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Examining the Use of “Snap” Removals to Circumvent the Forum Defendant Rule
Before the
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I. Introduction

My name is James E. Pfander. I am the Owen L. Coon Professor of Law at Northwestern University Pritzker School of Law, where I have taught such classes as civil procedure, conflicts of law, federal jurisdiction, and constitutional law for the past twelve years. Before accepting my post at Northwestern, I served for some years as the Prentice Marshall Professor of Law at the University of Illinois College of Law. I have written dozens of articles, book chapters, and books on procedural and jurisdictional subjects, often viewing modern developments from the perspective of history.

I have been asked by the subcommittee to testify today on the subject of “snap” removal, a growing problem in the administration of justice between state and federal courts. Snap removal applies to cases that begin in state court, as state law claims brought against one or more defendants. Federal law and policy usually require that state law claims stay in state court unless the alignment of the parties satisfies the complete diversity requirement. *See* 28 U.S.C. § 1441(a) (allowing removal of state law actions that qualify as disputes “between citizens of different States” within the meaning of the diversity statute, 28 U.S.C. § 1332(a)(1)). Even where the parties satisfy the citizenship-diversity requirement, moreover, federal law forbids removal of the action if one of the defendants “is a citizen of the State in which such action is brought.” 28 U.S.C. § 1441(b)(2). The forum defendant rule presumes that a defendant faces no significant threat of bias from the prospect of litigation in the courts of that defendant’s own state of citizenship.

Despite this congressional policy judgment, which has been part of our federal system since the adoption of the Judiciary Act of 1789,¹ some federal courts have allowed alert defendants to use new technology to circumvent the forum defendant rule by using “snap” removal. Monitoring state dockets with electronic alerts, these defendants quickly learn of any lawsuit filed in state court in which they appear as parties to litigation framed to include a forum defendant whose joinder would normally bar removal. Or, the removing defendant may learn of the suit by other means, such as conversations with the plaintiff’s counsel. Snap removal occurs immediately, before the plaintiff can perfect service of process on the forum defendant. The removing parties argue that this preemptive action avoids the forum defendant rule, which applies by its terms to cases in which the defendant in question has been “properly joined and served.” 28 U.S.C. § 1441(b)(2). Several but by no means all district courts have taken a literal view of the “and-served” requirement, concluding that pre-service

¹ See Judiciary Act of 1789, ch. 20, §§ 11, 12, 1 Stat. 73 (1789) (conferring federal jurisdiction in original actions over a suit “between a citizen of the State where the suit is brought, and a citizen of another state” and independently conferring removal jurisdiction only as to suits brought in state court only where the plaintiff as a citizen of the forum state brings suit against “a citizen of another state” and thereby conferring no removal jurisdiction when an out-of-state citizen plaintiff sued a diverse forum defendant).

removal avoids the forum defendant rule.² Two federal appellate courts have agreed and studies suggest that the practice has grown more common.³

No one defends the practice of snap removal as the product of a considered policy judgment by Congress, and for good reason. It's difficult to see why Congress would leave the forum defendant rule generally intact as a bar to removal, and create a special exception for only those forum defendants who have the resources and incentives as repeat players to hire docket monitoring services and act quickly in the wake of new litigation. Rather, as with so many other aspects of modern life, technological change has created new disruptive possibilities. Snap removal seems novel in the sense that it exploits old language by deploying modern technology. But in a larger sense, snap removal represents only the latest example of the way parties, both on the plaintiff side and on the defendant side, use creative tactics and arguments in an effort to secure access to their preferred forum.

