

**STATEMENT OF**

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**BEFORE THE**

**SUBCOMMITTEE ON**  
**COURTS, INTELLECTUAL PROPERTY,**  
**AND THE INTERNET**

**COMMITTEE ON THE JUDICIARY**

**U.S. HOUSE OF REPRESENTATIVES**

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

**November 14, 2019**

**TABLE OF CONTENTS**

Introduction to the Problem ..... 2

    A. The Forum Defendant Rule ..... 4

    B. The Snap Removal Loophole to Avoid State Court Accountability .. 5

    C. The Snap Removal Problem Has Surged in Scope and Pace..... 6

    D. Unfathomable Abuse of Snap Removals ..... 10

    E. Snap Removals Create Undue Delay and Waste Federal Court  
Resources..... 13

    F. Additional Adverse Consequences of Snap Removal..... 16

    G. Plaintiffs’ Choice of Forum has Diminished Since the Supreme  
Court’s Decision in *Bristol-Myers Squibb* and any Further Erosion  
from Snap Removal will Deprive Injured Plaintiffs of Rights the  
Supreme Court Recognized in *Bristol-Myers Squibb* to Exist..... 18

    H. Legislative Solutions ..... 19

Amend 28 U.S.C. §§ 1447 & 1441(b)(2) to Put Focus Back on Joinder..... 20

Conclusion..... 23

Chairman Johnson, Ranking Member Roby, and Members of the Subcommittee:

Thank you for the invitation and opportunity to discuss the critical issue of so-called “snap removal,” and the problems this poses to the sovereignty of state courts, the capacity of federal courts, and to the rights of plaintiffs to bring suit in the courts of their choosing.

My name is Ellen Relkin and I am an attorney admitted to practice in New York, New Jersey, Pennsylvania and the District of Columbia, but I practice primarily in New York and New Jersey, and federal courts throughout the country. I am of counsel at the law firm Weitz & Luxenberg. For the past 35 years, I have represented thousands of clients injured by environmental pollution, recalled and defective medical devices, as well as recalled and inadequately labeled pharmaceutical products.

I received my Bachelor’s of Arts from Cornell University and my Juris Doctorate from Rutgers University Law School. I am certified by the New Jersey Supreme Court as a Certified Civil Trial Attorney, am an elected member of the American Law Institute, and an invited member of the American Bar Foundation. I am also the former President of the Pound Civil Justice Institute. I sit on the Board of Governors of the New Jersey

Association for Justice as well as on the Legal Affairs Committee of the American Association for Justice.

### **Introduction to the Problem**

I appreciate the opportunity to share my perspective as a plaintiffs' practitioner on the issue of snap removal. In my three plus decades of practice, I have not seen a procedural rule so dramatically alter the landscape of civil litigation, limiting the litigation rights of persons injured by dangerous products. Snap removals are surging and depriving plaintiffs of state court jurisdiction. The problem is particularly acute in the courts within the Third Circuit—to wit, New Jersey, Pennsylvania, and Delaware—and the problem is increasing in scope and frequency, exponentially, in the past two years. The snap removal tactic is percolating to many other states due to defense bar efforts and education programs urging companies to file quick removals to federal court before the forum defendant is served with the complaint. The tactic guarantees if nothing else, delay, which in and of itself is a win for defendants.<sup>1</sup> It is also a serious loss for our system of civil justice.

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<sup>1</sup> See Jennifer A. Eppensteiner, *Forewarned, Forearmed: Forum Defendants and Pre-Service Removal*, In-House Def. Q. 9, 12 (2019) (recommending snap removal “even in the face of negative precedent”).

New Jersey has been called the medicine chest of the nation due to its large number of resident pharmaceutical companies, including J&J, Merck, Bayer, and Novartis, to name just a few. Due to the longstanding presence of those companies, the New Jersey state court system has an advanced system of aggregating cases into what is called a “Multicounty Litigation,” so that cases can be efficiently managed with coordinated discovery, science hearings, and then a process for conducting trials.<sup>2</sup> These state court consolidated litigations, as well as individual state court cases involving plaintiffs from out-of-state, have seamlessly proceeded for years. These state court cases contribute to important state court jurisprudence, and provide persons injured by products such as Vioxx, Fen Phen, metal-on-metal recalled hips, recalled pelvic mesh products, and other recalled or otherwise dangerous medical products, the opportunity for efficient consolidated discovery, and when necessary, a jury trial.

