EXAMINING THE USE OF "SNAP" REMOVALS TO CIRCUMVENT THE FORUM DEFENDANT RULE

HEARING

BEFORE THE

SUBCOMMITTEE ON COURTS
INTELLECTUAL PROPERTY, AND THE
INTERNET

OF THE

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EXAMINING THE USE OF "SNAP" REMOVALS TO CIRCUMVENT THE FORUM DEFENDANT RULE

THURSDAY, NOVEMBER 14, 2019

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY, AND THE INTERNET

COMMITTEE ON THE JUDICIARY

Washington, DC.

The subcommittee met, pursuant to call, at 2:18 p.m., in Room 2141, Rayburn House Office Building, Hon. Henry C. "Hank" Johnson, Jr. [chairman of the subcommittee] presiding.

Present: Representatives Johnson of Georgia, Nadler, Correa, Roby, Jordan, and Cline.

Staff Present: Jamie Simpson, Chief Counsel, Subcommittee on Courts, Intellectual Property, and the Internet; Matthew Robinson, Counsel, Subcommittee on Courts, Intellectual Property, and the Internet; Danielle Johnson, Counsel, Subcommittee on Courts, Intellectual Property, and the Internet; David Greengrass, Senior Counsel; Madeline Strasser, Chief Clerk; Moh Sharma, Member Services and Outreach Adviser; Rosalind Jackson, Professional Staff Member, Subcommittee on Courts, Intellectual Property, and the Internet; Dan Ashworth, Minority Counsel; and Andrea Woodard, Minority Professional Staff Member.

Mr. JOHNSON of Georgia. The subcommittee will come to order.

Without objection, the Chair is authorized to declare recesses of the subcommittee at any time.

Welcome to this afternoon's hearing on Examining the Use of "Snap" Removals to Circumvent the Forum Defendant Rule.

I will now recognize myself for an opening statement.

Today's hearing examines the growing problem of snap removals to Federal court. A new tactic has emerged in the often high-stakes fight to move litigation from State court to Federal court. When a lawsuit is filed in State court, a defendant may try to remove the case to Federal court by invoking the court's diversity jurisdiction.

But 28 U.S.C. Section 1441 prohibits removal if any defendant is a citizen of the State where the case was filed. This requirement is called the "forum defendant rule." It was most recently codified in 1948, but it has been Federal law since 1789. But some well-resourced defendants have found a way to circumvent the forum defendant rule. Some courts have read Section 1441 to prevent removal only after a forum defendant has been served, and defend-

ants are taking advantage of that fact through sophisticated docket monitoring technology.

As State court systems have gone digital, defendants are now able to monitor State court dockets across the country in real time. They are thus able to remove a case almost as soon as it is filed and well before a plaintiff can effect service.

This is not an exaggeration. In some instances, defendants have been removed—defendants have removed a case less than 10 minutes after the plaintiff filed it in State court. Many courts have deplored this tactic, which is often called "Snap Removal," and for good reason.

Courts have called snap removals "preservice machinations'" or "bizarre" or "clear gamesmanship" or "tell-tale forum manipulation," and they have referred to it as "an ironic absurdity" and "an absurd loophole" at clear odds with congressional intent and "an abuse that serves no conceivable public policy goal" and "eviscerates the forum defendant rule."

Snap removals violate the basic tenets of Federal jurisdiction and procedure. This tactic offends the foundational principle that State courts are the best places to resolve questions of State law. This tactic also undermines the centuries-old rule that the plaintiff decides where to file suit. Snap removals also invite wasteful gamesmanship and clog the Federal courts' dockets, which are already full.

Although the Members of the 80th Congress could not have anticipated this kind of gamesmanship when they codified the forum defendant rule 70 years ago, I am confident that they did not intend to enable it. Federal practice is supposed to be just speedy—it is supposed to be just, speedy, and inexpensive. But Snap Removals caused needless expense, substantial delays, and are inherently unfair.

Unfortunately, however, the courts are badly splintered on what to do about Snap Removals. Looking at the purpose of the forum defendant rule and the removal statutes, some courts have held that Section 1441 does not allow snap removals. Other courts have focused on the "plain" text of the statute to hold that Snap Removals are permitted. But even courts that allow snap removals have criticized them and have called on Congress to fix the problem.

Today's hearing is the first step in that direction. Our witnesses represent a wide breadth of expertise and experience, and I look forward to hearing from them.

And at this time, it is now my pleasure to recognize the Ranking Member of the Subcommittee, the gentlewoman from Alabama, Mrs. Roby, for her opening statement.

Mrs. ROBY. Thank you, Chairman Johnson.

And thank you to the witnesses for being here today to share their experiences and perspectives on removal and diversity jurisdiction.

Our panel today will cover the procedures pertaining to snap removal, joinder, and forum defendant rule. All of the issues being discussed today revolve around diversity jurisdiction and how litigants choose the venue in which a case will be heard. While some of these ideas are worth exploring further, I have concerns that

some of the proposals will have a negative impact on fairness in litigation by giving one party a clear advantage over the other.

Under current jurisdiction statutes in the Federal Rules of Civil Procedure, plaintiffs receive wide discretion to dictate the forum in which a case will be heard. Plaintiffs sometimes use their ability to join nondiverse parties to limit a defendant's ability to remove to Federal court. Often, these nondiverse parties are not necessary to the litigation, and at times, they are only included to keep a case in a State court that may be seen favorable to the plaintiff.

Plaintiffs have been known to dismiss cases against these defendants after a case could no longer be removed to Federal court. In cases where a Federal court has already made a decision that goes against a plaintiff, they have been known to target individuals and businesses in their home State to prevent them from removing the case to Federal court. In doing so, plaintiffs are seeking to relitigate a case in another jurisdiction to avoid a negative decision.

While I understand that there are concerns with a split between the circuits on how to rule on snap removals, they have served to return some balance in determining forum location. Diligent attorneys can remove a case to Federal court prior to receiving service from plaintiffs. In doing so, defendants can avoid possible plaintiff gamesmanship and protect Federal subject matter jurisdiction.

I am a strong believer in the Federal court system and ensuring the public's access to justice. While we must always make sure that our courts are working fairly and efficiently, I have some concerns with these issues before us today. I hope to hear more in this hearing about possible abuses of the forum defendant rule and whether our witnesses believe that there are problems with fraudulent joinders.

I want to again thank each of you for taking time out of your lives to join us here today and hearing more about snap removal generally, as well as the proposals for changing this procedure that we are discussing today.

Thank you, Mr. Chairman. I yield back.

Mr. JOHNSON of Georgia. Thank you. And I am now pleased to recognize the Chairman of the Full Committee, the gentleman from New York, Mr. Nadler.

Chairman NADLER. Thank you, Mr. Chairman.

Corporate defendants have long sought to remove cases based on State law to Federal court, believing that the expense and complexity of Federal court offers those businesses advantages over less sophisticated plaintiffs with fewer resources. Snap Removals, in which defendants exploit modern technology and a supposed statutory loophole to remove cases that should properly be heard in State court, represent the latest effort to game the system in favor of the wealthy and the powerful at the expense of the average citizen and our overloaded Federal court system.

Under well-established law known as "diversity jurisdiction," when a plaintiff sues a defendant who is a resident of another State in State court, that defendant may remove the case to a Federal court. This provision is intended to protect against possible bias that may occur against an out-of-State defendant in a State court.

When the defendant is sued in his or her own State, however, removal is not permitted because the concern for bias no longer exists. This is referred to as the forum defendant rule. Unfortunately, a combination of modern technology, a desire by some corporations to avoid State courts, seemingly at any cost, and a supposed loophole in the removal statute has engendered a new tactic.

Some courts have read the forum defendant rule, which requires that a defendant be a citizen of the State where the case is filed and that it be properly served, to mean that removal to Federal court may occur before service of process is completed. Many companies, therefore, now use computer programs to monitor court filings in real time and to remove any case against them in their own State by an out-of-State plaintiff before the plaintiff has time to effect service, sometimes in a matter of mere minutes, in an attempt to thwart the forum defendant rule.

Although this sort of gamesmanship is clearly contrary to the spirit and the intent of the Federal removal statute, some courts have ruled that such snap removals are permitted by a plain reading of the text. It is important, therefore, that Congress clarify the statute to put an end to this dubious maneuver.

Not only do snap removals tilt the legal playing field in favor of large corporations, they also drain judicial resources, impose needless costs on the parties, and delay justice for plaintiffs seeking to hold wrongdoers accountable for the injuries they cause.

This evasion of the well-established forum defendant rule also threatens State sovereignty and violates federalism principles by denying State courts the ability to shape State law. State courts should be the final arbiters of State law, but snap removals are increasingly putting new State law questions into Federal court.

Snap removals also increase the complexity, duration, and cost of civil litigation, placing further burdens on plaintiffs who tend to have fewer resources than comparatively well-funded corporate defendants. This issue may seem obscure, but it is a growing problem, and it has a very real impact on the lives of people seeking redress in their State courts.

In an era where the courthouse doors are increasingly closed to ordinary Americans, snap removal can seem like just another turn of the deadbolt. I look forward to the witnesses' testimony and particularly their thoughts on how Congress can fix this important and growing problem.

I yield back the balance of my time.

Mr. JOHNSON of Georgia. Thank you, and I will now introduce the witnesses for today's hearing.

First, Ms. Ellen Relkin. She is the Drugs and Medical devices litigation Practice Group Co-chair at Weitz & Luxemberg. She has represented thousands of plaintiffs injured by defective medical products. Ms. Relkin is an elected member of the American Law Institute, serves on the Board of Governors of the New Jersey Association for Justice, and is a frequent lecturer at continuing legal education programs nationwide.

Ms. Relkin served as a law clerk to the Honorable Sylvia Pressler, then presiding Judge of the New Jersey Superior Court Appellate Division. Ms. Relkin holds a J.D. from Rutgers University Law

School and a Bachelor of Arts degree in history from Cornell University.

Welcome.

Next I will introduce Mr. Kaspar Stoffelmayr. Mr. Stoffelmayr is a partner—and that is correct, "Stoffel-mayor" or "meyer"?

Mr. STOFFELMAYR. "Stoffel-meyer."

Mr. JOHNSON of Georgia. I am sorry. Mr. Stoffelmayr is a Partner at Bartlit Beck, where his practice focuses on mass tort product liability and class action defense. His experience includes efficient management of large teams in mass litigations. From 2011 to 2014, Mr. Stoffelmayr served as vice president and associate general counsel at the Bayer Corporation.