In my testimony, I examine both snap removal and the systemic forum-shopping framework within which snap removal occurs. I begin with the assumption that both sides in disputes over snap removal seek to deploy lawyer's tactics within the framework of existing law to gain advantages for their clients. Thus, in the typical snap removal case, the plaintiffs have a strong preference for state court, perhaps to secure a local judge or jury or to avoid the prospect of having their claims consolidated for multi-district litigation with other claims pending in federal court. Plaintiffs seeking to avoid federal court can sometimes (depending on the facts) deliberately structure the litigation to keep it in state court, perhaps by naming either a non-diverse defendant (and defeating complete diversity) or by naming a forum defendant. Defendants who nonetheless wish to remove the action may attempt to do so, perhaps by arguing that the "jurisdictional spoiler" was fraudulently joined.⁴ Snap removal adds a new wrinkle to the struggle over forum choice.

In evaluating the rules of forum choice, Congress should view them as the establishing the structure within which the parties play a complex strategic game. Both parties, plaintiff and defendant, have clear financial incentives to use the existing rules to their best advantage. It makes little sense to evaluate the legitimacy of their strategic choices in moral terms. Indeed, the doctrinal rules that govern the evaluation of fraudulent joinder take for granted that plaintiffs sometimes join additional parties for the purpose of defeating diversity-based removal. Rather, Congress should distinguish on policy grounds between the matters best left to the state courts and those that belong in federal

² See, e.g., *Graff v. Leslie Hindman Auctioneers, Inc.*, 299 F.Supp.3d 928, 933-38 (N.D. Ill. 2017) (upholding snap removal after extensively canvassing the split). Other courts have rejected snap removal and remanded on the grounds that it is inconsistent with the spirit and purpose of the forum defendant rule. See, e.g., *Little v. Wyndham Worldwide Operations, Inc.*, 251 F. Supp. 3d 1215, 1221-23 (M.D. Tenn. 2017) (canvassing the case law).

³ See *Gibbons v. Bristol-Myers Squibb Co.*, 919 F.3d 699, 707 (2d Cir. 2019) (allowing removal before the forum defendant had been served with process); *Encompass Ins. Co. v. Stone Mansion Restaurant Inc.*, 902 F.3d 147, 153 (3d Cir. 2018) (same); Valerie M. Nannery, *Closing the Snap Removal Loophole*, 86 U. Cin. L. Rev. 541 (2018) (cataloging and criticizing judicial responses to snap removal and concluding that the practice has grown more common in recent years).

⁴ For an account of the complex world of jurisdictional spoilers and removal, see R. Marcus, M. Redish, E. Sherman & J. Pfander, *CIVIL PROCEDURE: A MODERN APPROACH* 944-51 (7th ed. 2018). For a brief overview of fraudulent joinder, see note 8 *infra*.

court. Then, it should articulate the clearest possible rules, so as to minimize the amount of time the parties expend litigating over forum selection. Removal and remand litigation wastes the time and resources of courts and parties, time and resources better devoted to resolving disputes on the merits.

In what follows, then, I will briefly describe the broad rules that now frame the strategic game of forum selection in our federal litigation system. After explaining why snap removal has no place in the defendants' forum-selection choice set, I will offer some thoughts on how Congress might fix the snap removal problem.

II. Forum Shopping in a Federal Litigation System

The Constitution creates a federal system of government, in which Congress bears primary responsibility for the allocation of jurisdiction as between the state and federal courts. State courts of general jurisdiction hear a broad range of state law matters as well as a mix of federal law claims. Federal courts, as courts of limited jurisdiction, concentrate their work on claims arising under federal law (28 U.S.C. § 1331), or what we often call federal-question jurisdiction. But federal courts also hear some claims arising under state law, at least where the parties' citizenship and the amount in controversy satisfy the statutory complete diversity test (28 U.S.C. § 1332(a)(1)). While the complete diversity rules limit federal jurisdiction over matters of state law, Congress has on occasion relaxed those rules to broaden the scope of federal authority over state law matters. Thus, in such areas as interpleader (28 U.S.C. § 1335), class action litigation (28 U.S.C. § 1332(d)), and multi-party, multi-forum litigation arising from catastrophic events (28 U.S.C. § 1369), Congress has extended federal jurisdiction to multi-party litigation over questions of state law.

