 at *3 (N.D. Okla. June 1, 2018); *Pathmanathan v. Jackson Nat’l Life Ins. Co.*, 2015 WL 4605757 at *5 n.1 (M.D. Ala. July 30, 2015).

The subsection sets forth the conditions that make the subsection applicable; it then authorizes removal and instructs the district court about what to do with the different claims within the civil action. As stated recently by a district judge, “Before 2011, district courts had discretion in how to deal with these hybrid cases, including the discretion to keep the entire case in federal court. Not anymore. *The statute now tells courts exactly what they must do.*”³⁰

B. The “snapback” proposal

The proposal by five law professors first published in the *Federal Courts Law Review* in 2016 implements the preferable approach. It does not change the language of section 1441 or any other part of Title 28. Rather, the proposal accepts the entirety of the Judicial Code in its current form and adds a new provision to be codified as a subsection of 28 U.S.C. § 1447, which delineates the procedures to be followed after removal.

This new provision would allow the plaintiff to counter snap removal by serving one or more in-state defendants *after* removal. Under the proposal, if the plaintiff takes that step within the time for service of process allowed by the Federal Rules of Civil Procedure, and a motion to remand is made within 30 days thereafter, the district court *must* send the case back to state court. There would be no discretion to do anything else; as with the JVCA’s rewrite of § 1441(c), the statute would “tell[] courts exactly what they must do.” In draft form, the new subsection would read as follows:

(f) Removal before service on forum defendant

If –

(1) a civil action was removed solely on the basis of the jurisdiction under section 1332(a) of this title, and

(2) at the time of removal, one or more parties in interest properly joined as defendants were citizens of the state in which such action was brought but had not been served, but

(3) after removal was effected, any such defendant was properly served within the time for service of process allowed by the Federal Rules of Civil Procedure,

the court, upon motion filed within 30 days after such service, shall remand the action to the state court from which it was removed.

³⁰ *Stewart v. Lewis*, 2019 WL 4267387 (W.D. Pa. Sept. 10, 2019) (emphasis added).

Because the new subsection requires immediate remand once any in-state defendant has been served, some have referred to it as creating a “snapback” mechanism.³¹ My coauthors and I believe that if the snapback provision is enacted, the incidence of snap removal can be expected to diminish sharply, as defendants come to recognize that the stratagem will no longer enable them to circumvent the forum defendant rule. To the extent that defendants do remove before any in-state defendants have been served, the plaintiff can secure remand by promptly serving at least one such defendant.

The snapback countermeasure would be available in any diversity removal in which one or more citizens of the forum state have been properly joined as defendants.³² It would not matter whether the plaintiff has also sued non-forum defendants; Congress assumed that non-forum defendants do not need protection against state-court bias as long as at least one forum defendant is a party on the same side.³³ Nor would it matter whether the non-forum defendants had been served when they filed their notice of removal. Section 1441(b)(2) says nothing about service on non-forum defendants, and nothing in Chapter 89 precludes a defendant (forum or non-forum) from removing before receiving service.³⁴

C. Advantages of the snapback approach

What makes the snapback approach so promising is that it builds on the incentives that already exist in the system for the various participants. The plaintiff wants the case to be litigated in state court, so he or she will have every incentive to perfect service quickly, particularly if the snap removal was possible

³¹ Credit for suggesting this term goes to Professor Steven Gensler of the University of Oklahoma Law School.

³² The phrase “properly joined” is taken from § 1441(b)(2), and it should be interpreted in the same way. The draft statute does not address the separate issue of fraudulent or improper joinder. Under current law, lack of service upon a fraudulently or improperly joined defendant, at the time of removal, would not affect the propriety of the removal. A finding of such joinder results in a removed case remaining in federal court, if there are no defects in removal procedure. See generally *Smallwood v. Illinois Central R. Co.*, 385 F.3d 568 (5th Cir. 2004) (en banc); Arthur D. Hellman, *The “Fraudulent Joinder Prevention Act of 2016”: A New Standard and a New Rationale for an Old Doctrine*, 17 Fed. Soc. Rev. 34 (2016).