In that capacity—and that is Bayer, not "Buyer" [Laughter.]

In that capacity, he was responsible for developing and implementing the company's defense strategies for a large docket of product liability and mass tort cases. Mr. Stoffelmayr also served as a law clerk for the Honorable A. Raymond Randolph of the U.S. Court of Appeals for the D.C. Circuit. He is a graduate of the University of Chicago School of Law, Grinnell College, and the University of Washington.

Welcome, sir.

We also have with us today Professor Arthur Hellman, who is a professor Emeritus at the University of Pittsburgh School of Law. Professor Hellman enjoys a national reputation as a scholar of the Federal courts, and his research and writings span a wide range of topics related to the Federal court system. He is a graduate of Yale Law School and holds an undergraduate degree from Harvard University.

Welcome, Professor.

And last, but not least, we have Mr. James Pfander, who is the Owen L. Coon Professor of Law at Northwestern's Pritzker School of Law. His teaching and research focus on the role of the Federal judiciary under Article III of the Constitution. He has served as Chair of both the Federal Courts and Civil Procedure Sections of the Association of American Law Schools.

Professor Pfander was a Fulbright Senior Scholar at the University of Bucharest. He holds degrees from the University of Missouri and the University of Virginia School of Law.

Welcome, sir.

Before proceeding with testimony, I hereby remind the witnesses that all of your written and oral statements made to the Subcommittee in connection with this hearing are subject to penalties of perjury, pursuant to 18 U.S.C. Section 1001, which may result in the imposition of a fine or imprisonment of up to 5 years or both, should one suffer a conviction.

Please note that your written statements will be entered into the record in its entirety. Accordingly, I ask that you summarize your testimony in 5 minutes. To help stay within that time, there is a timing light on your table. When the light switches from green to yellow, you have 1 minute to conclude your testimony. When the light turns red, it signals your 5 minutes have expired.

And so, Ms. Relkin, you may begin.

STATEMENTS OF ELLEN RELKIN, DEFECTIVE DRUGS AND DEVICES PRACTICES GROUP CO CHAIR, WEITZ & LUXEMBERG, P.C.; KASPAR STOFFELMAYR, PARTNER, BARTLIT BECK, LLP; ARTHUR D. HELLMAN, PROFESSOR OF LAW EMERITUS, UNIVERSITY OF PITTSBURGH SCHOOL OF LAW; AND JAMES E. PFANDER, OWEN L. COON PROFESSOR OF LAW, NORTHWESTERN UNIVERSITY PRITZKER SCHOOL OF LAW

STATEMENT OF ELLEN RELKIN

Ms. RELKIN. Thank you, Chairman Johnson, Ranking Member Roby, and Members of the Subcommittee. I appreciate the invitation and opportunity to discuss this critical issue of snap removal.

My name is Ellen Relkin, and I am counsel at the law firm Weitz & Luxemberg, practicing primarily in New York and New Jersey. For the past 35 years, I have represented thousands of clients injured by environmental pollution, medical devices, and pharmaceutical products.

I have not seen a procedural rule so dramatically alter the landscape of civil litigation which limits the rights of persons injured by dangerous products. Snap removals are surging and depriving plaintiffs of State court jurisdiction. There are 1,682 Westlaw decisions involving forum defendant removal in the last 10 years. In the 10 years before that, only 321.

Why the surge of snap removals? There has been a perfect storm of two factors, especially in the past 2 years. First, sweeping advances across the country in mandatory State court filing procedures, also known as e-filing. And two, recent appellate decisions by the Third Circuit last year in the Encompass v. Stone Mansion case and by the Second Circuit this year in Gibbons v. Bristol-Myers.

Prior to these appellate cases, judges within the district courts in those circuits frequently remanded, finding snap removal improper. We think those circuit courts fail to properly consider that when Congress last visited the text of the rule in 2011, no States had e-filing, according to the National Center for State Courts, who we consulted with prior to presenting the testimony. Not one.

That means that the capability that has given rise to the problem of snap removals' sudden ubiquity and speed did not even exist when Congress last considered the statute.

After the Encompass decision was issued, Johnson & Johnson and its subsidiary Ethicon began snap removing cases filed against it in New Jersey. Many of these cases were snap removed within 2 hours of filing. Within a month, serving 45 minutes after filing was already too late. Now removals are literally being effected in less than 10minutes.

Another New Jersey corporation, Stryker Orthopedics, retained the same counsel as J&J and began practicing the same tactics. Plaintiffs had to send—including my firm, we had to send process servers to wait in the parking lot of corporate headquarters with mobile printers in the car.

Counsel would file the complaint while on the phone with the process server and quickly email the file pleading to the server, who would print it and run inside. Once plaintiffs were able to beat defendants by a minute or two, literally, at extensive cost to the

clients, defendants began instituting contrived barriers to service at headquarters, turning corporate service into literally a game of hide and seek.

Now security guards assure our process servers that the authorized individuals for service are on their way down while, instead, literally hours pass. Then, just minutes after the snap removal is filed, like clockwork, authorized individuals suddenly appear to accept service. Our process servers have brought printers inside to print the complaint as soon as the individual appears, but in one case, when the corporate representative saw the printer, she fled and refused to return until after removal. Remarkably, Stryker's counsel boasts, "Defendant's service evading conduct here, if true, as alleged, was appropriate."

We began serving Stryker via its registered agent because under the rules, you can either serve at the corporate headquarters or their designated registered agent, who they choose. But Stryker responded to that by just removing anyway after service, asserting in a dozen actions that service on their own registered agent somehow did not constitute proper service under the forum defendant rule, even though it is unquestionably good service under State law.

Each snap removal drains the resources of an already stretched Federal court system and causes delay in the administration of justice. These cases remain in Federal court more than 5 months on average, with recent J&J remand motions taking almost a year to resolve. There is no Federal law that requires courts timely resolve motions to remand. This harms real people with serious injuries because it delays them getting actual relief.

The problem is especially acute in New Jersey, home to many drug companies, because it is in a state of judicial emergency, according to the Federal Administrative Office of the Courts, with the second-highest rate of filings per Federal judge in the Nation.

The removal pace has been so quick and robotic that defendants have removed cases where there wasn't even diversity and, thus, no Federal jurisdiction. Similarly, defendants have removed despite already being served directly at corporate headquarters, thus revealing there is no compliance with Rule 11 to recently investigate whether service has been effected.

One other point. Far from forum shopping, suing a company in its home State is the only State court option for out-of-State plaintiffs after the Supreme Court's 2017 decision in Bristol-Myers, but now that the last State venue is foreclosed by the epidemic of snap removal.

Thank you, and I would be happy to answer any questions.

[The statement of Ms. Relkin follows:]

STATEMENT OF

ELLEN RELKIN, ESQ.
WEITZ & LUXENBERG, P.C.

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

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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.[1] It is also a serious loss for our system of civil justice.

[1] *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.[2] 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

[2] *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.[3]

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

[3] 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,[4] and

[4] *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.[5] Prior to these appellate cases, judges within the district courts in those circuits frequently remanded, finding the snap removals improper. [6] 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

[5] *Gibbons v. Bristol-Myers Squibb Co.*, 919 F.3d 699 (2d Cir. 2019).
[6] 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.[7] 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

[7] 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."[8]

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,

[8] 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.[9]

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

[9] 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.[10]

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.[11] 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.[12] The removal pace of some defense counsel has-been so quick that they actually removed a case of my law firm

[10] *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.

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

[12] 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[13]. 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,[14] 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

[13] *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.

[14] 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*,[15] 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

[15] *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.[16]

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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[16] 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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Mr. JOHNSON of Georgia. Thank you.

We will now turn to Mr. Stoffelmayr. Five minutes, sir.

STATEMENT OF KASPAR STOFFELMAYR

Mr. STOFFELMAYR. Thank you very much, Chairman Johnson, Ranking Member Roby, and members of the subcommittee. Thank you for the invitation to testify today.

Again, my name is Kaspar Stoffelmayr. I am a partner at the law firm of Bartlit Beck in Chicago, and I am also speaking today on behalf of Lawyers for Civil Justice.

I would like to use my time to speak a little bit about what the forum defendant rule means in practice and in the much more common case, I think, than some of the examples we just heard about. And here is how it most often comes up.

You have a plaintiff from one State, say a plaintiff from Illinois, who wants to sue a defendant from another State, let us say a pharmaceutical company from New Jersey, and they choose to file in a third State. For example, it could be Missouri, in our example, say, California. They have chosen to file in a California State court obviously because they hope that they will enjoy some sort of special benefits by suing in a California State court rather than at home in Illinois or in New Jersey.

And then what they will frequently do is add a California company as a second defendant, very often a distributor. One major pharmaceutical distributor happens to be headquartered in California.

Now there is no question in this case that there is proper Federal diversity jurisdiction. Jurisdiction is not in question. The plaintiff could have filed that case in the Federal courts without any problem.

But what the forum defendant rule means is that the defendant cannot remove that case to a local California Federal court. And again, this happens all the time. And then as the case moves forward, nobody takes one step toward litigating against that local California distributor. They are in the case. They are never heard from again.

So, as you can imagine from the perspective of the New Jersey defendant, the case is exactly the same with or without that California distributor in the case. The only thing that has changed is that they don't have access to the Federal courts but are required to litigate the case in State court.

Now there is an important limit, and that is what brings us here today on this forum defendant rule. And the limit is that it only applies when that local defendant, the California company, has been properly joined and served. If the California company doesn't get served, they are not in the case. There is no relevant forum defendant.

And I wouldn't describe that as circumventing the forum defendant rule. That is just the rule in its application. That is how the rule works. But the suggestion today is that the forum defendant rule ought to be amended to take away that limit, in effect to broaden the forum defendant rule so it extends to that group of cases as well.

And I think the most important question before making changes to the jurisdictional statutes, which inevitably, you know, raises the possibility of unintended consequences and just further gamesmanship of a different kind, is what is the problem we are trying to solve here? You know, that California distributor has not been served. They are not part of the case. There is no reason to prevent the New Jersey defendant from removing.

And if the California distributor really belongs in the case, if there is a live, actual claim, it is the easiest thing in the world to serve a corporate defendant through a registered agent. It takes literally minutes.

What we heard about, and I have seen it in the written testimony, are some cases where there is an unexpected result. You might say, well, what I have just described is the typical case, the normal case that you would expect. There are these other cases where there are unexpected results.