However, due to recent factors discussed below, counsel for large corporations, such as the J&J subsidiary Ethicon, and the Stryker Corporation subsidiary Stryker Orthopedics, among others, are exploiting a loophole to remove cases from state court to federal court via “snap removal.” Snap removals deprive plaintiffs of the ability to pursue claims in

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<sup>2</sup> See <https://www.njcourts.gov/attorneys/assets/mcl/nonasbestosmanual.pdf?c=dSS>.

the state court that is home to the defendant manufacturer corporations, and which is imbued with the duty to regulate the conduct of its own corporate and other citizens. The experience I have observed with removals in New Jersey, New York, Pennsylvania, and Delaware is consistent with the empirical study performed by Valerie Nannery, Esq., while she was a Supreme Court Fellow assigned to the Federal Judicial Center. However, the pace and scope of these removals has expanded in leaps and bounds since the already dated data she studied. Nannery noted that that there was a concentration of snap removals in districts where a large number of pharmaceutical companies are based and that remains true today although snap removals certainly occur elsewhere.<sup>3</sup>

### **A. The Forum Defendant Rule**

The forum defendant rule, as 28 U.S.C. § 1441(b)(2) is commonly known, prohibits the removal of a case to federal court on diversity grounds by a forum defendant—one residing in the same state where the state court action was filed. The reasoning is simple: a forum defendant has no more to fear from a jury of its own peers, in a local tribunal, than it would from a federal fact-finder. In other words, the purpose of diversity jurisdiction—to

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<sup>3</sup> Valerie M. Nannery, *Closing the Snap Removal Loophole*, 86 U. Cin. L. Rev. 541, 567 (2018).

protect against a foreign state court’s potential prejudice—is rendered superfluous when the defendant being sued is at home in that state. That fact, taken together with the maxim that federal jurisdiction is to be limited, mandates the result repeatedly enshrined by Congress—that removal by a forum defendant on diversity grounds is prohibited.

**B. The Snap Removal Loophole to Avoid State Court Accountability**

Snap removal is the removal of a case from state court to federal court by a defendant before the plaintiff can formally effect service on the forum defendant. This directly contravenes the primary and overarching purpose of the forum defendant rule, and is an unintended result of a flawed solution to the problem of fraudulent joinder—where a plaintiff files a complaint in state court naming multiple defendants, including at least one forum defendant, but never serves or otherwise fails to pursue the action against the forum defendant, thereby improperly exploiting the forum defendant rule just to keep the action in state court.

To address this, Congress amended the statute in 1948 —long before fiber optic high-speed internet—to specify that a diverse action could not be removed by a forum defendant “properly joined and served.” The “and served” language was to function as a bright-line test for the propriety of

joinder, since a plaintiff was now forced to take an affirmative step against a forum defendant beyond simply naming it in the complaint, and actually serve the in-state defendant with the action to pursue the claim. The “properly joined and served” language was meant to foreclose gamesmanship by a Plaintiff’s counsel who named a forum defendant with no intention of proceeding against it.

### **C. The Snap Removal Problem Has Surged in Scope and Pace**

Defendants will claim that there is no problem requiring legislation, and that snap removal itself is not something new, and is used sparingly. While snap removal actions and motions to remand have occurred with moderate frequency in the past ten years or so, like most things tied to technology, it has exploded onto the scene at an exponential rate over the past year and a half.

Why this surge of snap removals and remand motions? There has been a perfect storm of two culminating trends: (1) sweeping technological advances across the country in mandatory state court filing practices (e-filing); and (2) recent appellate decisions: *Encompass Insurance Company v. Stone Mountain Restaurant, Inc.*, by the Third Circuit last year,<sup>4</sup> and

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<sup>4</sup> *Encompass Ins. Co. v. Stone Mansion Rest. Inc.*, 902 F.3d 147 (3d Cir. 2018).