³³ See *supra* note 25; *infra* Part V.

³⁴ *Novak v. Bank of N.Y. Mellon Trust Co. N.A.*, 783 F.3d 910 (1st Cir. 2015) (noting that this interpretation aligns with decisions of all other federal courts that have considered the question since the Supreme Court construed the statute in *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344 (1999)).

only because of delays caused by state service-of-process rules.³⁵ The federal district judge to whom the case is assigned will want to clear his or her docket. And the defendant will often be a repeat player like a pharmaceutical company. The defendant's lawyers will have at least some incentive not to antagonize the district judges in their home state by removing cases that will be swiftly remanded to the state court.

In considering whether the snapback mechanism is likely to be effective, it is important to keep in mind a jurisdictional rule that is often overlooked: when determining whether complete diversity exists, unserved defendants do count.³⁶ Thus, when the plaintiff sues a forum defendant in his home state, it is irrelevant whether or not the forum defendant has been served; none of the defendants can remove because the complete-diversity requirement is not satisfied. It follows that the only cases where snap removal is an issue are cases in which the plaintiff is suing outside his home state.³⁷

If that is so, it has important implications for how the two sides' lawyers can be expected to act. The plaintiff generally will not be represented by a small-town lawyer or solo practitioner who unexpectedly has been caught up in the unfamiliar intricacies of removal practice. Rather, the plaintiff will be represented by a savvy, experienced lawyer who for tactical reasons has taken the unusual step of filing suit in a state where the plaintiff does not live. And that in turn suggests that the plaintiff's lawyer will be very familiar with the law of removal and will make other tactical decisions based on extensive knowledge and experience. (Indeed, the plaintiff may have brought suit in the defendant's state for the very purpose of frustrating removal.) As for the defendant, the defendant will generally be a corporation represented by lawyers who routinely remove cases and are very knowledgeable about the governing rules. A structured regime

³⁵ See, e.g., *In re: Propecia (Finasteride) Products Liability Litigation*, 2016 WL 5921070 (E.D. N.Y. Oct. 11, 2016) (noting that after removal before service, all in-state defendants were promptly served).

³⁶ The Supreme Court decision in *Pullman Co. v. Jenkins*, 305 U.S. 534 (1939), is often cited as authority for this proposition. See, e.g., *New York Life Ins. Co. v. Deshotel*, 142 F.3d 873, 883 (5th Cir. 1998) (“Whenever federal jurisdiction in a removal case depends upon complete diversity, the existence of diversity is determined from the fact of citizenship of the parties named and not from the fact of service.”); *Clarence E. Morris, Inc. v. Vitek*, 412 F.2d 1174, 1176 (9th Cir. 1969) (same).

³⁷ A quick review of recent cases considering the validity of a snap removal confirms this pattern. This includes *Encompass Insurance* and *Gibbons*.

like the one contemplated by the snapback proposal is well suited to a situation where each side can generally count on the other's being well versed in the law and tactics of removal.

D. Litigation of other issues in a snap removal case

A snap removal case may also raise other issues of jurisdiction or removal practice. How would those be handled under the snapback proposal? It is useful to consider the question first from the defendant's perspective, then from the plaintiff's.

In the typical snapback case, once the plaintiff perfects service on an in-state defendant, the removing defendant will have no basis for opposing the motion to remand, and the motion would be granted. But in some cases the defendant will wish to argue that, independent of the service requirement in § 1441(b)(2), the forum defendant rule does not bar removal because the in-state defendant has been fraudulently joined.³⁸ The defendant may have raised this issue in the notice of removal, but if it did not, it would do so in its response to the motion to remand. We would not want the possibility of such a response to delay resolution of the remand motion.

In many districts, that would not be a problem; a local rule requires that responses to all motions must be filed within a short time after filing (or sometimes service) of the motion – typically, 14 days.³⁹ Such local rules may be sufficient, but if they are not, it might be desirable to modify the draft statute to include a short deadline applicable only to remand motions under the snapback provision. If no response is filed, the case can be remanded without further ado.