The data we have, the real empirical data is that this sort of removal before service called snap removal, or simply removal before service, happens infrequently. There is a paper that has been cited numerous times in the written testimony. It suggests it happens about 50 times a year. Based on what Ms. Relkin just said, that number may be somewhat higher today, but it is not a huge number of cases.

We have to assume in most instances, the forum defendant rule works as intended. There may, of course, be a handful of cases where there is an unexpected result, but what I think it is important to remember about that handful of cases is that we are not ever in these cases talking about a plaintiff who wants to sue in their local home court.

This has nothing to do with somebody saying I should be able to sue right here at home. These are always plaintiffs who have gone elsewhere to file a lawsuit. These are all cases where diversity jurisdiction is uncontroversial in the Federal courts, and the Federal court will always apply exactly the same law as a State court would. No one's law is being changed on them as a result of this removal.

So on that basis, even in these odd cases, I don't think there is anything that the plaintiff has to complain about. And with that, I would be happy to answer any questions.

Thank you.

[The statement of Mr. Stoffelmayr follows:]

Testimony of Kaspar J. Stoffelmayr

Partner, Bartlit Beck LLP

Submitted to

U.S. House of Representatives, Committee on the Judiciary

Subcommittee on Courts, Intellectual Property, and the Internet

For a Hearing on

"Examining the Use of 'Snap' Removals to Circumvent the Forum Defendant Rule"

November 14, 2019

Chairman Johnson, Ranking Member Roby, and Members of the Subcommittee, thank you for the opportunity to testify today.

My name is Kaspar Stoffelmayr. I am a partner in the law firm of Bartlit Beck LLP in Chicago, Illinois. I am testifying today on behalf of Lawyers for Civil Justice, a national coalition of law firms, corporations and defense trial lawyer organizations that promotes excellence and fairness in the civil justice system to secure the just, speedy, and inexpensive determination of civil cases. To be clear, I am not testifying on behalf of my law firm, and the views I express are entirely my own and should not be taken to represent the views of the firm or any of its clients.

A large part of my practice involves the defense of mass tort and product liability cases. This is the type of litigation often associated with so-called "snap" removals (better described as "pre-service removals" for the reasons explained below). I have defended these cases both as outside counsel and as a senior in-house lawyer when I worked for three years as Vice President and Associate General Counsel for Bayer, where I served as the company's head of litigation in the United States.

My testimony begins with some background to provide context for a discussion of pre-service, or "snap," removals. This background includes a brief review of the general principles that govern the federal courts' diversity jurisdiction and the special "forum defendant rule" that applies when diversity cases filed by out-of-state plaintiffs are removed from state court to federal court. I will then discuss some of the considerations that surround pre-service removal, including the purposes that it serves and why, in the rare cases where pre-service removal may lead to anomalous results, no party will suffer

any injustice. While a small number of litigants may be disappointed that, as a consequence of pre-service removal, a presumptively neutral federal court will hear their cases, these parties are not subject to any unfairness or injustice that would weigh in favor of revising statutory language that has served well since its enactment.

A. Background on Diversity Jurisdiction, the Forum Defendant Exception, and Pre-Service Removal

The colloquial term "snap" removal refers simply to the removal of a case from a state court to a local federal court on the basis of the federal court's diversity jurisdiction when two requirements are satisfied: (1) the plaintiff is not a citizen of the state where they filed the lawsuit and (2) no local defendant has yet been served. While such pre-service removals are relatively uncommon, two appellate courts have examined the question and have concluded that pre-service removal is proper.[1]

Because pre-service removal is a particular instance of the more general principles governing federal diversity jurisdiction and the removal of diversity cases, a brief overview of those principles offers useful context for any discussion of pre-service removal.

Article III, Section 2 of the Constitution and 28 U.S.C. § 1332(a)(1) provide that the federal courts have subject-matter jurisdiction over cases involving disputes between "citizens of different States." It is generally understood that the purpose of the federal courts' jurisdiction to hear these cases is to provide out-of-state litigants with access to an

[1] *Gibbons v. Bristol-Myers Squibb Co.*, 919 F.3d 699, 705-07 (2d Cir. 2019); *Encompass Ins. Co. v. Stone Mansion Rest. Inc.*, 902 F.3d 147, 153-54 (3d Cir. 2018).

unbiased federal forum that protects them from the unfair advantages or perceived advantages that home-state litigants might enjoy in their local state courts.[2] Importantly, a federal court's exercise of diversity jurisdiction has no effect on the law that controls the parties' claims and defenses. A federal court hearing a diversity case will apply the same substantive legal rules to the dispute (including the same choice-of-law rules) as a state court would apply.[3]

Federal diversity jurisdiction under 28 U.S.C. § 1332(a)(1) is surprisingly narrow given its broad purpose to provide out-of-state litigants with a neutral federal forum. Among other things, courts have interpreted the general statutory grant of diversity jurisdiction to be limited to cases that meet a requirement of "complete diversity," meaning that no defendant can be a citizen of the same state as any plaintiff.[4] It follows from this limitation that a plaintiff may often compel an out-of-state party to defend itself

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[2] *Erie R. Co. v. Tompkins*, 304 U.S. 64, 74 (1938) ("Diversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the state."). A paper by Charles Cooper and Howard Nielson includes a thorough review of the historical record and concludes that "[t]he history of the framing and ratification of the diversity clause thus makes clear that it was designed to ensure that a party in a dispute with a citizen of a different state would be entitled to litigate that dispute in a presumably neutral federal court rather than in a possibly biased state court." C. Cooper & H. Nielson, *Complete Diversity and the Closing of the Federal Courts*, 37 Harv. J. L. & Pub. Policy 295, 309 (2014).

[3] "A federal court sitting in diversity applies the law of the state in which it sits, including the state's choice-of-law rules." *BB Syndication Servs., Inc. v. First Am. Title Ins. Co.*, 780 F.3d 825, 829 (7th Cir. 2015). This principle has been firmly established at least since the Supreme Court's decisions in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), and *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941).

[4] *E.g.*, *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 67-68 (1996). This interpretation of the diversity statute can be traced to the Supreme Court's early decision in *Strawbridge v. Curtiss*, 7 U.S. 267 (1806). The Supreme Court has also held, however, that the Constitution's diversity clause is not so limited and extends to cases with only "minimal diversity," *i.e.*, with just one plaintiff and one defendant from different states. *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 531 (1967) ("Article III poses no obstacle to the legislative extension of federal jurisdiction, founded on diversity, so long as any two adverse parties are not co-citizens.").

in the plaintiff's home state court as long as at least one other defendant in the case is a citizen of the same state as the plaintiff. The complete-diversity requirement can thus lead to peculiar and counterintuitive results. For example, if a Missouri plaintiff wishes to sue several out-of-state defendants from Pennsylvania, New York, and Florida, but then adds a single Missouri defendant with only peripheral involvement in the matter, the out-of-state defendants are generally denied a federal forum—whether or not they are affiliated with the local Missouri defendant and whether or not their interests and litigation positions are aligned with those of the Missouri defendant. And if 75 Missouri plaintiffs wish to sue a citizen of Pennsylvania in a Missouri state court, they may be able to deny the Pennsylvania defendant a federal forum by adding just one Pennsylvania plaintiff to their Missouri case, thereby avoiding complete diversity between the parties.[5]

Despite these restrictions on federal jurisdiction imposed by the complete-diversity requirement, no "forum defendant rule" (or, for that matter, "forum plaintiff rule") further limits regular federal diversity jurisdiction. That is, as long as a case satisfies the requirement of complete diversity (and a minimum amount-in-controversy requirement), a federal court's jurisdiction does not depend on whether any party happens to be a citizen of the forum state. So, for example, if a serious accident involving a citizen of Pennsylvania occurs on the roads of Missouri, the Pennsylvania citizen would

[5] Whether a Missouri court could exercise personal jurisdiction to hear the Pennsylvania plaintiff's claims against a Pennsylvania defendant is another matter that may yet impact the federal court's exercise of diversity jurisdiction. For example, in *Timpone v. Ethicon*, 2019 WL 2525780 (E.D. Mo. June 19, 2019), a Missouri federal court hearing a case between 99 plaintiffs and a non-Missouri defendant concluded that it lacked personal jurisdiction over the claims of the 96 non-Missouri plaintiffs, permitting the court to exercise diversity jurisdiction over the claims of the remaining three Missouri plaintiffs against the non-Missouri defendant.

have the same access to a Missouri federal court whether the defendant is a local Missouri citizen or a citizen of Florida involved in the same accident. Likewise, a Missouri citizen involved in the accident would have the option to sue Pennsylvania and Florida defendants in a Missouri federal court rather than the local state courts.

The "forum defendant rule" comes into play only as a special procedural exception to federal diversity jurisdiction when a case is filed in the local state courts of one state by a plaintiff who comes from a different state. Then, even if the plaintiff could have originally filed the lawsuit in federal court based on diversity of citizenship—and the case would have remained in federal court through its conclusion without any question about the court's subject-matter jurisdiction—the same lawsuit cannot be removed from state court to federal court if any defendant "properly joined and served" is a citizen of the forum state. 28 U.S.C. § 1441(b)(2). The "forum defendant rule" is thus a procedural exception to the regular rules for diversity jurisdiction that further restricts the federal courts' exercise of that jurisdiction—but only in the removal context—by blocking access to the federal courts in cases where at least one defendant is a citizen of the forum state. The exception works to deny a federal forum to out-of-state defendants even when their interests are opposed to those of the local defendant, as may often be the case, for example, in a tort lawsuit where the defendants are exposed to potential joint-and-several liability.

That brings me to pre-service removal. Pre-service removal occurs when a case filed in state court is removed before a local defendant has been served. In that case, no local defendant has been "properly joined and served" for purposes of the forum

defendant exception of 28 U.S.C. § 1441(b)(2). Accordingly, the forum defendant exception does not apply and, instead, the regular rules for diversity jurisdiction control whether the federal court may hear the case.

