

It's a Snap (Removal, That Is) Recent Rulings in the Third Circuit Address the Procedural Steps Required to Successfully "Snap Remove" a Case



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occurs than a typical over-the-road driver.

When a truck driver is a citizen of the state in which the case is brought, removal is not allowed under the "forum defendant" rule set forth in the federal removal statute. In other words, a case cannot be removed even if the plaintiff and defendant are citizens of different states where the defendant is a citizen where the suit was filed. For example, if a New Jersey citizen sues an Arkansas trucking company and a Pennsylvania driver in Pennsylvania state court, the case cannot, pursuant to the forum defendant rule, be removed to a federal district in Pennsylvania. While there is, indeed, diversity (and let's assume sufficient damages), the citizenship of the truck driver precludes removal.

The forum defendant rule is set forth at 28 U.S.C. § 1441(b)(2), and states:

A civil action otherwise removable solely on the basis of jurisdiction under section 1332(a)¹ 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.

However, there is a way to circumvent the forum defendant rule and successfully remove a case to federal court if the removal is filed before the forum defendant (i.e., the truck driver who is a citizen of the forum state) is served with the Summons and Complaint. These types of removals are called "snap removals" (or less often, "wrinkle removals").² As noted, they refer to cases removed to federal court before a forum defendant is served. Since 28 U.S.C. § 1441(b)(2) applies only to "parties in interest properly served as

defendants," the courts have ruled that removals filed before the forum defendant is served are, indeed, allowed.

Snap removals are most prevalent in multi-party product liability or toxic tort lawsuits, where sophisticated, well-funded corporate defendants and their attorneys electronically monitor dockets and remove cases within minutes of the filing of a Complaint—before service of a single "forum" (in-state) defendant can occur. Not surprisingly, this practice has come under increased scrutiny by the Courts and the plaintiff's bar. Critics complain that the race to the courthouse created by the rule is contrary to the intent and purpose of the removal statute. Indeed, the United States House of Representatives has recently introduced a Bill to close the loophole. The practice is so controversial that splits exist between and within federal districts on this issue. For example, the Northern and Central Districts of California are divided on the issue. Only two federal appellate courts have directly addressed the issue, the Second and Third Circuits. In both cases, snap removals were upheld under a plain language of 28 U.S.C. 1441(b)(2). However, some District Courts have refused to follow their authority. In summary, while under increased attack, the jurisprudential authority on the issue remains generally supportive of snap removal. Consequently, pre-service removal remains—for now—an effective defense strategy.

Two recent federal court rulings have seemingly carved out a small chunk of the snap removal armor by focusing on when, specifically, "removal" actually occurs. In these cases, the courts focused not only on when the notice of removal is filed with the federal court, but also when the

In many casualty cases involving motor carriers, removal is an effective and preferred defense strategy, for obvious reasons. Removal to federal court eliminates the home field advantage provided by state judges, many of whom are elected friends of the plaintiff's personal injury bar. Moreover, federal courts provide uniform rules of civil procedure, tighter scheduling and "better" juries.

In many trucking cases the defendant truck driver and the defendant trucking company are "foreign," thus making the path towards removal smooth and without issue. Assuming that the amount in controversy is sufficient to trigger diversity jurisdiction, removal in these types of cases is relatively straightforward.

In recent years, however, particularly with the proliferation of massive distribution centers, last mile delivery services and "dedicated" trucking accounts, fewer truck drivers are true "over the road" drivers and more are locally based. Increasingly, trucking companies are offering drivers the ability to be home on weekends as "dedicated" drivers assigned to a particular distribution center and regular routes in specified geographic regions. These "dedicated" drivers are much more likely to be citizens of the state in which an accident

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removing defendant files notice of the removal to the state court from which the case was removed. In these two cases, the federal courts ruled that the cases were "removed" *only after notice of the removal was filed and served in the state court*. In other words, the formal process of removal is completed only after the federal notice is filed and served in state court, and if service of the forum defendant occurs in this temporal gap, the case cannot be removed.