Broadly speaking, then, Congress has created a world of concurrent jurisdiction in which state and federal courts share responsibility for the adjudication of matters of state and federal law. Many (but not all) federal-question proceedings can originate in state court, subject to the right of the defendant(s) to remove. Similarly a small slice of state law matters that begin in state court can be removed to federal courts on the basis of diversity. By preserving the complete diversity rule, Congress has signaled a desire in the main to preserve the primacy of the state courts in hearing questions of state law. Only where litigation cuts across state lines and involves complex multi-party proceedings has Congress relaxed the complete diversity rule to allow federal jurisdiction and the forms of consolidated litigation federal courts make possible.

Viewing this allocation of authority, one can see that Congress has deliberately left state courts in charge of most questions of state law. Such an allocation of authority reflects the common-sense idea that state institutions continue to bear responsibility for the creation, explication, and application of state law norms and that federal courts have little to contribute to that norm development and application process. *See Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). So far at least, Congress has not viewed the demands for consolidated litigation as sufficiently compelling to expand federal jurisdiction on the basis of diversity. And with some cause. Multi-party litigation based on state law norms creates choice of law complications as federal courts look to the law that

would have applied in the state where the proceeding originated.⁵ This required reference to state law can complicate the consolidated and efficient resolution of multi-party disputes under the aegis of the federal Judicial Panel on Multidistrict Litigation.⁶

With this allocation of authority between state and federal courts in place, Congress and the Supreme Court have expressed a clear preference for the quick and efficient resolution of matters of forum choice. Congress for its part authorizes defendants to remove the action, but requires that they do so within 30 days of service of process. *See* 28 U.S.C. § 1446(b)(1). Following removal, Congress calls for speedy litigation of any remand motions by requiring plaintiffs to file any motion to remand within 30 days of removal. *See* 28 U.S.C. § 1447(c). Finally, Congress has declared that when a federal district court remands a case to state court, that order is not reviewable “on appeal or otherwise.” 28 U.S.C. § 1447(d). The Court has confirmed Congress’s preference for clear rules and quick decisions on forum allocation, expressing a firm if not quite absolute view of the bar to appeals from remand orders.⁷

Forum shopping occurs within this framework, as parties jockey to secure litigation advantages through the selection of a preferred forum. Plaintiffs, as masters of their complaints, have important first-mover advantages in selecting the body of law on which they wish to rely and the forum in which to litigate. As for matters of state law, with multiple defendants, plaintiffs may join non-diverse defendants and forum defendants. In some instances, the desire of forum-shopping plaintiffs to lock in a state forum may induce them to file suit in the defendants’ state of citizenship, even at some inconvenience to themselves. The law protects defendants in part by requiring that the plaintiffs assert colorable claims against the jurisdictional spoilers; they cannot add parties without some substantial basis for the claim.⁸ Snap removal and other defense tactics arise as responses to counter the strategic advantages associated with plaintiffs’ forum selection.

The forum-selection game strikes many students and practitioners as an inevitable part of litigation; studies show that forum choice affects the outcome of litigation.⁹ Instead of decrying forum shopping, we might as well acknowledge that it occurs and set up clear rules that minimize the

⁵ *See* *Van Dusen v. Barrack*, 376 U.S. 612 (1964) (calling for application of the choice-of-law rules of the transferor district in cases transferred under 28 U.S.C. § 1404); *Wahl v. General Elec. Co.*, 786 F.3d 491 (6th Cir. 2015) (applying *Van Dusen* in the context of an MDL proceeding).

⁶ On the authority of the Judicial Panel, see 28 U.S.C. § 1407.

⁷ *See* *Kirchner v. Putnam Funds Trust*, 547 U.S. 633 (2006) (concluding that remand order was not subject to appellate review).