It is important to understand that the forum defendant exception and the issue of pre-service removal can come up only if the plaintiff is not a citizen of the state in which they chose to file a state-court lawsuit. Otherwise, the case would involve both a local plaintiff and at least one local defendant. And that would mean a lack of the complete diversity necessary for federal jurisdiction, which cannot be fixed by removal prior to service.[6]

B. Some Considerations Regarding Pre-Service Removal

Courts have recognized that the statutory provision limiting the forum defendant exception to defendants "properly joined and served" guards against the improper use of misjoined local defendants to deny access to the federal courts. Even when a case is clearly subject to federal diversity jurisdiction, the plaintiff may nevertheless attempt to avoid removal to a neutral federal forum by naming an improperly joined "straw man" local defendant to exploit the forum defendant exception. Pre-service removal provides an important tool to address such efforts to deprive an opposing party of its right to proceed in federal court.[7]

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[6] In such a case, out-of-state defendants seeking a federal forum might still argue that the local defendant was improperly joined and should be ignored for purposes of determining diversity jurisdiction. But neither the forum defendant exception, nor the timing of removal before or after service on the local defendant, plays any part in determining whether the federal court may exercise jurisdiction.

[7] *Encompass Ins. Co. v. Stone Mansion Rest. Inc.*, 902 F.3d 147, 153 (3d Cir. 2018) ("[C]ourts and commentators have determined that Congress enacted the rule to prevent a plaintiff from blocking

The mischief of improperly joined defendants is no less a problem today than it was when Congress added the "properly joined and served" language to the statute in 1948. In product liability cases, for example, plaintiffs often attempt to frustrate an out-of-state defendant's right to a federal forum simply by naming as an additional defendant a single local party, such as a distributor, against whom the plaintiff has no intention of actually litigating.[8]

The forum defendant exception's requirement that any local defendant be not just properly "joined" but also actually "served" provides a bright-line rule that courts can easily and objectively apply without wading into potentially complex questions about which defendants are properly joined and which claims the plaintiff actually intends to pursue to a judgment.[9]

As with any bright-line rule, there may be instances in which pre-service removal leads to results that can seem anomalous. The same is true—but on a much larger

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removal by joining as a defendant a resident party against whom it does not intend to proceed, and whom it does not even serve.") (internal quotation marks omitted); *Morris v. Nuzzo*, 718 F.3d 660, 670 n.3 (7th Cir. 2013) (noting that "properly joined and served" provision "provides at least a modicum of protection against the insertion of a 'straw-man' resident defendant whose presence blocks removal but against whom the plaintiff does not intend to proceed"); *Stan Winston Creatures, Inc. v. Toys "R" Us, Inc.*, 314 F. Supp. 2d 177, 181 (S.D.N.Y. 2003) ("The purpose of the 'joined and served' requirement is to prevent a plaintiff from blocking removal by joining as a defendant a resident party against whom it does not intend to proceed, and whom it does not even serve."); *see also Gibbons v. Bristol-Myers Squibb Co.*, 919 F.3d 699, 706 (2d Cir. 2019) (provision is designed to "limit gamesmanship").

[8] *See, e.g.*, H.R. Rep. 114-422, at 2-4 (noting "abuse" by "trial lawyers who fraudulently sue local defendants, even though the plaintiff's claims against those defendants have little or no support in fact or law, because suing them allows the trial lawyers to keep their case in a preferred state court forum" and describing the various "go-to local defendants" frequently named to avoid diversity jurisdiction).

[9] *Gibbons v. Bristol-Myers Squibb Co.*, 919 F.3d 699, 706 (2d Cir. 2019) (the "properly joined and served" requirement "provide[s] a bright-line rule keyed on service, which is clearly more easily administered than a fact-specific inquiry into a plaintiff's intent or opportunity to actually serve a home-state defendant").

scale—about the complete diversity requirement and the forum defendant exception itself. But that is no basis for doing away with the salutary provision permitting pre-service removal when the anomalous results are infrequent and can result in no injustice to the disappointed plaintiffs.

The limited empirical evidence available suggests that pre-service removal is relatively rare. A recent paper located just 221 instances of attempted pre-service removal over a plaintiff's objection in the entire federal court system during the three-year period from 2012 to 2014.[10] In only 19 cases over three years did a federal court's decision to permit pre-service removal result in the removal of a case to federal court that otherwise would have remained in state court. Putting aside the 68 cases in which federal jurisdiction was proper on other grounds (based on either federal-question or federal-officer jurisdiction), the survey's results mean that even if every pre-service removal attempt had been completely successful between 2012 and 2014 (although many were not successful), it would have affected the selection of a federal forum versus a state forum in at most 153 cases over three years. That comes to only 51 cases per year and represents 0.00018% of all civil cases filed in the federal courts during the same period.[11]

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[10] V. Nannery, *Closing the Snap Removal Loophole*, 86 U. Cin. L. Rev. 541 (2018). While the author notes that her count may understate the true number of pre-service removals, which cannot be ruled out, she describes a methodology that appears comprehensive and should capture virtually all of the cases in which the plaintiff objected to removal by filing a motion to remand.

[11] According to the Administrative Office of the United States Courts, during the same 2012-2014 period, there were 851,260 new civil filings in the federal courts. *See* U.S. Courts, *Statistical Tables for the Federal Judiciary*, https://www.uscourts.gov/statistics-reports/analysis-reports/statistical-tables-federal-judiciary.

While the plaintiffs in those cases may have been unhappy for tactical reasons to be in a federal court rather than in the state court they initially chose, there was no resulting unfairness or injustice that would justify rewriting statutory language that has served the courts well for decades.

Any argument that these plaintiffs enjoyed a privilege to pursue their claims in their local state courts is belied by the fact that pre-service removal comes up only when the plaintiff, contrary to normal practice, has elected to file a lawsuit in a state court outside of the plaintiff's own home state. These are "litigation tourists" shopping for what they hope to be the most favorable state-court forum, not ordinary plaintiffs who simply filed a lawsuit in their local state court system. Nor can they complain that removal to federal court resulted in any change to the law governing their claims. As explained above, federal courts hearing diversity cases apply exactly the same substantive legal rules as a state court would apply. And I am not aware of any reason to believe that federal judges are systematically less competent or more biased than their state-court counterparts. If this small group of plaintiffs has a complaint at all, it appears to be only that they were deprived of some unfair advantage that they hoped to achieve by avoiding federal court.

Naturally, there may be individual cases in which a litigant believes that a state court would have moved more quickly than a federal court. There are likewise individual cases in which a federal court is the faster tribunal. None of this represents a problem specific to pre-service removal. While there may well be room to improve the efficiency of litigation in our federal courts, reform efforts directed at improving the administration

of civil justice in the federal system should be for the benefit of all parties who litigate before those courts, who number in the hundreds of thousands, not just the handful of litigants in cases where pre-service removal happens to have occurred.

* * *

Thank you again for the opportunity to testify today. I would be happy to answer any questions.

Mr. JOHNSON of Georgia. Thank you.
Next, Professor Hellman. Five minutes, sir.

STATEMENT OF ARTHUR D. HELLMAN

Mr. HELLMAN. Thank you, Mr. Chairman and Ranking Member Roby.

As Chairman Nadler has said, this problem, this issue may seem narrow and technical, but in the cases where it has arisen, it is a serious problem. Congress decided that as a general matter, when a plaintiff sues in the State court of the defendant's home State, the defendant should not be able to remove the case to Federal court under diversity jurisdiction. In cases such as the ones Ms. Relkin has described, snap removal circumvents that congressional determination.

The Third Circuit, in holding that snap removal is permissible under the current statutes as they are written, invited Congress to make a change in the law, and I applaud this subcommittee for taking up the court's invitation. I would like to start by addressing what the goals of the legislation should be and then say something about how those goals should be accomplished.

The primary goal of the legislation should be to restore the symmetry that Congress intended in the operation of the forum defendant rule as revised in 1948. Plaintiffs should not be able to prevent removal of a diversity case by joining as a defendant an in-State party against whom they do not intend to proceed and whom they do not even serve. Defendants should not be able to evade the forum defendant rule by removing before the plaintiff has even had a chance to serve the in-State defendant.

The change in the law should retain the service requirement, but configure it in a way that does not reward gamesmanship by either side or make removability depend on what one court has called the vagarities of State law service requirements.

Finally, and very important, the statutory fix should be narrowly tailored to the problem Ms. Relkin has described without disrupting other aspects of the very complex law of removal. In other words, it should close this loophole without interfering with the removal rights of other defendants.

What action should Congress take? Well, the problem has been created by the two words "and served" in 1441(b)(2), and one obvious possibility would be to delete those two words from the statute. But doing so would encourage and just bring back the gamesmanship that Congress intended to prevent when it added the words in 1948.

More important, any attempt to change the law through what might be called "text editing"—adding, deleting, or changing words in an existing text—runs a serious risk of inadvertently unsettling other doctrines of removal law. It is just not possible to anticipate all of the consequences of revising a statutory provision of broad applicability as the forum defendant rule is.

Here, the language in question has been part of the statute for more than 70 years. Hundreds of decisions have interpreted it. The committee should leave that language as it is.

The preferable approach is to write a standalone provision that first defines the situation that it covers and then tells the parties

and courts what to do in that situation. That is the approach taken by the proposal offered by five law professors, including myself, first published in 2016.

Our proposal would allow the plaintiff to counter snap removal by serving one or more in-State defendants after the case has been removed. If the plaintiff takes that step within the time for service allowed by the Federal rules or by State law, and a motion to remand is made within 30 days after that, the district court must, must send the case back to State court.

Because this new subsection requires immediate remand once any in-State defendant has been served, we are calling it the "snapback" mechanism. My co-authors and I believe that if the snapback provision is enacted, the incidence of snap removals will diminish sharply because defendants will recognize that the stratagem will no longer enable them to circumvent the forum defendant rule.

To the extent that defendants do remove before any in-State defendants have been served, the plaintiff can secure remand by promptly serving at least one such defendant. Our proposal would close this one loophole without opening others and without changing the law that applies in the vast majority of removal cases.

Thank you, and I will be happy to answer questions about our proposal or about snap removal generally.

[The statement of Mr. Hellman follows:]

Statement of

Arthur D. Hellman
Professor of Law Emeritus
University of Pittsburgh School of Law

House Committee on the Judiciary
Subcommittee on Courts, Intellectual Property, and the Internet

Hearing on
Examining the Use of "Snap" Removals to
Circumvent the Forum Defendant Rule

November 14, 2019

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Outline of Statement

Statement of
Arthur D. Hellman

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

Thank you for inviting me to express my views at this hearing on the practice of "snap removal."