*Gibbons v. Bristol-Myers Squibb Co.*, by the Second Circuit this year.<sup>5</sup> Prior to these appellate cases, judges within the district courts in those circuits frequently remanded, finding the snap removals improper.<sup>6</sup> Moreover, vigilant plaintiffs' counsel could avoid defendant's abuse of the snap removal technicality by promptly effecting service on the forum defendant. The two changes above have shifted the paradigm.

Those appellate holdings, to their credit, intended snap removal to be permissible only in narrow, limited circumstances, but particularly unrelenting defense counsel have exploited the rulings and expanded the tactic to cover nearly every case filed against their clients in state court by out-of-state plaintiffs. Put simply, in astonishingly quick time, the forum defendant rule has been almost completely stripped of its primary purpose, especially in courts within the Third Circuit.

We think these decisions were a product of the Courts' failure to properly consider three things: (1) the pace of technology; (2) the win-at-all costs mentality of high-powered civil litigators; and, most importantly, we believe, for this esteemed Subcommittee, (3) the critically mistaken

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<sup>5</sup> *Gibbons v. Bristol-Myers Squibb Co.*, 919 F.3d 699 (2d Cir. 2019).

<sup>6</sup> Valerie M. Nannery, *Closing the Snap Removal Loophole*, 86 U. Cin. L. Rev. 541 (2018) (describing the divergent decisions in cases of snap removal).

perception that when Congress last revisited the text of the forum defendant rule in 2011, Congress already had some appreciation for what brings us before you today—snap removal in the age of the Internet and electronic filing, and the attendant assumption that Congress, by not addressing snap removals in the legislation, implicitly blessed it.

It cannot be overemphasized that, in 2011, when Congress last revisited the statute, no states had electronic filing. Not one. According to the National Center for State Courts, the first few states to get electronic filing went live in 2012.<sup>7</sup> That means the technological capability that has given rise to the problem of snap removal’s sudden ubiquity and speed—the problem we are here to address—did not even exist when Congress last considered this issue. Back then, the “race” was still more or less fair, still a literal “race to the courthouse”—with a defendant physically checking at the court clerk’s office to see if any complaints naming them had been filed. That gave any alert plaintiffs’ lawyer typically at least a day to effect service before the especially vigilant defendant learned that a complaint had been filed naming it. Now though, it is a race between physically serving a defendant and defendant electronically removing the plaintiff’s complaint. It

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<sup>7</sup> E-mail conversations between Brendan McDonough, Esq., of Weitz & Luxenberg, P.C., and William E. Raftery, Ph.D., Senior Knowledge and Information Services Analyst, and James E. McMillan, Principal Court Management Consultant, National Center for State Courts, November 11-12, 2019.

is the Stone Age versus the Space Age, but worse—because on top of everything, certain defense counsel are brashly operating under the assumption that they can deliberately delay accepting service, and equally troublesome, claim that service upon their own registered agent pursuant to state procedural rules is somehow invalid.

The following passage from the Third Circuit’s holding in *Encompass*, the case that jumpstarted snap removal’s increased usage, shows that while defendants have trumpeted the decision for its apparent endorsement of gamesmanship and deception, the Third Circuit was in fact beseeching Congress to clarify the forum defendant rule, lest the “peculiar” result rendered by application of its plain meaning become truly “absurd”:

Our interpretation ... envisions a broader right of removal only in ... narrow circumstances.... We are aware of the concern that technological advances ... permit litigants to monitor dockets electronically, potentially giving defendants an advantage.... However, the briefs fail to ... argue that the practice is widespread. If a significant number of potential defendants ... possess the ability to quickly determine whether to remove the matter before a would-be state court plaintiff can serve process ... the legislature is well-suited to address the issue.... Thus, this result may be peculiar...; however,... [the plaintiff] has not provided, nor have we otherwise uncovered, an extraordinary showing of contrary legislative intent.... Reasonable minds might conclude that the

procedural result demonstrates a need for a change...; however, if such change is required, it is Congress — not the Judiciary — that must act.

*Encompass*, 902 F.3d at 153-54, n. 4.