⁸ The fraudulent joinder doctrine holds that defendants against whom the plaintiff has no plausible claim are to be ignored in evaluating the existence of complete diversity jurisdiction. *See, e.g., In re Briscoe*, 448 F.3d 201, 216 (3d Cir. 2006) (“If the district court determines that the joinder was ‘fraudulent’ ..., the court can ‘disregard, for jurisdictional purposes, the citizenship of certain nondiverse defendants, assume jurisdiction over a case, dismiss the *nondiverse* defendants, and thereby retain jurisdiction.”). On the uncertain application of that doctrine to forum defendants, see *Morris v. Nuzzo*, 718 F.3d 660 (7th Cir. 2013) (declining to decide whether the fraudulent joinder doctrine extends to joinder of forum defendants).

⁹ *See* Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About The Legal System? Win Rates and Removal Jurisdiction*, 83 *Cornell L. Rev.* 581, 593 (1998) (comparing an overall plaintiff win rate in federal civil cases of 57.97% to a win rate after removal of only 36.77%).

collateral costs for the system.¹⁰ Indeed, one might recognize some value in forum shopping, as the price we pay in a federal legal system for the preservation of some portion of state court control of the content and application of state law.¹¹ This matter-of-fact attitude toward forum selection may help to explain why some federal courts have embraced snap removal; they may view forum-shopping by both plaintiffs and defendants as morally neutral and inevitable. In such a world, courts might apply rules literally and let the parties adapt and Congress intervene as appropriate.

In evaluating snap removal, then, we might ask whether a sensible system of jurisdictional allocation would foreclose removal by forum defendants and then create an exception for nimble docket-monitoring forum defendants. The question seems to answer itself. True, one could argue against the forum defendant rule just as one could argue against the complete diversity rule. But those rules seek to maintain some core of state court control over matters of state law in circumstances where defendants do not face a threat of forum bias. If Congress wishes to preserve those limits on federal jurisdiction, it makes little sense to allow them to be circumvented by snap removal. Indeed, one striking feature of snap removal is that it has almost no policy justification; the doctrine has arisen entirely in reliance on a literal interpretation of federal law.

One can imagine policy justifications, but they fail to persuade. Some may argue for broader removal of complex litigation to facilitate joinder and consolidated resolution, perhaps through the MDL process. Whatever one might think about those proposals, it does not make sense to rely on snap removal as a way to achieve the goal. Snap removal operates only for the benefit of some forum defendants; it stops well short of providing a systemic solution to the consolidation of important and related cases. Snap removal will facilitate arbitrary removals and it will leave many cases in state court, where the rules of complete diversity bar removal altogether. Snap removal may indeed induce more frequent naming of non-diverse defendants, whose joinder similarly deprives federal courts of removal jurisdiction.¹² The goal of consolidation will thus prove elusive so long as state law controls and the rules of complete diversity remain intact.

To be sure, Congress could achieve convenient and consolidated litigation by enacting rules of federal substantive law to govern the matters of national economic importance that increasingly burden federal dockets. Exercising its power over interstate commerce, Congress could surely federalize, say, the law of products liability just as it did the field of intellectual property law, with the

¹⁰ See *Abels v. State Farm Fire & Cas. Co.*, 770 F.2d 26, 32 (3d Cir.1985) (presuming that “plaintiffs’ motive for joining a defendant is to defeat diversity” and explaining that motive “is not considered indicative of fraudulent joinder”). Discounting evidence of motive reflects the courts’ view that “there is nothing improper about formulating and executing an effective litigation strategy, including selecting the most favorable forum for the client’s case.” *Moorco Int’l, Inc. v. Elsag Bailey Process Automation, N.V.*, 881 F.Supp. 1000, 1006 (E.D.Pa.1995).

¹¹ See James E. Pfander, *Forum Shopping and the Infrastructure of Federalism*, 17 Temp. Pol. & Civ. Rts. L. Rev. 355 (2008).