"Snap removal" is a stratagem used by defendants in civil litigation as an end run around the "forum defendant rule." That rule, embodied in 28 U.S.C. § 1441(b)(2), prohibits removal of civil actions based on diversity of citizenship jurisdiction "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." Focusing on the phrase "properly joined and served," defendants have argued that § 1441(b)(2) allows removal of a diversity action when a citizen of the forum state has been joined as a defendant but has not yet been served. Two courts of appeals and many district judges have accepted this argument; other district judges have rejected it. The conflict in the lower courts has few parallels in its extent and its intensity.

In 2018, when the Third Circuit upheld removal by a forum defendant who had not been served, the court commented: "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."[1] I applaud this Subcommittee for taking up the court's invitation. The issue may seem narrow and technical, but it continues to generate extensive litigation in the lower courts, consuming client funds and court resources without advancing resolution of the underlying claims. Only Congress can set the matter right.

What action should Congress take? One obvious possibility would be to delete the words "and served" from § 1441(b)(2). However, altering the language of a statutory provision that has been in effect for more than 70 years runs a serious risk of disrupting other aspects of the complex law of removal. The better approach is to enact a standalone provision that carefully defines the situation to which it applies and then tells the parties and the court what to do when that situation arises.

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[1] *Encompass Ins. Co. v. Stone Mansion Restaurant Inc.*, 902 F.3d 147, 154 (3rd Cir. 2018).

A statutory amendment along those lines has been proposed in an article written by five Federal Courts scholars, of whom I am one.[2] The proposed amendment would allow the plaintiff to counter snap removal by serving one or more in-state defendants *after* removal. Under the proposal, if the plaintiff takes that step within the time for service of process allowed by the Federal Rules of Civil Procedure, and a motion to remand is made within 30 days thereafter, the district court *must* send the case back to state court. I think that this approach – creating what has been called a "snapback" mechanism – provides the best starting-point for the statutory fix that the Third Circuit invited. This statement explains the basis for that conclusion.

Before turning to the analysis, I will say a few words by way of personal background. I am a professor of law emeritus at the University of Pittsburgh School of Law, where I was appointed in 2005 as the inaugural holder of the Sally Ann Semenko Endowed Chair. I have been studying the operation of the federal courts for more than 40 years. In addition to my academic writings and a coauthored Federal Courts casebook, I have testified at several hearings of the House and Senate Judiciary Committees on various aspects of the federal judicial system.

Of particular relevance here, I have had the privilege of working with Members and staff of the House Judiciary Committee in drafting four pieces of federal courts legislation that were enacted into law with bipartisan support. Three of these bills included provisions dealing with the removal of cases from state to federal court.[3] The first was the "Holmes Group fix," involving jurisdiction over patent and copyright cases; this measure was enacted as part of the Leahy-Smith America Invents Act of 2011.[4] Next came the Federal Courts Jurisdiction and Venue Clarification Act of 2011 (JVCA), which extensively

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[2] See Arthur D. Hellman, Lonny Hoffman, Thomas D. Rowe, Jr., Joan Steinman, & Georgene Vairo, *Neutralizing the Stratagem of "Snap Removal": A Proposed Amendment to the Judicial Code*, 9 Fed. Courts L. Rev. 103 (2016). Portions of this statement have been adapted from that article, with thanks to my coauthors for their contributions to a truly collaborative project. Particular thanks to Professor Rowe for extremely helpful comments on earlier drafts of this statement.

[3] The fourth bill was the Judicial Improvements Act of 2002, which revised the provisions in the Judicial Code dealing with judicial misconduct and disability. See H.R. Rep. No. 107-459 (2002).

[4] For the legislative history, see H.R. Rep. 109-407 (2006), incorporated by reference in H.R. Rep. 112-98 at 81 (2011).

revised the law of removal, particularly the provisions applicable to diversity cases.[5] Finally, in 2010 and 2011 I worked on the Removal Clarification Act of 2011, sponsored by Congressman Henry C. "Hank" Johnson. That Act amended the federal officer removal statute. Earlier this year, in an amicus curiae brief submitted to the en banc Court of Appeals for the Fifth Circuit, Congressman Johnson quoted my testimony at a hearing on a predecessor bill as evidence of the proper interpretation of disputed language added by the 2011 law.[6]

I. Background

To set the stage for the policy and drafting issues raised by snap removal, it will be useful to provide some background about removal and diversity jurisdiction generally.

A. State and federal courts

In the system of dual sovereignty established by the Framers, power is divided between the national government and the governments of the several states. In the judicial sphere, one consequence of this division of powers is the existence of two sets of trial courts, each of which can hear a wide variety of civil suits between private (non-governmental) parties.

State courts are courts of general jurisdiction. They can hear and determine any case, except in the rare instances where Congress has vested exclusive jurisdiction in the federal courts.

Federal courts are courts of limited jurisdiction. As the Supreme Court recently explained, "Article III, § 2, of the Constitution delineates the character of the controversies over which federal judicial authority may extend. And lower federal-court jurisdiction is further limited to those subjects encompassed within a statutory grant of jurisdiction."[7]

Two statutory grants – both part of Title 28, the Judicial Code – account for the vast majority of the private civil cases filed in federal court. First, 28 U.S.C. § 1331 grants jurisdiction over civil cases that "arise under" federal law. This is known as "federal question" jurisdiction. Second, 28 U.S.C. § 1332(a)

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[5] For the legislative history, see H.R. Rep. 112-10 (2011).

[6] En Banc Amicus Curiae Brief of U.S. Congressman Henry C. "Hank" Johnson, Jr., in Support of Appellee and Affirmance at 12, *Latiolais v. Huntington Ingalls, Inc.*, No. 18-30652 (5th Cir. July 12, 2019).

[7] *Home Depot, Inc. v. Jackson*, 139 S. Ct. 1743, 1746 (2019) (cleaned up).

authorizes federal courts to hear cases in which the amount in controversy exceeds $75,000 and the suit is "between ... citizens of different states." This is known as "diversity jurisdiction." Again to quote the Supreme Court:

> Each [of these jurisdictional grants] serves a distinct purpose: Federal-question jurisdiction affords parties a federal forum in which "to vindicate federal rights," whereas diversity jurisdiction provides "a neutral forum for parties from different States when the claims are grounded in state law."[8]

The topic of this hearing, snap removal, is relevant only to cases falling within the diversity jurisdiction. In this statement, I will not be saying anything more about federal question jurisdiction.

B. Removal: a central battleground in civil litigation

With very limited exceptions, the jurisdiction of the federal courts is *concurrent* with that of the state courts, so that most of the cases that could be brought in federal court could also be brought in state court. This means that litigants will often have a choice between federal and state court.

Selecting the forum is usually thought of as the prerogative of the plaintiff, and often it is. But in some cases the defendant can override the plaintiff's choice of state court by *removing* to federal court. The basic rule, set forth in 28 U.S.C. § 1441(a), is that if a case could have been brought in federal court by the plaintiff, it can be removed to federal court by the defendant. One important exception – the forum defendant rule – is central to this hearing and will be discussed in detail later in this statement. For completeness, I'll note that if the plaintiff sues in federal court, and the federal court has jurisdiction over the case, the case will stay in federal court. There is no removal from federal to state court.

Removal has become a central battleground in civil litigation. The reason is that across a wide spectrum of civil suits, plaintiffs prefer state court; defendants want to be in federal court. Many explanations have been given for these preferences. Some lawyers point to developments in federal practice over the last three decades, including Supreme Court decisions on summary judgment, expert testimony, and pleading. Others emphasize systemic differences between

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[8] Id.

federal and state courts, such as jury pools or pressure on federal courts from criminal caseloads.[9]

Whatever the explanation, the preferences are well known. One consequence is that lawyers are willing to put a good deal of effort – and client funds – into maneuvering over removal. A dramatic example – directly implicating the subject of today's hearing – can be found in a decision issued by the District Court for New Jersey just last month.

In *Dutton v. Ethicon, Inc.*, 2019 WL 5304169 (D. N.J. Oct. 18, 2019), a non-New Jersey plaintiff, Gilbert, filed suit against a New Jersey defendant, Ethicon, in New Jersey state court.[10] The court recounted the sequence of events as follows:

> Gilbert commenced her action on November 30, 2018, at 9:35 a.m., by filing a Complaint against Defendants in the Middlesex County Superior Court. A New Jersey process server was able to personally serve [defendants] by 10:15 a.m., only 40 minutes after filing. As service was being made, Defendants were already in the process of filing their Notice of Removal with the District of New Jersey, which was timestamped at 10:14 a.m.

New Jersey is part of the Third Circuit, which as noted earlier had upheld the practice of snap removal. And, as the District Court's narrative makes clear, defendants filed their notice of removal with the District Court one minute before the completion of service. So the removal was effective, right? No, it was not. Under 28 U.S.C. § 1446(d), removal is not "effected" until the defendant files a copy of the notice of removal *with the state court*. And in Gilbert's case the defendants did not file a copy of the removal notice with the New Jersey state court until 11:17 a.m., one hour and two minutes after service was completed. So the forum defendant rule barred removal of the Gilbert action.

The *Dutton* opinion also considered a motion to remand by another non-New Jersey plaintiff, Williams, in a separate case against Ethicon. Williams filed his complaint in Middlesex County Superior Court at 3:10 p.m. on January 7, 2019. Defendants immediately filed their notice of removal with the District of New Jersey; the notice was timestamped at 3:21 p.m. The state court was notified two

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[9] For a brief discussion, see Arthur D. Hellman, *Another Voice for the "Dialogue": Federal Courts as a Litigation Course*, 53 St. Louis U. L. J. 761, 765-68 (2009).

[10] Plaintiff sued both Johnson & Johnson and its wholly owned subsidiary, Ethicon, both of whom are New Jersey citizens for purposes of diversity jurisdiction. The court referred to the "defendants" in the plural.

minutes later, at 3:23 p.m. Service on the defendants was not made until the following day. The court held that under the Third Circuit's decision the forum defendant rule did *not* bar the removal.

Maneuvering of this kind trivializes removal jurisdiction and makes poor use of the scarce resources of federal courts. It is entirely appropriate for Congress – and this Subcommittee in the first instance – to seek to reform the law of removal to minimize litigation over forum selection while also seeking to achieve a sound "balance of federal and state judicial responsibilities."[11]

C. Diversity jurisdiction and removal

For the general run of state-law claims, there is only one route to federal court, and that is the diversity of citizenship jurisdiction. Section 1332(a) of Title 28 authorizes federal courts to hear cases that do not arise under federal law if two conditions are satisfied: the amount in controversy exceeds $75,000, and there is diversity of citizenship among the parties.