The Third Circuit, its hands tied by the plain meaning, did not foreclose the issue, as defendants have suggested, but instead explicitly put it to Congress to act, if such action is necessary. Similarly, the Second Circuit, the only other circuit to address the issue, took care to note that only “*in limited circumstances*” was permitting snap removal not absurd, at least not enough to “depart from the statute’s express language.” Both Courts appear to have ruled reluctantly, even without recognizing that we are already at the absurd place where action is necessary. As the examples that follow demonstrate, with dire urgency—Congress must act.

#### **D. Unfathomable Abuse of Snap Removals**

After the *Encompass* decision was issued in August of last year, a subsidiary of one of the largest medical device companies in the world, J&J, headquartered in Somerset County, New Jersey—began snap removing every case filed against it in state court. Many of these cases were snap removed within one to two hours of filing. Within a month, effecting service forty-five minutes after filing was already too late. By the holidays, snap

removals were literally being effected in less than 10 minutes from when the case was electronically filed in New Jersey state court.

Another New Jersey corporation, Stryker Orthopedics, headquartered in Bergen County, retained the same counsel as J&J and began practicing the same tactics. In response, plaintiffs began sending process servers to wait in the parking lot of corporate headquarters with mobile printers in the car. Counsel would file the complaint and quickly e-mail the filed pleading to the server, who would print it and physically run it inside. For a brief time, a plaintiff's right to sue the corporation in its home state was protected—so long as service occurred within 8 minutes. Then, using a twisted interpretation of *Encompass* as a shield, Stryker and others in New Jersey began instituting contrived barriers to service at corporate headquarters.

Now, security guards deceptively assure process servers waiting to serve recently filed complaints that the authorized individuals for service are on their way down, while instead the hours slowly pass. Time and again, just minutes after the snap removal is filed by defense, like clockwork—authorized individuals suddenly appear to accept the summons and complaint. In a few notable instances, our process servers have brought the mobile printers inside to print the complaint as soon as the individual to

accept service appears. When the individual saw the printer and realized service is about to occur on a case the corporation had not yet removed, the individual fled the corporate lobby and refused to return until after removal. Presently pending before the District of New Jersey is a series of motions to remand in a number of cases against Stryker Orthopedics.

Remarkably, Defense counsel's response to these tactics is unabashedly cynical and bold, stating, "Defendant's purported service-evading actions ... even if true as alleged, are permitted by Third Circuit courts." Stryker Orthopedics counsel shamelessly boasts, "As *Encompass* ... and other cases make clear, 'pre-service machinations,' gamesmanship and other forms of 'otherwise "unsavory" behavior' are *permitted* within the Third Circuit, and Plaintiff's arguments to the contrary are simply antithetical to settled law." (emphasis in original). Remarkably, counsel also states license to evade service: "If the conduct in *Encompass* – which included affirmative deception toward the plaintiff's counsel regarding service of process – was deemed proper, surely Defendant's service-evading conduct here, if true as alleged, was similarly appropriate."<sup>8</sup>

To be clear, any avenue of legitimate service will be challenged. This is the beginning—not the end—if Congress does not act. For example,

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<sup>8</sup> Letter [D.I. 14], Civil No. 2:19-cv-15040-JMV-JBC, at 1, 6; *see also* Def.'s Br. in Opp'n [D.I. 9], Civil No. 2:19-cv-17986-JMV-JBC, at 20.

realizing that corporations could probably not instruct their registered agents for service to engage in the same gamesmanship as their employees, plaintiffs in New Jersey began serving the registered agent for service, with some success. Stryker Orthopedics has responded to that tactic by simply removing anyway, *after* proper service, asserting in nearly one dozen improperly removed actions that service on the corporation's registered agent for service somehow did not constitute proper service under the forum defendant rule, even though it is unquestionably good service under the forum state's law. But as these examples show, with the prevention of improper joinder focused as it is on service, corporate defendants have raised and will continue to raise an endless list of petty, inauthentic objections to the mode of service. To combat this, plaintiffs' counsel have had to pay extraordinary service fee costs for rush service, waiting times of hours, mobile printers, and parallel service. This saga is all regaled in motions presently pending before the District of New Jersey.<sup>9</sup>