¹² The desire to protect innocent non-diverse defendants from being named by plaintiffs keen to prevent removal was the subject of the proposed Innocent Party Protection Act, H.R. 725, 115th Cong. Congress might also expand the scope of federal subject matter jurisdiction to include all civil actions based on any minimal diversity of citizenship, thereby virtually eliminating both the forum defendant rule and the non-diverse jurisdictional spoiler as barriers to removal to federal court. Such changes could transfer a substantial number of new state law proceedings to the federal docket, could do so in circumstances in which threats of citizenship-based bias appear quite modest, and could further attenuate state court control of disputes governed by state law.

recent passage of the Defend Trade Secrets Act.¹³ If Congress were to do so, removal of such newly federalized disputes would occur as a matter course as cases arising under federal law. Consolidation of related cases could also occur routinely, without regard to the rules of diversity and without regard to the forum defendant rule. For this reason, I would advise the subcommittee to resist arguments in support of snap removal that rely on the need to consolidate important matters that affect the national economy. Congress can address that problem head on with federal law, if it concludes that the problem warrants a national solution. Just allowing the removal of more state law matters to federal court, either on the basis of minimal diversity or by embracing the arbitrary procedure of snap removal, cannot provide a sensible solution to any perceived need for consolidation.

Without any policy justification, one finds snap removal quite difficult to defend. It takes cases that current law assigns to the state courts and allows them to be removed but only until the time the forum defendant has been served with process. That possibility will create incentives for defendants to engage in wasteful docket monitoring and for plaintiffs to take steps in advance of the litigation to counter anticipated snap removal practices. Given the uncertainty in current law as to the legality of the tactic, moreover, snap removal tends to foster jurisdictional litigation that complicates and delays the resolution of the merits of the dispute. Resources devoted to the snap removal game do little to advance the goal of the achieving the “just, speedy, and inexpensive determination” of every action and proceeding. Fed. R. Civ. P. 1.

III. How to Fix Snap Removal: Prevention or Cure

A number of proposals have been floated to address the snap removal problem. Broadly speaking, those proposals can be distinguished as forms of prevention or cure. Preventive measures would foreclose snap removal by clarifying the rules prohibiting removal by forum defendants. Curative measures (like those proposed by my friend, colleague, and fellow panelist, Professor Arthur Hellman) would address the snap removal problem by allowing the plaintiff to counter snap removal by serving a forum defendant and asking to have the case remanded to state court. *See* Arthur Hellman et al., *Neutralizing the Stratagem of “Snap Removal”: A Proposed Amendment to the Judicial Code*, 9 Fed. Cts. L. Rev. 104 (2016). I have great respect for Professor Hellman, but I believe in this context that an ounce of prevention is worth a pound of cure.

A. Curative Approaches

Professor Hellman and his co-authors propose a solution to snap removal that would entail the addition of a new subsection to section 1447, governing process after removal.

(f) Removal before service on forum defendant

If

¹³ Defend Trade Secrets Act of 2016, Pub.L. No. 114–153, 130 Stat. 376 (codified at 18 U.S.C. § 1836, et seq.).

(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.

Professor Hellman and his colleagues recognize that this would institutionalize and confirm the practice of snap removal, but they argue that it would disappear over time as defendants came to recognize that it could no longer secure a federal forum.

They might be right. But the value of snap removal may lead defendants to exploit the new rule. Forum defendants whose presence would otherwise block removal might nonetheless remove (or encourage other parties to do so) and attempt to evade service of process during the period specified in federal law, thereby securing a federal docket for the litigation. Congress may not wish to encourage such wasteful maneuvering. District courts might be tempted to proceed with the parties then before the court as the plaintiff seeks to serve the forum defendant. Or district courts might put the matter on hold pending some resolution of the service question. Either way, the plaintiff's ability to secure an adjudication of the merits in state court will have been thwarted or delayed.