The defendant may also seek to have the case transferred under 28 U.S.C. § 1407 to an existing multidistrict litigation (MDL) proceeding. This possibility raises a policy question: should defendants be able to secure the transfer to an MDL of a case which, but for a snap removal, would have remained in state court with no possibility of transfer? To ask the question is almost to answer it: no, defendants should not be able to do that, especially if the removal was possible only because of circumstances beyond the plaintiff's control. But it may not be necessary to address this in the statute. Transfers are centralized in the Judicial Panel on Multidistrict Litigation; the Panel could announce that it will not transfer

³⁸ See supra note 29.

³⁹ See, e.g., N.D. Cal. Civil Local Rule 7-3(a) (stating that opposition to a motion must be filed and served not more than 14 days after the motion was filed); (E.D. Tex. Local Rule CV-7(e) (setting 14-day response deadline for all motions except summary judgment).

a case in which a forum defendant has been joined but not served until the remand issue has been resolved.⁴⁰

As for plaintiffs, the plaintiff may have other objections to removal – incomplete diversity, for example, or untimeliness. But if perfecting service on one in-state defendant will bar removal under the forum defendant rule and the snapback provision, it is hard to see why the plaintiff would want to pursue other arguments, particularly when those will probably be more difficult to establish. Nevertheless, if the plaintiff wishes to raise other objections, he or she can do so in the motion to remand.

E. Treatment of subsidiary issues in the proposed legislation

The proposed addition to 28 U.S.C. § 1447 also resolves two other issues that have given rise to disagreement in the lower courts. The final clause provides that after the plaintiff has served one or more in-state defendants, the district court, “*upon motion . . .*, shall remand the action to the state court from which it was removed.” (Emphasis added.) Specifying that the court shall act “upon motion” confirms that the forum defendant rule is not jurisdictional. That is the position of all but one of the circuits that have addressed the issue. See *Lively v. Wild Oats Markets, Inc.*, 456 F.3d 933, 940 (9th Cir. 2006) (collecting cases).⁴¹ Thus, in the absence of a timely motion to remand, the case can and will remain in federal court.

By the same token, the language makes clear that the district court may not remand for violation of the forum-defendant rule in the absence of a motion. This resolution is consistent with the view of all circuits that have considered the effect of similar language in 28 U.S.C. § 1447(c).⁴² Those courts hold that the first sentence of section 1447(c) does not authorize a district court’s *sua sponte*

⁴⁰ For further discussion of MDL, see *infra* Part V.

⁴¹ Only the Eighth Circuit has held otherwise. *Horton v. Conklin*, 431 F.3d 602, 605 (8th Cir. 2005) (reaffirming adherence to the minority view). In the Sixth Circuit, the court of appeals has not issued a definitive ruling, and at least three district courts have held that the forum-defendant rule is jurisdictional. See *Balzer v. Bay Winds Fed. Credit Union*, 622 F. Supp. 2d 628, 630–31 (W.D. Mich. 2009) (citing cases). In the Fourth Circuit, district courts have held that the forum-defendant rule is procedural and subject to waiver. See *USA Trouser, S.A. de C.V. v. International Legware Group, Inc.*, 2015 WL 6473252, at *3 (W.D.N.C. Oct. 27, 2015) (citing cases)

⁴² Section 1447(c) provides in part: “A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a).”

remand of an action based on a defect “other than lack of subject matter jurisdiction.” See *Ellenburg v. Spartan Motors Chassis, Inc.*, 519 F.3d 192, 197–98 (4th Cir. 2008) (joining “all of the circuit courts that have considered the question” in concluding that “a district court is prohibited from remanding a case *sua sponte* based on a procedural defect absent a motion to do so from a party”). A few district courts have remanded cases *sua sponte* based on violation of the forum defendant rule. See, e.g., *Beeler v. Beeler*, 2015 WL 7185518 (W.D. Ky. Nov. 13, 2015).