### **E. Snap Removals Create Undue Delay and Waste Federal Court Resources**

Each snap removal and the concomitant remand motion drains the resources of an already stretched federal court system and embeds undue

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<sup>9</sup> Amanda Bronstad, *Oh Snap! As Defendants Increase Pace of 'Snap Removals' of Lawsuits, Scrutiny Ramps Up*, N.J.L.J., Nov. 11, 2019.

delay in the administration of justice. The *Nannery* empirical study of cases snap removed between 2012-2014 reflects that, on average, District Court judges who did rule on remand motions took more than three months to rule and that the remanded cases remained in federal court for more than five months on average. *Nannery, supra* at 569. That empirical study reflected that even when the remand motions were unopposed or the defendant withdrew its opposition, plaintiffs nevertheless had to wait more than two months for a remand order. *Nannery, supra* at 570.

That is entirely consistent with my recent experience with the spate of removals my firm is encountering. The first of the removals was filed on July 11, 2019. We filed our remand promptly, then Defendant took advantage of an automatic request for a two-week extension allowed by the local rules to oppose motions, thus delaying the briefing, and now, fully briefed, the first of the series of motions is on the busy plate of one of the District Judges in New Jersey. Since that initial motion briefing, involving seven (7) separate removed cases, later removals, and thus, remand motions, have followed, clogging the court docket and delaying the rights of these



generally elderly plaintiffs with failed hip implants to have their cases heard on the merits.<sup>10</sup>

The problem is especially acute in the District of New Jersey, which was deemed by the Administrative Office of U.S. Courts to be in a state of judicial emergency, with weighted filings of 903 cases per judgeship, the second highest in the nation.<sup>11</sup> The court presently has six vacancies out of seventeen judgeships with over one third of the judgeships vacant awaiting appointment. This rampant removal is not an aberration as the defense counsel presenting testimony may suggest. There have been similar recent large number of removals and remand practice involving hernia mesh products manufactured by Ethicon, a J&J subsidiary in the District of New Jersey, and in Delaware, in the past two years alone, removals of at least 186 cases involving the medication Eliquis to the District of Delaware by defendant Bristol-Myers Squibb.<sup>12</sup> The removal pace of some defense counsel has been so quick that they actually removed a case of my law firm

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<sup>10</sup> See *Fusco, et al. v. Howmedica*, 2:19-cv-15040-JMV-JBC; *Johnson v. Howmedica*, 2:19-cv-15078-JMV-JBC; *Wyche v. Howmedica*, 2:19-cv-15085-JMV-JBC; *Shafer-Jones, et al. v. Howmedica*, 2:19-cv-15111-JMV-JBC; *McCracken v. Howmedica*, 2:19-cv-15137-JMV-JBC; *D'Alessandro, et al. v. Howmedica*, 2:19-cv-15147-JMV-JBC; *Wolfe v. Howmedica*, 2:19-cv-15152-JMV-JBC; *Brown, et al. v. Howmedica*, 2:19-cv-17984-JMV-JBC; *Ward v. Howmedica*, 2:19-cv-17986-JMV-JBC; *Gorman v. Howmedica*, 2:19-cv-18665-JMV-JBC; *Jackson v. Howmedica*, 2:19-cv-18667-JMV-JBC; *Kennedy v. Howmedica*, 2:19-cv-19304-JMV-JBC.

<sup>11</sup> Charles Toutant, *State's Federal Judge Shortage Deepens With Departure of Jose Linares*, N.J.L.J., May 16, 2019.

<sup>12</sup> E-mail conversations between the undersigned and Raeann Warner, Esq., of Jacobs & Crumplar, P.A., counsel of record in 186 cases removed to D. Del. by Bristol-Myers Squibb, Nov. 12, 2019.

concerning mesothelioma caused by talc in asbestos filed by a New Jersey plaintiff involving a New Jersey defendant where complete diversity was lacking. In the mechanized rush to remove, apparently no lawyer read the papers or carelessly glanced at them since they failed to recognize this blatant error<sup>13</sup>. While the error was corrected once it was pointed out, it demonstrates the abuse of process and disregard for the rule of law. Similarly, counsel for defendant in a hernia mesh action removed despite being served directly at corporate headquarters,<sup>14</sup> thus revealing there is no compliance with Rule 11 to reasonably investigate whether service has been effected. Again, the error was corrected when it was belatedly recognized, but this reflects the rush to remove has become a clerical act without legal counsel exercising due diligence in removing and certifying to the court that the case was properly removed.