What's more, the proposed statute could be read to establish a mid-course switch from state to federal rules for the determination of the timing and legality of service of process on forum defendants. Under current law, plaintiffs filing in state court effect service of process on defendants in accordance with state law. If some properly served (or docket-monitoring) defendants agree to remove, federal law specifies the rule that governs post-removal service of process on unserved defendants. Section 1448 provides that in cases in which service has not been perfected prior to removal, service may be "completed" (as specified in state rules) or new process "issued in the same manner as in cases originally filed" in federal court. 28 U.S.C. § 1448. The proposed statute might be read to eliminate the state law "completion" option and compel new process to issue in compliance with federal rules. In any case, uncertainty as to the operation of new Section 1447(f) and current Section 1448 might occasion further litigation.

B. Preventative Approaches

Rather than providing a cure to address snap removal after it occurs, Congress might foreclose snap removal altogether. Such an approach would have the virtue of ending, rather than institutionalizing, the practice and eliminating the wasteful behavior that a snap removal cure might encourage. But Congress should surely proceed cautiously, alert to avoid the problem of unintended

consequences. Time and again, history shows that litigants—plaintiffs and defendants alike—will seek any advantage they can find in their efforts to either defeat or secure removal. Proposed changes will need to be carefully vetted to minimize the risk of inadvertently creating new problems.

1. Eliminate the “And-Served” Requirement

One alternative would be to amend section 1441(b) to remove the words “and served” from the clause currently barring removal if any of the parties “properly joined and served as defendants” is a citizen of the forum state. That simple change could prevent snap removal by eliminating its textual predicate. It would do so, moreover, in a way that streamlined the removal process rather than making it more cumbersome.

In evaluating such a proposal, we should note that Congress added the “and served” language in 1948,¹⁴ perhaps in an effort to prevent plaintiffs from including removal-blocking forum defendants that they never intended to serve. Some scholars worry that the elimination of the “and served” language might end snap removal at the price of encouraging an equally unwanted form of gamesmanship by plaintiffs. In evaluating that question, we might ask about other statutory provisions that encourage the plaintiff to serve defendants promptly.

Notably, a plaintiff who names but fails to serve a forum defendant in accordance with state law risks an adjudication by the state, dismissing the claims against that party. (Thus, for example, federal courts must generally dismiss the action against any defendant that the plaintiff fails to serve within 90 days of commencement. *See* Fed. R. Civ. P. 4(m).) Were the state court to issue such a dismissal, it could operate as an order from which it “may first be ascertained” that the case is one “which is or has become removable” within the meaning of 28 U.S.C. § 1446(b)(3). If so, current law would provide the defendants with a new 30-day window during which to remove the action. *Id.* Elimination of “and served” would thus place the state court in charge of evaluating the forum defendant’s status as a properly served party and, if and when the state court found that service had not been properly effected, removal would become an option.¹⁵ Instead of snap removal, such an approach would lead to delayed removal for failure to perfect service of process. Such an approach would resemble the Hellman cure in allowing the plaintiff to avoid removal by service on forum defendants but would do so while the proceeding remained in state court.

Plaintiffs have another incentive to serve defendants promptly. Following the passage of the Jurisdiction and Venue Clarification Act in 2011,¹⁶ the removal statute now provides each defendant with a 30-day window to remove the action after service of process and further specifies that later-served defendants may have their full 30-day period, even if others have been served at an earlier stage. *See* 28 U.S.C. § 1446(b)(2)(B)-(C). As a practical matter, these provisions operate to keep the

¹⁴ *See* Nannery, *supra* note 3.

¹⁵ To be sure, the removal statute gives the defendants in diversity proceedings at most one year to effect removal of the action, but the district court can extend the time on a finding that the plaintiff has acted in bad faith. *See* 28 U.S.C. § 1446(c)(1).

¹⁶ Pub. L. 112–63, 112th Cong., 125 Stat. 758, codified in various provisions of 28 U.S.C. (2011)

window for removal open to all defendants so long as the plaintiff has failed to serve any defendant. It thus provides an important inducement to prompt service that was not part of the legislative landscape at the time of the 1948 legislation.

