"Oh Snap!" A Loophole Around the Forum-Defendant Rule in Removal Cases

By John Polzer and Derek Carson

Under what is known as the "forum-defendant rule," a lawsuit that is otherwise removable solely on the basis of diversity jurisdiction may not be removed to federal court "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."[1] "Snap removal refers to the emerging litigation tactic used to circumvent the forum defendant rule."[2]

Here's how snap removal works: A non-forum defendant in a state court case removes the case to federal court on diversity grounds—even though one of the co-defendants is a forum defendant—by filing the notice of removal before the plaintiff has had an opportunity to formally serve the forum defendant. This tactic seizes on the language in § 1441(b)(2) limiting application of the forum-defendant rule to situations where a forum defendant has been "properly joined **and served**" as a defendant. If no forum defendant has been served as of the date of removal, the argument goes, then the forum-defendant rule does not bar removal.

In *Breitweiser v. Chesapeake Energy Corporation*,[3] the Honorable Jane J. Boyle, United States District Judge of the Northern District of Texas ("the *Breitweiser* Court" or "the Court"), addressed the legitimacy of snap removal in some detail. After surveying available authorities on the subject, the *Breitweiser* Court observed that district courts across the country had reached competing conclusions about the viability of snap removal, that appellate courts had not yet had an opportunity to address the issue, and that Congress remained silent on the question when it adopted the *Federal Courts Jurisdiction and Venue Clarification Act of 2011*.[4] The Court noted that the approach taken in the few cases from the Northern District of Texas that addressed snap removal (or what the Court called quasi-snap removal) had either denied remand or had granted remand on another basis.

The *Breitweiser* Court then turned to the plain language of § 1441(b)(2). Reading the removal statute as a whole, the Court observed that the "properly joined and served" language appearing in § 1441(b)(2) also appeared in § 1446(b)(2), where it is required that all defendants generally must join in or consent to removal if they have been "properly joined and served." The Court observed that Fifth Circuit precedent had construed § 1446(b)(2) as meaning that a defendant's consent is not required until he has been served.[5] Applying the plain text of § 1441(b)(2), the *Breitweiser* Court concluded that the non-forum defendant's snap removal was proper.

The *Breitweiser* Court rejected the plaintiffs' argument that applying the statute's plain language would lead to absurd results. The Court also noted that the relevant legislative history was inconclusive and that allowing a non-forum defendant to utilize snap removal did not undermine the policies of diversity-based jurisdiction—even though it was apparent that the defendants' snap removal to federal court bore "the telltale signs of gamesmanship and forum manipulation.".

There are various implications and nuances to the rules governing snap removal that the *Breitweiser* Court

thoughtfully explored or noted in dicta or footnotes. Here are some principles that can be distilled from *Breitweiser*:

- For purposes of the forum-defendant rule, courts generally do not consider unserved forum defendants. Thus, if a non-forum defendant removes the case to federal court while any (and all) forum defendants are still unserved, the unserved forum defendants are ignored for purposes of the forum-defendant rule.
- Snap removals can occur only in cases where diversity jurisdiction is the sole basis of removal and where complete diversity of citizenship exists. First, the forum-defendant rule does not apply to removals based on federal question jurisdiction. Second, absent complete diversity, courts can simply remand for lack of subject matter jurisdiction.
- Appellate case law addressing snap removal is scarce and will continue to be. A district court's order remanding a case is generally "not reviewable by appeal or otherwise."[6] Even where remand is denied, plaintiffs generally must litigate their case to final judgment before they can appeal.[7]
- A plaintiff cannot avoid a snap removal by refraining from serving the non-forum defendant. Once the non-forum defendant files an answer in the state court, he is deemed to have made a general appearance under Texas law, which in turn means he no longer needs to be served and is treated as having been "served."[8] At that point, he can remove the case to federal court if it is otherwise removable.
- Allowing a forum defendant to engage in snap removal would lead to an absurd result. But this could never happen because, in order to remove case, a defendant has to appear and answer in the state court. Once the forum defendant files an answer, he is deemed "served" under Texas law and cannot remove the case under § 1441(b)(2). ■

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[1] 28 U.S.C. § 1441(b)(2) (emphasis added). Importantly, the forum-defendant rule is not jurisdictional, but merely procedural.

[2] *Smethers v. Bell Helicopter Textron Inc.*, No. 6:16-CV-58, 2017 WL 1277512, at *2 (S.D. Tex. Apr. 3, 2017) (citation omitted).

[3] No. 3:15-CV-2043-B, 2015 WL 6322625, at *1 (N.D. Tex. Oct. 20, 2015).

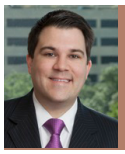
[4] Pub. L. No. 112-63, 125 Stat. 758; *see also* H.R. Rep. No. 112-10, at 11-12, *reprinted in* 2011 U.S.C.C.A.N. 576, 580.

[5] *Humphries v. Elliott Co.*, 760 F.3d 414, 417 (5th Cir. 2014).

[6] 28 U.S.C. § 1447(d).

[7] *Black Fire Fighters Ass'n, Inc. of Dall., Tex. v. City of Dall.*, 233 F. App'x 386, 386 (5th Cir. 2007).

[8] *See* Tex. R. Civ. P. 121.



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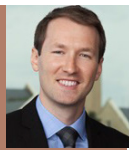

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