## **F. Additional Adverse Consequences of Snap Removal**

Another example of a problem almost certainly unforeseen by Congress when it enacted the “properly ... served” language is the chilling

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<sup>13</sup>. *Pollinger, et al. v. Cyprus Amax Minerals Co., et al.*, Civil Case No. 3:19-cv-01041-MAS-TJB. The faulty snap removal was filed by counsel for Revlon Inc., a non-forum defendant although the case involved a forum defendant as well.

<sup>14</sup> Communications between my associate Brendan McDonough Esq. and Joshua Kincannon Esq. of the Wilentz firm in a case involving Ethicon.

effect seen on pre-suit resolution. Admittedly, plaintiffs might have been burned historically from time to time by forum defendants who—made aware through settlement negotiations of the existence of a suit, and perhaps even the date the suit likely had to be filed for statutes of limitations purposes—were prepared to snap remove upon filing, and did so. But now, with the current state of affairs, there is a serious danger in plaintiffs’ counsel approaching counsel for forum defendants known to snap remove, since doing so only puts the defendant on notice that a state court filing susceptible to snap removal may be imminent. From my experience, I have been able to favorably and promptly resolve cases for clients to their satisfaction, by presenting the case with its supporting evidence pre-suit to the defendant or its counsel. If my practice is at all representative, I would assume that a meaningful percentage of cases are resolved in that fashion nationally. However, with the blessing of *Encompass* and the speed of electronic filings and thus removals, it is very risky proposition to consider approaching a defendant with pre-suit resolution discussions. I now only do so sparingly, with adversarial counsel I can trust based on years of professional dealings. It goes without saying that pre-suit resolution is a win-win for all—prompt resolution for the injured claimant, reduced legal fees for the defense, and fewer cases clogging our courts.

**G. Plaintiffs' Choice of Forum has Diminished since the Supreme Court's 2017 Decision in *Bristol-Myers Squibb*,<sup>15</sup> and any Further Erosion from Snap Removal will Deprive Injured Plaintiffs of Rights the Supreme Court Recognized in *Bristol-Myers Squibb* to Exist**

The Supreme Court, in the case *Bristol-Myers Squibb Co.*, 137 S. Ct. 1773, 198 L. Ed. 2d 395 (2017), limited the scope of personal jurisdiction so that a defendant could not be sued in a state where they and the plaintiff were not residents, even if they did billions of dollars of business in that state. However, in justifying this retrenchment of personal jurisdiction, Justice Alito, for the majority of the Court, expressly stated, "Our decision does not prevent the California and out-of-state plaintiffs from joining together in a consolidated action in the States that have general jurisdiction over BMS. BMS concedes that such suits could be brought in either New York or Delaware." Notably, the Supreme Court's statement is nullified by snap removal abuses following the Third Circuit's *Encompass* decision. With the lightning speed removals following electronic filing, plaintiffs cannot get jurisdiction in the New York or Delaware state courts, despite *Bristol-Myers Squibb* being headquartered in New York and incorporated in Delaware. Thus, cases involving plaintiffs from states other than New York and Delaware against BMS company would move to federal

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<sup>15</sup> *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County*, 137 S. Ct. 1773, 198 L. Ed. 2d 395 (2017).

court, which is a result not contemplated or intended by our very own Supreme Court a mere two years ago.

It may be true the *Bristol-Myers Squibb* decision itself does not prevent an out-of-state plaintiff from suing a corporation in its own home state. The decision does, however, leave an out-of-state plaintiff with little choice but to file against the corporation in its home state, since it is now nearly impossible to prove a corporation is subject to jurisdiction anywhere else. Thus, the *Bristol-Myers Squibb* decision, in conjunction with snap removal and the two recent circuit decisions permitting the practice, has essentially foreclosed plaintiffs from suing corporations in state court, except where the plaintiff and corporation just happen to be residents of the same state.