Some worry that elimination of the “and served” language would encourage the assertion of more frivolous claims against jurisdictional spoilers. But under current law, the fraudulent joinder doctrine governs attempts by plaintiffs to join jurisdictional spoilers to prevent removal.¹⁷ If the plaintiff’s complaint does not disclose a colorable basis for the imposition of liability on a defendant, the parties (and the court) may treat that defendant as a non-party for purposes of assessing the propriety of removal. Or, put in simpler terms, the plaintiff must assert substantial claims against all of the parties joined to defeat removal on the basis of diversity of citizenship. Plaintiffs may find that prompt service on forum defendants will assist in demonstrating that they have asserted valid claims on which they seek a merits adjudication.

2. Curtail Removal Jurisdiction over Suits against Diverse Forum Defendants

Congress might forestall snap removal by taking a page from the Judiciary Act of 1789, which decline to confer federal removal jurisdiction in state court diverse-citizen disputes in which forum defendants appear as parties.¹⁸ Federal jurisdiction, then and now, has a slightly asymmetric quality: it allows the plaintiff to choose an original federal diversity docket in a suit against a forum defendant. *See* 28 U.S.C. § 1332(a)(1). But if the plaintiff accepts the state court and initiates suit there, current law follows the law of 1789 in denying the forum defendant an opportunity to remove. Congress apparently instituted and maintained this asymmetry in recognition that an out-of-state plaintiff may fear bias if forced to litigate in state court but that a forum defendant faces no such fear of state court bias.

The difference between the old the new laws lies in the nature of the barrier to suit. The Act of 1789 achieved its preferred result by declining to extend removal jurisdiction to suits initiated against forum defendants in state court. Current law, by contrast, has been interpreted as a non-jurisdictional barrier to the removal of suits naming forum defendants.¹⁹ By framing the barrier to removal of cases involving forum defendants in jurisdictional terms, Congress could presumably end

¹⁷ On fraudulent joinder, see note 8 *supra*. Somewhat surprisingly, the Seventh Circuit found little circuit court level authority on the question of whether the doctrine of fraudulent joinder creates an exception to the forum defendant rule. *See Morris v. Nuzzo*, 718 F.3d 660, 665 (7th Cir. 2015). From a textual perspective, the requirement that forum defendants be “properly joined,” 28 U.S.C. § 1441(b)(2), would seem to provide a natural home for an inquiry into the propriety of the forum defendant’s joinder under the fraudulent joinder doctrine.

¹⁸ Most courts take the position that the rule is a mandatory, but non-jurisdictional, case processing rule. *See Encompass Ins. Co. v. Stone Mansion Restaurant, Inc.*, 902 F.3d 147, 152 (3d Cir. 2018) (describing a long held rule that the forum defendant rule is procedural rather than jurisdictional); *Morris v. Nuzzo*, 718 660, 665 (7th Cir. 2015) (collecting similar authority); *In re 1994 Exxon Chemical Fire*, 558 F.3d 378 (5th Cir. 2009) (characterizing the forum defendant rule as procedural). Some courts have viewed the forum-defendant rule as jurisdictional for some purposes. *See, e.g., Horton v. Conklin*, 431 F.3d 602 (8th Cir. 2006) (interpreting the rule’s jurisdictional quality as a barrier to appellate review of a remand order).

¹⁹ *See* note 18 *supra*.

the practice of snap removal.²⁰ The forum defendant rule would thus resemble the jurisdictional rule of complete diversity, which operates as a barrier to removal that snap removal cannot overcome.