Section 1332(a) has been interpreted to require "complete diversity" – i.e., a case cannot be brought in federal court under § 1332(a) or removed under § 1441(a) unless no plaintiff is a citizen of the same state as any defendant. The complete diversity requirement means that a plaintiff can defeat removal based on diversity jurisdiction by naming a co-citizen as a defendant. That aspect of removal practice, although very important, is not directly relevant to the topic of today's hearing, so it will not be discussed further here.

Superimposed on the complete-diversity rule is a limitation that applies only to removal based on § 1332(a). This is the forum defendant rule, codified in 28 U.S.C. § 1441(b)(2). The forum defendant rule is central to today's hearing, and I shall now discuss it in some detail.

II. The Forum Defendant Rule and "Snap Removal"

The forum defendant rule is often paraphrased as saying that a civil action may not be removed on the basis of diversity jurisdiction if any defendant "is" a citizen of the forum state. Indeed, the United States Supreme Court has used exactly that language.[12] But that is not what the statute says. What the statute says is this:

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[11] See Grable & Sons Metal Products, Inc. v. Darue Eng'g. & Mfg., 545 U.S. 308, 314 (2006).

[12] See, e.g., Lincoln Prop. Co. v. Roche, 546 U.S. 81, 84 (2005) ("Defendants may remove an action on the basis of diversity of citizenship if there is complete diversity ..., and no

> 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. 28 U.S.C. § 1441(b)(2) (emphasis added).[13]

Focusing on the phrase "properly joined and served," defendants have argued that § 1441(b) allows removal of a diversity action when a citizen of the forum state has been joined as a defendant but has not yet been served.

A. Varieties of snap removal

The practice of removing before forum defendants have been served has been called "snap removal,"[14] and it is largely (though not entirely) a product of the Internet era. Defendants monitor state-court dockets electronically, and when they learn of a state-court suit, they quickly file a notice of removal.[15] Sometimes they file before *any* defendants have been served. In other cases, the plaintiff has served a non-forum defendant or defendants, but not yet any forum defendant, at the time of removal. In the first case to reach a court of appeals, there was only one defendant, and that defendant knew about the lawsuit because of correspondence between the plaintiff's and defendant's lawyers.[16]

There is some disagreement about precisely which practices should be encompassed within the term "snap removal." For example, one recent decision suggests that "snap" removal occurs only when the defendant removes "before [plaintiffs] had a *reasonable opportunity to serve* the forum defendant."[17] An

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defendant is a citizen of the forum State."). The Court's opinion was by Justice Ginsburg, widely regarded as the Court's expert on civil procedure and federal jurisdiction.

[13] Section 1441(b) was rewritten by the Federal Courts Jurisdiction and Venue Clarification Act of 2011 (JVCA), but the "properly joined and served" language was not changed.

[14] The term was popularized by an opinion issued in 2015. See *Breitweiser v. Chesapeake Energy Corp.*, 2015 WL 6322625, at *2, *6 (N.D. Tex. Oct. 20, 2015).

[15] See Danielle Gold & Rayna E. Kessler, *How to Avoid "Snap Removals,"* Trial, July 2019, at 54 ("Corporate defendants ... have hired people to troll state electronic dockets and immediately file notices of removal before a plaintiff has any reasonable opportunity to serve the forum defendant.").

[16] Encompass Ins. Co. v. Stone Mansion Restaurant Inc., 902 F.3d 147 (3rd Cir. 2018).

[17] Howard v. Crossland Const. Co., 2018 WL 2463099 at *3 (N.D. Okla. June 1, 2018) (emphasis added). The court noted that plaintiff had "ample time" to serve the in-state defendant. See also Gorman v. Schiele, 2016 WL 3583640 at *6 (M.D. La. May 20, 2016) (recommending denial of motion to remand because forum defendant had not been served at

empirical study of snap removals "excluded cases in which the *removing* defendant *was* served before removal."[18] In this statement, the term will be used to refer to any case in which one or more properly joined defendants are citizens of the forum state, but a defendant removes based on diversity of citizenship jurisdiction before any forum-state citizen has been *served*.

B. The conflict in the lower courts

There is a raging conflict in the lower federal courts over the permissibility of removing a diversity action when a citizen of the forum state has been joined as a defendant but has not yet been served. Many courts hold that removal under those circumstances is permissible. Typically, these courts conclude that the "plain meaning" or "plain language" of § 1441(b)(2) requires this result. *See, e.g.*, *Valido-Shade v. Wyeth LLC*, 875 F. Supp. 2d 474, 478 (E.D. Pa. 2012). As one court explained:

> Although Congress may not have anticipated the possibility that defendants could actively monitor state court dockets to quickly remove a case prior to being served, on the facts of this case, such a result is not so absurd as to warrant reliance on "murky" or non-existent legislative history in the face of an otherwise perfectly clear and unambiguous statute.

North v. Precision Airmotive Corp., 600 F. Supp. 2d 1263, 1270–71 (M.D. Fla. 2009). Other courts, while recognizing that the "plain meaning" of the statute allows snap removal, "decline[] to enforce the plain meaning . . . because doing so produces a result that is at clear odds with congressional intent." *Swindell-Filiaggi v. CSX Corp.*, 922 F. Supp. 2d 514, 521 (E.D. Pa. 2013). This "purposive" approach results in a remand to state court.

There are also variations within the two basic approaches; these too have given rise to conflicting decisions. For example, in *Breitweiser* – the case that gave currency to the term "snap removal" – the court held that the "plain language" approach allows snap removal by *non-forum* defendants, but it said that allowing

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time of removal and stating: "The instant case does not seem to be a 'snap removal,' as over four months had passed between filing of the Petition in state court and removal.").

[18] Valery M. Nannery, *Closing the Snap Removal Loophole*, 86 U. Cin. L. Rev. 541, 559 n. 114 (2018) (emphasis added). The author explained: "The text of § 1441(b)(2) and the weight of authority support the removal of diversity cases by an out-of-state defendant that has been served or has otherwise submitted to the state court's authority despite the presence of a properly joined forum defendant [who has not been served]." Id; see also id. at 551.

removal by a *forum* defendant who had not yet been served would be "absurd" and "untenable." *Breitweiser*, 2015 WL 6322625, at *6.[19] Other courts have rejected this distinction, taking the position that "nothing turn[s] . . . on whether the removing party was a forum defendant or non-forum defendant." *Munchel v. Wyeth LLC*, 2012 WL 4050072, at *4 (D. Del. Sept. 11, 2012).

A different method of line drawing is illustrated by *Gentile v. Biogen Idec, Inc.*, 934 F. Supp. 2d 313 (D. Mass. 2013). The court there held that a non-forum defendant can remove, but only if it does so after "at least one defendant has been served." *Id.* at 322. But other courts allow removal before *any* defendant has been served. *See, e.g., Valido-Shade*, 875 F. Supp. 2d at 476.

A striking feature of the conflict is that because district court decisions are not binding even within the same district, different judges within a district can and do reach opposite results on this issue. Two of the decisions cited above (*Valido-Shade* and *Swindell-Filiaggi*) exemplify the conflict that existed within the Eastern District of Pennsylvania. And in at least four other districts, different judges have handed down decisions on both sides of the basic divide.[20] Whether removal is allowed thus depends on which judge is drawn—typically, by lot—to hear the case. There are also conflicts between different federal judicial districts within the same state.[21]

C. The court of appeals decisions

Until 2018, no court of appeals had resolved the question of whether snap removal is permissible. In that year, the Third Circuit decided *Encompass Insurance Co. v. Stone Mansion Restaurant, Inc.*, 902 F.3d 147 (3d Cir. 2018). The court held unanimously that the "plain meaning" of § 1441(b)(2) "precludes removal on the basis of in-state citizenship only when the defendant has been properly joined and served" (emphasis added), and that there was no reason to depart from that plain meaning.

The court explained that Congress adopted the "properly joined and served" language "to prevent a plaintiff from blocking removal by joining as a defendant a resident party against whom it does not intend to proceed, and whom it does not even serve." Permitting removal before service on the in-state

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[19] A similar distinction was drawn by another district judge in *Smethers v. Bell Helicopter Textron Inc.*, 2017 WL 1277512 (S.D Tex. April 4, 2017).

[20] For citations to the cases, see Hellman et al, supra note 2, at 105-06.

[21] For examples, see id.

defendant, the court said, "does not contravene the apparent purpose" of the language, nor does it "render the statute nonsensical or superfluous." The court gave three reasons for this conclusion:

> [Our interpretation] (1) abides by the plain meaning of the text; (2) it envisions a broader right of removal only in the narrow circumstances where a defendant is aware of an action prior to service of process with sufficient time to initiate removal; and (3) it protects the statute's goal without rendering any of the language unnecessary.

The unanimous decision to allow snap removal in *Encompass Insurance* was particularly noteworthy because the case presented the issue in an unusual, and arguably extreme, setting. In the more typical case, the plaintiff sues both in-state and out-of-state defendants, and the out-of-state defendant removes before in-state defendant has been served. Here, there was only one defendant – a citizen of the forum state. As a policy matter, that is the weakest situation for allowing removal. Yet the Third Circuit allowed it without hesitation. The ruling would apply a fortiori to cases in which the plaintiff sues both in-state and out-of-state defendants.

A few months after the decision in *Encompass Insurance*, the question of snap removal came before a second court of appeals. In *Gibbons v. Bristol-Myers Squibb Co.*, 919 F.3d 699 (2nd Cir. 2019), the Second Circuit agreed with the Third Circuit's interpretation of the forum defendant rule. "By its text," the court stated, § 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." Like the Third Circuit, the court found no reason to depart from the plain meaning of the statute. The court acknowledged that "it might seem anomalous to permit a defendant sued in its home state to remove a diversity action," but the court found that applying the plain text did not produce an absurd result. The court even suggested that the plain-text interpretation might serve a policy purpose. The court explained:

> Allowing a defendant that has not been served to remove a lawsuit to federal court "does not contravene" Congress's intent to combat fraudulent joinder. In fact, Congress may well have adopted the "properly joined and served" requirement in an attempt to both limit gamesmanship and provide a bright-line rule keyed on service, which is clearly more easily administered than a fact-specific inquiry into a plaintiff's intent or opportunity to actually serve a home-state defendant.