## **F. Legislative Solutions**

There are a number of ways to close the loophole of snap removal and reaffirm the primary purpose of the forum defendant rule—prohibiting diversity-based removals by forum defendants—while preserving the rule’s derivative aim of preventing its exploitation by plaintiffs through fraudulent joinder. I have canvassed the proposals by academics and practitioners alike,

and today ask you to consider what I believe is the best proposal that has been put forward.

**Amend 28 U.S.C. §§ 1447 & 1441(b)(2) to Put Focus Back on Joinder**

Solving the problem of snap removal could be accomplished by adding a new provision to 28 U.S.C. § 1447 that allows a plaintiff to remand an action removed under 1441(b)(2) by a properly joined forum defendant, *so long as the plaintiff first serves the forum defendant within the time prescribed by the forum state's rules*. This solution would rebut any potential concern by defendants that plaintiffs would be able to resume the practice of improperly joining “dummy” forum defendants and simply never serving them. By the plain language of the proposed text below, plaintiffs would *have* to serve the forum defendant before moving to remand the action to state court. This would preserve everything defendants advocate about the “properly ... served” language, including ensuring that forum defendants could still remove before service. However, because plaintiffs could simply remand by effecting proper service on a properly joined defendant, the change would ensure forum defendants are not only removing

purely because they have not been served. This proposal is a variant of the legislation proposed by Professor Hellman and his co-authors.<sup>16</sup>

Moreover, this addition to § 1447 could be buttressed by simply removing the words “and served” from § 1441(b)(2), thus placing the focus of the 1948 Amendment back where it properly belongs—on improper *joinder*.

Section 1447 of title 28, United States Code, would be amended by adding at the end the following:

- (f) A civil action removed solely on the basis of jurisdiction under section 1332(a) shall be remanded to the State court from which such action was removed if –
  - (1) any party in interest properly joined as a defendant –
    - (A) is a citizen of the State in which such action was brought; and
    - (B) has been properly served within the time period for service of process described in the forum state’s rules for service; and
  - (2) a motion to remand the action is filed not later than 30 days after a defendant described in paragraph (1)(A) is served as described in paragraph (1)(B).

Section 1441(b) of title 28, United States Code, would be amended as follows:

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<sup>16</sup> Arthur Hellman, et al., *Neutralizing the Stratagem of “Snap Removal”: A Proposed Amendment to the Judicial Code*, 9 Fed. Ct. L. Rev. 103 (2016).

- (2) 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.

The timing of service, and even the fact of service, would instantly become irrelevant. Instead, if any defendant—forum or non—viewed the joinder of a forum defendant as fraudulently designed to prevent an otherwise legitimate removal, the removal notice would so state. The plaintiff would then *have* to timely serve the forum defendant pursuant to state rules before moving to remand—thus satisfying any concern that proper service is needed to “prove” the propriety of joinder. The defendant, in opposition, could then assert improper joinder as the basis for denying remand. Accordingly, the issue litigated—if any—would be the issue at hand, fraudulent joinder. This would not conflict with Congressional intent, as the “and served” language was only meant to serve as an affirmative act that the plaintiff had to perform in order to prove, in a sense, that joinder was legitimate. Eliminating service from the statute would better serve Congressional intent by putting the focus back on joinder while honoring the rule that service must be timely effected on a forum defendant.



## **G. Conclusion**

We thank the Chairman, Ranking Member, and other Members of this Subcommittee for its time and attention to the critical issue of snap removal. This hearing is an important first step. Now, I want to implore you, as a practicing attorney representing injured people, who has repeated experience with the very technique I am decrying herein—my experience is real, practical, and actual, and not theoretical—good people are being hurt. I implore this Subcommittee, and Congress, generally, to take the necessary steps to introduce and pass legislation that closes the snap removal loophole, and thereby restores the balance not just of federal and state court jurisdiction, but of power between injured people and corporations.

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