3. The Clermont Fix

Professor Kevin Clermont has suggested an additional possible solution, blending cure and prevention. In describing his solution, Clermont imagines a hypothetical lawsuit brought in New Jersey state court by P from NY who sues D1 from PA and D2 from NJ. He then assesses the removal possibilities:

Under pretty much accepted law [after 1948], if P served D1 first, then D1 could remove immediately despite D2's status as a forum defendant. *See* 14B Wright, Miller, Cooper & Steinman § 3723, at 784 n.89. Of course, if P served D2 first, then § 1441(b)(2) blocked removal. So P had the protective ability to serve D2 first. Snap removal introduced the tactic of either D1 or D2 removing before anyone is served. . . .

A direct cure of pre-service removal, one suggested to me by a student in class, would be to require that the removing defendant be served before she can remove. That is, Congress could add “properly served” before “defendant” in the first line of § 1446(a). [I had originally thought to add “properly joined and served” for consistency's sake, but I think there is no reason to test joinder at this point; moreover, this language might also work to codify the somewhat controversial doctrine of procedural misjoinder, which is described in the online Wright et al. § 3723.1.] (If you want to limit any change to diversity suits, I guess the change could be by appropriate language put in § 1446(c)(2).)

This change would hardly be radical. The removal statutes seem to assume that the removing defendant is already in the action. It is pre-service removal that makes snap removal so controversial. Pre-service removal also enables defendants to avoid the all-defendants-must-consent rule in § 1446(b)(2)(A).

This cure prevents an unserved D1 or D2 from using snap removal. But what about a served D1? If D1 is served first, she could still remove immediately despite D2's existence. But D1 could do this under the post-1948 law. And P could protect himself by serving D2 first, a protection long thought to be adequate. We can, and do, live with this situation.

Clermont Memorandum on Snap Removal (copy on file with author).

Many aspects of the Clermont fix fit well with current law. For starters, removal law tends to assume that the parties effecting removal have been served; indeed, the Supreme Court made this

²⁰ The amended terms of section 1441(b)(2) might read as follows:

The removal jurisdiction conferred in section 1441(a) shall not extend to any civil action otherwise removable solely on the basis of jurisdiction under 1332(a) of this title if any of the parties in interest properly joined and served as defendants is a citizen of the State in which the action is brought.

assumption explicit, holding that the 30-day removal clock begins when defendants have been formally served with the complaint.²¹ The holding rejected the removal-defeating strategies of plaintiffs who were acting to shorten the time for removal by providing defendants with pre-service courtesy copies of the complaint. The Clermont fix would accomplish something similar, deferring removal until after the removing defendant has been served.

In addition, the Clermont fix would preserve much of current law while allowing the plaintiff to exercise control of the timing of service and thereby preterm snap removal by serving the forum defendant first. If no removal can be had until service on at least one defendant has been perfected, then the plaintiff can make a strategic choice. Current law already incorporates such choices on the part of plaintiffs, giving all defendants a full 30 days to remove after service, but enabling plaintiffs to shorten the total time for removal by serving all defendants at roughly the same time. *See* 28 U.S.C. § 1446(b)(2)(B)-(C). While further study may be warranted, it appears to me at present that the Clermont fix provides the cleanest solution to the problem of snap removal.

IV. Conclusion

This subcommittee deserves credit for addressing the dysfunctional features of federal jurisdiction, including the current poster child of dysfunction, snap removal. As this subcommittee works to develop a fix for snap removal, it might also give some thought to the question of how to keep jurisdictional law in better repair as a general matter. Since the revisions of 1948, some seventy years ago, Congress has made no comprehensive restatement of the federal judicial code. Instead, it has contented itself with a series of statutory fixes, some of which have miscarried. Does it make sense to start a conversation about broadening the Rules Enabling Act, 28 U.S.C. § 2702, to assign some authority over the details of removal and remand procedure to a rule-making body within the Judicial Conference of the United States?

²¹ *See* *Murphy Bros. Inc. v. Michetti Pipe Stringing* 526 U.S. 344, 356 (1999) (dating the time for removal from the date of service of process, rather than from the earlier date on which the plaintiff sent the defendant a courtesy copy of the complaint).