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Snap Removals Come to New York

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In New York, whether your case proceeds in state or federal court can have a significant impact on your client's resolution strategy. Differences in the potential jury pool, expert disclosure, scientific evidence admissibility, discovery rules, subpoena power—to name a few—will all play a role in foreseeing the course and outcome of your case. For that reason, every litigator's ears perk up when they hear something new or unusual when it comes to removal under 28 U.S.C. §1441, et seq. This article will discuss the Second Circuit's recent decision in *Gibbons v. Bristol-Myers Squibb Company*, 919 F.3d 699 (2d Cir. March 26, 2019), which upheld the use of a clever mechanism known as "snap removal" that some defendants have successfully employed to circumvent the well-known "forum defendant" exception to removal so they can litigate in their preferred forum of federal court.

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Most civil actions brought in state court over which a federal district court has original jurisdiction may be removed by the defendants to district court. 28 U.S.C. §1441(a). Section 1441 permits removal on the basis of federal question jurisdiction (28 U.S.C. §1331) or diversity jurisdiction (28 U.S.C. §1332). But, when it comes to removal based on diversity jurisdiction, the removal statute provides that "[a] civil action otherwise removable solely on the basis of [diversity] 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). This prohibition to removal is known as the "forum defendant rule." *Lively v. Wild Oats Markets*, 456 F.3d 933, 939 (9th Cir. 2006). Removal based on diversity jurisdiction is intended to protect out-of-state defendants from possible prejudices in state court. Id. at 940. Obviously, the need for such

protection does not exist where the defendant is a citizen of the forum state. "Within this contextual framework, the forum defendant rule allows the plaintiff to regain some control over forum selection by requesting that [a case removed to federal court in violation of the rule] be remanded to state court." Id.

If, notwithstanding the prohibition of §1441(b)(2), a "forum defendant" who has been properly joined and served removes a case to the district court, the issue becomes whether that "defect" in the removal is waivable or whether it is jurisdictional in nature such that it cannot be waived and will result in the sua sponte remand of the case to state court despite the passage of the 30-day time limit within which to move for a remand. See 28 U.S.C. §1447(c). The majority of circuit courts have held that the defect of a properly joined and served forum defendant utilizing the removal procedure is waived if the plaintiff does not move to remand the case within the statutory 30-day time limit. *Farm Construction Services v. Fudge*, 831 F.2d 18, 22 (1st Cir. 1987); *Handlesman v. Bedford Village Associates, Ltd. Partnership*, 213 F.3d 48, 50 n.2 (2d Cir. 2000); *Blackburn v. United Parcel Service*, 179 F.3d 81, 90 n.3 (3d Cir. 1999); *In re Shell Oil Co.*, 932 F.2d 1518, 1523 (5th Cir. 1991); *Handley-Mack Co. v. Godchaux Sugar Co.*, 2 F.2d 435, 437 (6th Cir. 1924); *Hurley v. Motor Coach Industries*, 222 F.3d 377, 380 (7th Cir. 2000); *Lively*, 456 F.3d at 940 (9th Cir. 2006); *American Oil Co. v. McMullin*, 433 F.2d 1091, 1095 (10th Cir. 1970); and *Pacheco de Perez v. AT&T Co.*, 139 F.3d 1368, 1372 n.4 (11th Cir. 1998); but see *Hurt v. Dow Chemical Co.*, 963 F.2d 1142, 1146 n. 1 (8th Cir. 1992) (holding that a violation of §1441(b) is a non-waivable jurisdictional defect requiring remand to state court).

But a forum defendant sued in state court who would prefer to litigate in federal court can—at least in some jurisdictions—do more than just hope its adversary fails to timely move to remand; it can "snap remove" the case to federal court by filing a notice of removal before it is served. Thanks to the Second Circuit's recent decision in *Gibbons*, snap removal is now available to New York defendants sued in New York state court.

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Gibbons involved an appeal by plaintiffs in a multi-district litigation from final judgments entered by Judge Denise L. Cote of the Southern District of New York on products liability claims in favor of the defendants, Bristol-Myers Squibb Co. and

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Pfizer. Plaintiffs' claims arose from injuries alleged to have been caused by their use of defendants' blood-thinning drug, Eliquis. Judge Cote dismissed all of plaintiffs' claims, concluding that some of the claims were preempted by federal law and that the others failed to satisfy federal pleadings standards. After Judge Cote dismissed the claims, 33 plaintiffs who had filed identical claims in federal court in California but were awaiting transfer to the MDL in the SDNY when Judge Cote entered her dismissal order voluntarily dismissed their claims without prejudice and refiled against defendants in state court in Delaware, where both defendants are incorporated and are thus subject to general personal jurisdiction. The law firm who represented many of the plaintiffs in the federal litigation also filed suit against defendants in Delaware state court on behalf of 45 new plaintiffs.

Not to be outdone by plaintiffs' procedural maneuvering, Defendants took immediate action to get all of the cases in front of Judge Cote after all. To attempt to avoid

application of the forum defendant exception to removal, defendants removed the cases to the District of Delaware *before they were served* and requested that they be transferred and consolidated into the MDL before Judge Cote. Plaintiffs opposed the motions to transfer and moved the District of Delaware to remand the cases to state court, arguing that the forum defendant rule prevented defendants from removing the cases to federal court. The District of Delaware denied plaintiffs' motions, transferred the cases to Judge Cote, and Judge Cote dismissed all of the claims with prejudice for the reasons she articulated in her previous Eliquis decisions.

The Second Circuit affirmed on appeal. Writing for a unanimous panel, Judge Sullivan explained that "while it might seem anomalous to permit a defendant sued in its home state to remove a diversity action, the language of the statute [28 U.S.C. §1441(b)(2)] cannot be brushed aside." The court explained that by its plain terms, "Section 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."

The Second Circuit rejected plaintiffs' arguments that it is absurd to allow home-state defendants to remove before they are served, but not after, and that a defendant's ability to remove could vary from state-to-state depending on the state's service rules. In so arguing, plaintiffs contended that the "properly joined and served" language in §1441(b)(2) is only meant to prevent plaintiffs from naming home-state defendants in the complaint—who they have no intention of proceeding against—solely to prevent removal of the case to federal court. The panel explained that Congress's intentions for including the language were not clear and that, in any event, the court's holding "does not contravene Congress's intent to combat fraudulent joinder."

In so ruling, the Second Circuit joined the Third Circuit—the only other court of appeals to have addressed the issue to date—in allowing snap removal by home-state defendants prior to service. See *Encompass Ins. Co. v. Stone Mansion Restaurant*, 902 F.3d 147 (3d Cir. 2018) ("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.").

The possibility of snap removal is potentially very significant to both plaintiffs and defendants, and must be considered at the outset if the difference between a state and federal venue could have a substantive impact on the case for either party. For starters, plaintiffs who wish to stay in state court should serve defendants as soon as possible after filing the complaint. Plaintiffs desiring to remain in state court should also be wary about asking defendants to waive service of process, given that defendants may delay responding to the request only to then file a notice of removal before they are formally served. And to the extent possible, defendants who would prefer to litigate in federal court should closely monitor electronic dockets for new filings and limit the number of individuals who are authorized to accept service of process. The harder it is for plaintiff's counsel to serve defendant, the more time defendant has to remove.

Congress may step in to close the door on snap removal. But until that happens, counsel should be on alert and take whatever steps are necessary to litigate in their client's preferred forum.

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