Since *Gibbons*, no other court of appeals has considered the permissibility of snap removal. And several district judges have rejected the reasoning of *Encompass Insurance*, with one judge saying that the language of § 1441(b) did not prevent the court "from undoing Defendants' gamesmanship." *Delaughder v. Colonial Pipeline Co.*, 360 F. Supp. 3d 1372 (N.D. Ga. 2018).[22]

Against this background, there is every reason to think that the conflict in the lower courts will continue until the Supreme Court resolves it or Congress acts to clarify the law. The Supreme Court is not likely to consider the issue until there is a conflict between *circuits*, but even if that were not so, the proper allocation of responsibility between state and federal courts is primarily a matter for Congress. This Subcommittee should not hesitate to devise a legislative "fix" rather than waiting for the Supreme Court to definitively interpret the language of the current statute.

III. The Need for a "Change in the Law"

As noted earlier, the Third Circuit, after adopting the "plain language" interpretation of § 1441(b)(2), added: "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."[23] But what should that change be?

As far as I am aware, no one has suggested that Congress should codify the result in *Encompass Insurance* and allow removal of a diversity action when a citizen of the forum state has been joined as a defendant but has not yet been served. Legislation along those lines would be particularly anomalous in light of the wide variation in state laws on service of process. As the Second Circuit pointed out, "allowing home-state defendants to remove on the basis of diversity before they are served [would] mean that defendants sued in some states – those that require a delay between filing and service, like Delaware – will be able to remove diversity actions to federal court while defendants sued in others – those that permit a plaintiff to serve an action as soon as it is filed – will not."[24]

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[22] See also *Bowman v. PHH Mortgage Corp.*, 2019 WL 5080943 *5 (N.D. Ala. Oct. 10, 2019) (holding that the statute "require[es] at least one defendant to have been properly joined and served before removal when an in-state defendant is involved"); *Timbercreek Asset Mgmt., Inc., v. De Guardiola*, 2019 WL 947279 (S.D. Fla. Feb. 27, 2019) (agreeing with *Delaughder*)

[23] *Encompass Insurance*, 902 F.3d at 154.

[24] *Gibbons*, 919 F.3d at 706. The court found that this policy consideration was not sufficient to overcome "the plain text" of the statute. *Id.*

But it would also be a mistake to abrogate the service requirement. Congress established the forum defendant rule based on the premise that there is no risk of state-court bias against an out-of-state defendant as long as at least one in-state defendant is a party on the same side.[25] But if the in-state party is only a nominal defendant, with no real role in the lawsuit, the premise is undercut, and the risk of bias against the out-of-state defendant could be very real. Thus, as the Third Circuit explained, Congress adopted the "properly joined and served" language "to prevent a plaintiff from blocking removal by joining as a defendant a resident party against whom it does not intend to proceed, and whom it does not even serve."[26] Of course failure to serve is not a perfect proxy for what is sometimes called fraudulent joinder. But as the Second Circuit noted, it provides a bright-line rule that is "easily administered."

This analysis suggests that the goal of the legislation should be to restore the symmetry that Congress intended in the operation of the rule. Plaintiffs should not be able to prevent removal of a diversity case by joining as a defendant an in-state party against whom they do not intend to proceed, and whom they do not even serve. Defendants should not be able to evade the forum defendant rule by removing before the plaintiff has had a *chance* to serve the in-state defendant. The "change in the law" should retain the service requirement, but configured in a way that does not reward gamesmanship by either side or make removability depend on "the vagaries of state law service requirements."[27]

IV. Designing a "Fix"

The goal, then, is to restore the *symmetry* that Congress intended in the operation of the forum defendant rule. How should that be done?

A. Text editing versus standalone legislation

To begin, it would not be adequate to simply delete the words "and served" from § 1441(b)(2) as it now stands. Doing so would encourage the gamesmanship that Congress intended to prevent when it added the words in 1948. Plaintiffs would once again be able to prevent removal of a diversity case by joining as a

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[25] I am somewhat skeptical about this premise, particularly when the out-of-state defendant is the principal "target" of the complaint. See infra Part V. However, for purpose of this discussion I am assuming the validity of the premise.

[26] *Encompass Insurance*, 902 F.3d at 153.

[27] See *Gibbons*, 919 F.3d at 706.

defendant an in-state party against whom they do not intend to proceed, and whom they do not even serve.

Moreover, deletion of the "and served" language would not necessarily eliminate litigation over compliance with the forum defendant rule. To be sure, an out-of-state defendant could not attempt snap removal. But if the plaintiff has asserted insubstantial or thinly grounded claims against the forum defendant, the out-of-state defendant might remove anyway based on an argument that the local defendant has been *improperly* – i.e. fraudulently – *joined*.[28] Litigating that question is likely to be more difficult and costly than litigating snap removal.[29]

More important, any attempt to change the law through what might be called "text editing" – adding, deleting, or changing words in existing text – runs a serious risk of inadvertently unsettling other doctrines of removal law. Removal law is complex and interconnected. The statutory language provides only a framework; most of the law is contained in a vast corpus of decisions, many dealing with issues that have never reached the Supreme Court.

It is just not possible to anticipate all of the consequences of revising a statutory provision of broad applicability. For example, Congress amended the basic venue statutes in 1988, only to find that further revisions were required in 1990 and again in 2011.

The preferable approach is to write a standalone provision that first defines the situation that it covers and then tells parties and courts what to do in that situation. A good example is 28 U.S.C. § 1441(c) as revised by the Federal Courts Jurisdiction and Venue Clarification Act of 2011 (JVCA). That subsection deals with removal of civil actions filed in state court that join federal and state claims.

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[28] Although the fraudulent joinder doctrine is more frequently applied to defendants who share citizenship with the plaintiff, it also comes into play when the "spoiler" is a citizen of the forum state, and the doctrine is generally applied in the same way. As a district court in Missouri observed a few years ago, "The standards for determining whether a *resident* defendant is fraudulently joined are the same as the standards for determining whether a diversity-destroying defendant is fraudulently joined." *Byrd v. TVI, Inc.*, 2015 WL 5568454 (E.D. Mo. Sept. 21, 2015) (emphasis added). Accord, *In re Ethicon, Inc., Pelvic Repair Sys. Prods. Liab. Litig.*, 2013 WL 6710345 at *3 n. 2 (S.D. W. Va. Dec. 19, 2013) ("In *Musewicz*, the issue is diversity of citizenship, while in *Hammons* and *Delacruz*, the issue is the home state defendant rule. However, the fraudulent joinder analysis remains the same in both instances.").

[29] In some cases in which courts have allowed snap removal, the court noted that it did not need to address the defendant's alternative argument that the "spoiler" had been fraudulently joined. E.g., *Howard v. Crossland Const. Co.*, 2018 WL 2463099 at *3 (N.D. Okla. June 1, 2018); *Pathmanathan v. Jackson Nat'l Life Ins. Co.*, 2015 WL 4605757 at *5 n.1 (M.D. Ala. July 30, 2015).

The subsection sets forth the conditions that make the subsection applicable; it then authorizes removal and instructs the district court about what to do with the different claims within the civil action. As stated recently by a district judge, "Before 2011, district courts had discretion in how to deal with these hybrid cases, including the discretion to keep the entire case in federal court. Not anymore. *The statute now tells courts exactly what they must do.*"[30]

B. The "snapback" proposal

The proposal by five law professors first published in the Federal Courts Law Review in 2016 implements the preferable approach. It does not change the language of section 1441 or any other part of Title 28. Rather, the proposal accepts the entirety of the Judicial Code in its current form and adds a new provision to be codified as a subsection of 28 U.S.C. § 1447, which delineates the procedures to be followed after removal.

This new provision would allow the plaintiff to counter snap removal by serving one or more in-state defendants *after* removal. Under the proposal, if the plaintiff takes that step within the time for service of process allowed by the Federal Rules of Civil Procedure, and a motion to remand is made within 30 days thereafter, the district court *must* send the case back to state court. There would be no discretion to do anything else; as with the JVCA's rewrite of § 1441(c), the statute would "tell[] courts exactly what they must do." In draft form, the new subsection would read as follows:

> (f) **Removal before service on forum defendant**
>
> If –
>
> (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.

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[30] *Stewart v. Lewis*, 2019 WL 4267387 (W.D. Pa. Sept. 10, 2019) (emphasis added).

Because the new subsection requires immediate remand once any in-state defendant has been served, some have referred to it as creating a "snapback" mechanism.[31] My coauthors and I believe that if the snapback provision is enacted, the incidence of snap removal can be expected to diminish sharply, as defendants come to recognize that the stratagem will no longer enable them to circumvent the forum defendant rule. To the extent that defendants do remove before any in-state defendants have been served, the plaintiff can secure remand by promptly serving at least one such defendant.

The snapback countermeasure would be available in any diversity removal in which one or more citizens of the forum state have been properly joined as defendants.[32] It would not matter whether the plaintiff has also sued non-forum defendants; Congress assumed that non-forum defendants do not need protection against state-court bias as long as at least one forum defendant is a party on the same side.[33] Nor would it matter whether the non-forum defendants had been served when they filed their notice of removal. Section 1441(b)(2) says nothing about service on non-forum defendants, and nothing in Chapter 89 precludes a defendant (forum or non-forum) from removing before receiving service.[34]

C. Advantages of the snapback approach

What makes the snapback approach so promising is that it builds on the incentives that already exist in the system for the various participants. The plaintiff wants the case to be litigated in state court, so he or she will have every incentive to perfect service quickly, particularly if the snap removal was possible

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[31] Credit for suggesting this term goes to Professor Steven Gensler of the University of Oklahoma Law School.

[32] The phrase "properly joined" is taken from § 1441(b)(2), and it should be interpreted in the same way. The draft statute does not address the separate issue of fraudulent or improper joinder. Under current law, lack of service upon a fraudulently or improperly joined defendant, at the time of removal, would not affect the propriety of the removal. A finding of such joinder results in a removed case remaining in federal court, if there are no defects in removal procedure. See generally *Smallwood v. Illinois Central R. Co.*, 385 F.3d 568 (5th Cir. 2004) (en banc); Arthur D. Hellman, *The "Fraudulent Joinder Prevention Act of 2016": A New Standard and a New Rationale for an Old Doctrine*, 17 Fed. Soc. Rev. 34 (2016).

[33] See supra note 25; infra Part V.