In the first case, which involved a defective medical device, a Florida plaintiff filed her complaint in the Court of Common Pleas of Philadelphia County against several Pennsylvania defendants at 10:06 a.m., and the defendants removed the case at 1:55 p.m. *before they were served*. Twenty minutes later, the defendants were served.

Defendants argued that since they filed their notice of removal before they were served, they avoided the effects of the forum defendant rule. The court found that removal involved two steps: (1) the filing of the notice of removal with the federal court; and, most significantly, (2) filing of the notice of removal with the state court as well, as required by 28 U.S.C. § 1446(d). In this case, the defendants did not file their notice of removal with the state court until after they were served. Thus, the case was remanded. See *Brown v. Teva Pharmaceuticals, Inc.*, No. 19-3700, 2019 WL 5406218 (E.D. Pa. Oct. 23, 2019).

In a similar Third Circuit case involving

a defective medical device, a Kentucky plaintiff sued a New Jersey defendant in New Jersey state court at 9:35 a.m., and the defendants removed the case to federal court at 10:14 a.m.—*one minute before service of the Complaint occurred*. However, as in the *Brown v. Teva* case, the defendant *did not* file and serve notice in state court until 11:17 a.m. Since service was made before the case had been "completely" removed as required by 28 U.S.C. 1446(d), the forum defendant rule did not apply and the case was remanded. See *Dutton v. Ethicon, Inc.*, No. 18-17199, 2019 U.S. Dist. LEXIS 180567 (Oct. 18, 2019).

These decisions were in accord with a previous ruling in the Eastern District of Pennsylvania See *Doe v. Valley Forge Military Acad.*, 2019 WL 3208178 (E.D. Pa. July 15, 2019). In these cases, the courts focused on the provision in Section 1446(b) stating "which shall effect the removal." As the court in *Dutton* stated:

By language alone, § 1446 requires three steps for effectuating removal to federal court: defendants must file the notice of removal in federal court, provide written notice to all adverse parties, and file a copy of the notice with the clerk of the state court. Indeed, the phrase "which shall effect the removal" in § 1446(d) . . . makes it clear that removal is not "effected" until all three steps are completed.

Dutton, at *14; see also *Brown*, at *2 ("Significantly, § 1446(d) further provides

that the written notification of all adverse parties and the filing of a copy of the removal notice with the state court clerk 'shall effect the removal.'").

While the aforementioned cases seem at first glance to curb snap removals (or, at least, make them more difficult), they also reaffirm snap removals as a means to comply with the forum defendant rule. Each of the cases relied heavily upon the 2018 Third Circuit decision in *Encompass Insurance Co. v. Stone Mansion Restaurant, Inc.*, 902 F.3d 147 (3d Cir. 2018), which recognized the statutory basis for snap removals under the plain language of 1446(b) and, at the same time, acknowledged that the statute would also create races to the courthouse. Indeed, the court in *Dutton* noted: "Here as the circuit court signaled in *Encompass*, [the defendant's] filing of notice of removal within minutes of the timestamping of [the] complaint does not make removal improper under § 1441(b). . . . [T]he *Encompass* court recognized the possibility of such docket monitoring and accelerated filing and found that such conduct does not violate either the language or the intent of the removal statute." *Dutton*, at *20-*21.

The message seems rather clear: If you want to avoid the forum defendant rule by racing to the courthouse, make sure you run at full speed to both the federal and state courthouse. Otherwise, you may very well be "stuck" in state court. 🚗

Endnotes

¹ Section 1332(a), as we know, sets for the conditions permitting diversity jurisdiction.

² The term "snap removal" originated from the case of *Breitweiser v. Chesapeake Energy Corp.*, No. 3:15-CV-2043-B, WL 6322625, at *1, (N.D. Tex., Oct. 20, 2015). The Court recognized the legitimacy of snap removal by a non-forum defendant before a forum defendant is served, based upon the plain meaning of Section 1441. However, the Court stated that it would be "absurd" to allow a forum defendant (i.e., an in-state defendant) to avail itself of the rule.