The proposed amendment does not make any change in 28 U.S.C. § 1447(d), which provides: “An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise” This is important, because it means that an order of remand pursuant to the snapback provision cannot be appealed, and the case can be returned to the state court without further delay.

The draft amendment published in the *Federal Courts Law Review* did not include a provision specifying the effective date of the new provision. Legislation enacted by Congress should do so. In the *Federal Courts Jurisdiction and Venue Clarification Act of 2011*, the amendments to Title 28 were made applicable to actions “commenced” 30 days after enactment; however, for removed cases, an action was deemed to commence “on the date the action ... was commenced, within the meaning of State law, in State court.” (Emphasis added.) That is probably a good model for legislation dealing with snap removal.

F. Responses to possible objections

I can anticipate several possible objections to the snapback proposal, but I think that all can be answered to the Committee’s satisfaction.

First, it may be argued that codifying the snapback mechanism would entrench snap removal into the removal scheme. But that is a cause for concern only if the mechanism proves to be an ineffective means of addressing the problem. As will be explained below, I do not think it will be. Moreover, it is not clear that the practice could be extirpated from the removal scheme without rewriting the *criteria* for removal – an approach that, for reasons given earlier, is fraught with risk.

Second, there may be a concern that cases will arise in which the plaintiff will not be able to serve the forum defendant “within the time for service of process allowed by the Federal Rules of Civil Procedure.” That scenario is not impossible, but it seems unlikely. Rule 4(m) of the Federal Rules of Civil

Procedure allows 90 days – three months – to serve the defendant after the complaint is filed, and if the plaintiff shows good cause for failure to serve within 90 days, the court must extend the time “for an appropriate period.” Moreover, by hypothesis, the initially unserved defendant will be a citizen of the forum state, so there will be no problems with service out of state.

Third, there may be doubt that defendants will behave as predicted and stop attempting to invoke snap removal. Not all plaintiffs’ attorneys will know of the countermeasure, and some might fail to deploy it properly and on time. Defendants might therefore remove in advance of service and hope that the snapback mechanism will not be invoked against them.

The question is certainly legitimate; no one can be certain about what information lawyers will have and how they will act. But as pointed out earlier, the only cases where snap removal is an issue are cases in which the plaintiff is suing outside his home state. There is good reason to believe that the lawyers on both sides will be very knowledgeable about the law of removal and will take full advantage of the opportunities the law offers them, but without wasting resources.⁴³

Fourth, some will worry that that after the snap removal, there may be an extended period of uncertainty in the federal court, and the defendant may file motions or other pleadings that will turn out to be for naught. But as discussed earlier, the plaintiff will generally have an incentive to act quickly to get the case back to the state court, and it is hard to see how the defendant could initiate an extensive motion practice before the case is remanded. If, for some reason, service is taking longer than expected, the plaintiff could inform the defendant and the court of that fact, making clear that the plaintiff will be invoking the snapback mechanism.⁴⁴

⁴³ See supra Part IV-C.

⁴⁴ Rule 81(c)(2) specifies the deadlines for the defendant to “answer or present other defenses or objections” if it did not answer before removal, and it gives the defendant the longest of the three periods listed. Paragraph (B) specifies “21 days after being served with the summons for an initial pleading on file at the time of service.” That should suffice in most snap removal cases. Moreover, a defendant facing a 21-day limit can always move for an extension of time under Rule 6(b) if it sees a motion for remand coming. Perhaps in an occasional case the defendant will have to file an answer that will go for naught, but if so, the defendant brought the burden on itself by going ahead with the snap removal with the snapback provision on the books.

The Committee might also conclude that the 90-day period provided by Rule 4(m) is longer than is necessary. Given the dynamics and incentives discussed earlier, a shorter period may be sufficient. I would be guided by what this Committee hears from the lawyers in the trenches.

Finally, it may be argued that the snapback countermeasure would make the already long and complicated statutory scheme for removal even longer and more complicated. It is true that the proposal would add a new subsection to § 1447. But the *practice* of removal would be no more complicated than it is today – less so, in fact, because the new provision would forestall litigation over the many varieties of snap removal that are disputed today. Moreover, practice in each state can adapt to the particular features of the laws governing service of process in that state.

Several provisions of the Federal Courts Jurisdiction and Venue Clarification Act of 2011 could be viewed as having added to the length and complexity of the removal scheme. But from the perspective of judges and lawyers, those provisions brought simplification, because they provided step-by-step guidance for recurring situations. The snapback proposal is in the same mold.

V. Conclusion: Snap Removal in Perspective

I support legislation along the lines of the snapback proposal because such legislation would restore the symmetry that Congress sought in the 1948 revision of the forum defendant rule, and because decisions like *Encompass Insurance* leave the law in a state where the availability of diversity removal depends on fortuities such as state rules on service of process and the defendant’s ability to “troll” state-court dockets. But that does not necessarily mean that the resulting arrangements would establish an optimum “balance of federal and state judicial responsibilities.”⁴⁵ Here I will mention two variations on diversity removal that may warrant the Committee’s attention in the long term – after the narrow and pressing issue of snap removal has been dealt with.

First, the language of the forum defendant rule prohibits removal if any of the parties in interest properly joined and served as defendants is a citizen of the [forum] State.” As noted earlier, the assumption seems to be that there is no risk of bias against an out-of-state defendant as long as at least one in-state defendant is a party on the same side. That assumption may be justified when all of the defendants, forum and non-forum, stand in the same relation to the plaintiff and

⁴⁵ See *Grable & Sons Metal Products, Inc. v. Darue Eng’g. & Mfg.*, 545 U.S. 308, 314 (2006).

the claims. But in many diversity removal cases the out-of-state defendant – for example, the manufacturer of the drug that the plaintiff ingested – is not simply one defendant among many; on the contrary, it is the primary defendant – the entity from whom the plaintiff will recover if any recovery is to be had. In that situation, the joinder of (for example) a local retailer, pharmacist, or distributor is not likely to mitigate any local bias. The Class Action Fairness Act (CAFA) uses the concept of “primary defendants” to define the “home state exception” to class action jurisdiction.⁴⁶ Perhaps a similar concept could be developed to limit application of the forum defendant rule or even the complete-diversity requirement.

Second, in Part IV-D, I suggested that defendants should not be able to secure the transfer to an MDL of a case which, but for a snap removal, would have remained in state court with no possibility of transfer. The snapback proposal reflects that view, because it is consistent with the overall thrust of the forum defendant rule that the snapback mechanism would restore. But it is not necessarily the most efficient way of handling the cases. To be sure, there can be coordination between the MDL court and state courts handling similar claims. And consolidation in an MDL is often seen as “a black hole from which cases, plaintiffs and defendants cannot escape,” and where various factors “often conspire to wrest control of the lawsuit away from the individual plaintiff and his chosen attorney.”⁴⁷ But it may be possible to devise a more coherent set of rules for determining which cases become part of the MDL and which stay in state courts.

I offer these suggestions very tentatively, and I emphasize again that they are for the long term. In contrast, the phenomenon of snap removal warrants immediate attention. The conflict in the lower courts continues unabated, consuming court and client resources without addressing the merits of the underlying disputes. Meanwhile, two courts of appeals have established a rule under which the choice between state and federal court will depend on variables that bear little if any relation to the need for a “neutral forum” that underlies the diversity jurisdiction.⁴⁸ The problem of snap removal can be solved without

⁴⁶ See William B. Rubenstein, 2 *Newberg on Class Actions* § 6.20 (5th ed. 2019 Update).

⁴⁷ Gary Wilson et al., *The Future of Products Liability in America*, 27 *Wm. Mitchell L. Rev.* 85, 104 (2000).

⁴⁸ See *Home Depot, Inc. v. Jackson*, 139 S. Ct. 1743, 1746 (2019).

addressing broader issues, and I welcome the opportunity to work with this Subcommittee to craft narrowly tailored legislation to that end.