[34] *Novak v. Bank of N.Y. Mellon Trust Co. N.A.*, 783 F.3d 910 (1st Cir. 2015) (noting that this interpretation aligns with decisions of all other federal courts that have considered the question since the Supreme Court construed the statute in *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344 (1999)).

only because of delays caused by state service-of-process rules.[35] The federal district judge to whom the case is assigned will want to clear his or her docket. And the defendant will often be a repeat player like a pharmaceutical company. The defendant's lawyers will have at least some incentive not to antagonize the district judges in their home state by removing cases that will be swiftly remanded to the state court.

In considering whether the snapback mechanism is likely to be effective, it is important to keep in mind a jurisdictional rule that is often overlooked: when determining whether complete diversity exists, unserved defendants do count.[36] Thus, when the plaintiff sues a forum defendant in his home state, it is irrelevant whether or not the forum defendant has been served; none of the defendants can remove because the complete-diversity requirement is not satisfied. It follows that the only cases where snap removal is an issue are cases in which the plaintiff is suing outside his home state.[37]

If that is so, it has important implications for how the two sides' lawyers can be expected to act. The plaintiff generally will not be represented by a small-town lawyer or solo practitioner who unexpectedly has been caught up in the unfamiliar intricacies of removal practice. Rather, the plaintiff will be represented by a savvy, experienced lawyer who for tactical reasons has taken the unusual step of filing suit in a state where the plaintiff does not live. And that in turn suggests that the plaintiff's lawyer will be very familiar with the law of removal and will make other tactical decisions based on extensive knowledge and experience. (Indeed, the plaintiff may have brought suit in the defendant's state for the very purpose of frustrating removal.) As for the defendant, the defendant will generally be a corporation represented by lawyers who routinely remove cases and are very knowledgeable about the governing rules. A structured regime

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[35] See, e.g., *In re: Propecia (Finasteride) Products Liability Litigation*, 2016 WL 5921070 (E.D. N.Y. Oct. 11, 2016) (noting that after removal before service, all in-state defendants were promptly served).

[36] The Supreme Court decision in *Pullman Co. v. Jenkins*, 305 U.S. 534 (1939), is often cited as authority for this proposition. See, e.g., *New York Life Ins. Co. v. Deshotel*, 142 F.3d 873, 883 (5th Cir. 1998) ("Whenever federal jurisdiction in a removal case depends upon complete diversity, the existence of diversity is determined from the fact of citizenship of the parties named and not from the fact of service."); Clarence E. *Morris, Inc. v. Vitek*, 412 F.2d 1174, 1176 (9th Cir. 1969) (same).

[37] A quick review of recent cases considering the validity of a snap removal confirms this pattern. This includes *Encompass Insurance* and *Gibbons*.

like the one contemplated by the snapback proposal is well suited to a situation where each side can generally count on the other's being well versed in the law and tactics of removal.

D. Litigation of other issues in a snap removal case

A snap removal case may also raise other issues of jurisdiction or removal practice. How would those be handled under the snapback proposal? It is useful to consider the question first from the defendant's perspective, then from the plaintiff's.

In the typical snapback case, once the plaintiff perfects service on an in-state defendant, the removing defendant will have no basis for opposing the motion to remand, and the motion would be granted. But in some cases the defendant will wish to argue that, independent of the service requirement in § 1441(b)(2), the forum defendant rule does not bar removal because the in-state defendant has been fraudulently joined.[38] The defendant may have raised this issue in the notice of removal, but if it did not, it would do so in its response to the motion to remand. We would not want the possibility of such a response to delay resolution of the remand motion.

In many districts, that would not be a problem; a local rule requires that responses to all motions must be filed within a short time after filing (or sometimes service) of the motion – typically, 14 days.[39] Such local rules may be sufficient, but if they are not, it might be desirable to modify the draft statute to include a short deadline applicable only to remand motions under the snapback provision. If no response is filed, the case can be remanded without further ado.

The defendant may also seek to have the case transferred under 28 U.S.C. § 1407 to an existing multidistrict litigation (MDL) proceeding. This possibility raises a policy question: should defendants be able to secure the transfer to an MDL of a case which, but for a snap removal, would have remained in state court with no possibility of transfer? To ask the question is almost to answer it: no, defendants should not be able to do that, especially if the removal was possible only because of circumstances beyond the plaintiff's control. But it may not be necessary to address this in the statute. Transfers are centralized in the Judicial Panel on Multidistrict Litigation; the Panel could announce that it will not transfer

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[38] See supra note 29.

[39] See, e.g., N.D. Cal. Civil Local Rule 7-3(a) (stating that opposition to a motion must be filed and served not more than 14 days after the motion was filed); (E.D. Tex. Local Rule CV-7(e) (setting 14-day response deadline for all motions except summary judgment).

a case in which a forum defendant has been joined but not served until the remand issue has been resolved.[40]

As for plaintiffs, the plaintiff may have other objections to removal – incomplete diversity, for example, or untimeliness. But if perfecting service on one in-state defendant will bar removal under the forum defendant rule and the snapback provision, it is hard to see why the plaintiff would want to pursue other arguments, particularly when those will probably be more difficult to establish. Nevertheless, if the plaintiff wishes to raise other objections, he or she can do so in the motion to remand.

E. Treatment of subsidiary issues in the proposed legislation

The proposed addition to 28 U.S.C. § 1447 also resolves two other issues that have given rise to disagreement in the lower courts. The final clause provides that after the plaintiff has served one or more in-state defendants, the district court, "*upon motion* . . ., shall remand the action to the state court from which it was removed." (Emphasis added.) Specifying that the court shall act "upon motion" confirms that the forum defendant rule is not jurisdictional. That is the position of all but one of the circuits that have addressed the issue. *See Lively v. Wild Oats Markets, Inc.*, 456 F.3d 933, 940 (9th Cir. 2006) (collecting cases).[41] Thus, in the absence of a timely motion to remand, the case can and will remain in federal court.

By the same token, the language makes clear that the district court may not remand for violation of the forum-defendant rule in the absence of a motion. This resolution is consistent with the view of all circuits that have considered the effect of similar language in 28 U.S.C. § 1447(c).[42] Those courts hold that the first sentence of section 1447(c) does not authorize a district court's *sua sponte*

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[40] For further discussion of MDL, see infra Part V.

[41] Only the Eighth Circuit has held otherwise. Horton v. Conklin, 431 F.3d 602, 605 (8th Cir. 2005) (reaffirming adherence to the minority view). In the Sixth Circuit, the court of appeals has not issued a definitive ruling, and at least three district courts have held that the forum-defendant rule is jurisdictional. *See* Balzer v. Bay Winds Fed. Credit Union, 622 F. Supp. 2d 628, 630–31 (W.D. Mich. 2009) (citing cases). In the Fourth Circuit, district courts have held that the forum-defendant rule is procedural and subject to waiver. *See* USA Trouser, S.A. de C.V. v. International Legware Group, Inc., 2015 WL 6473252, at *3 (W.D.N.C. Oct. 27, 2015) (citing cases)

[42] Section 1447(c) provides in part: "A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a)."

remand of an action based on a defect "other than lack of subject matter jurisdiction." *See Ellenburg v. Spartan Motors Chassis, Inc.*, 519 F.3d 192, 197–98 (4th Cir. 2008) (joining "all of the circuit courts that have considered the question" in concluding that "a district court is prohibited from remanding a case *sua sponte* based on a procedural defect absent a motion to do so from a party"). A few district courts have remanded cases *sua sponte* based on violation of the forum defendant rule. *See, e.g., Beeler v. Beeler*, 2015 WL 7185518 (W.D. Ky. Nov. 13, 2015).

The proposed amendment does not make any change in 28 U.S.C. § 1447(d), which provides: "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise ...." This is important, because it means that an order of remand pursuant to the snapback provision cannot be appealed, and the case can be returned to the state court without further delay.

The draft amendment published in the Federal Courts Law Review did not include a provision specifying the effective date of the new provision. Legislation enacted by Congress should do so. In the Federal Courts Jurisdiction and Venue Clarification Act of 2011, the amendments to Title 28 were made applicable to actions "commenced" 30 days after enactment; however, for removed cases, an action was deemed to commence "on the date the action ... was commenced, within the meaning of State law, in State court." (Emphasis added.) That is probably a good model for legislation dealing with snap removal.

F. Responses to possible objections

I can anticipate several possible objections to the snapback proposal, but I think that all can be answered to the Committee's satisfaction.

First, it may be argued that codifying the snapback mechanism would entrench snap removal into the removal scheme. But that is a cause for concern only if the mechanism proves to be an ineffective means of addressing the problem. As will be explained below, I do not think it will be. Moreover, it is not clear that the practice could be extirpated from the removal scheme without rewriting the *criteria* for removal – an approach that, for reasons given earlier, is fraught with risk.

Second, there may be a concern that cases will arise in which the plaintiff will not be able to serve the forum defendant "within the time for service of process allowed by the Federal Rules of Civil Procedure." That scenario is not impossible, but it seems unlikely. Rule 4(m) of the Federal Rules of Civil

Procedure allows 90 days – three months – to serve the defendant after the complaint is filed, and if the plaintiff shows good cause for failure to serve within 90 days, the court must extend the time "for an appropriate period." Moreover, by hypothesis, the initially unserved defendant will be a citizen of the forum state, so there will be no problems with service out of state.

Third, there may be doubt that defendants will behave as predicted and stop attempting to invoke snap removal. Not all plaintiffs' attorneys will know of the countermeasure, and some might fail to deploy it properly and on time. Defendants might therefore remove in advance of service and hope that the snapback mechanism will not be invoked against them.

The question is certainly legitimate; no one can be certain about what information lawyers will have and how they will act. But as pointed out earlier, the only cases where snap removal is an issue are cases in which the plaintiff is suing outside his home state. There is good reason to believe that the lawyers on both sides will be very knowledgeable about the law of removal and will take full advantage of the opportunities the law offers them, but without wasting resources.[43]

Fourth, some will worry that that after the snap removal, there may be an extended period of uncertainty in the federal court, and the defendant may file motions or other pleadings that will turn out to be for naught. But as discussed earlier, the plaintiff will generally have an incentive to act quickly to get the case back to the state court, and it is hard to see how the defendant could initiate an extensive motion practice before the case is remanded. If, for some reason, service is taking longer than expected, the plaintiff could inform the defendant and the court of that fact, making clear that the plaintiff will be invoking the snapback mechanism.[44]

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[43] See supra Part IV-C.

[44] Rule 81(c)(2) specifies the deadlines for the defendant to "answer or present other defenses or objections" if it did not answer before removal, and it gives the defendant the longest of the three periods listed. Paragraph (B) specifies "21 days after being served with the summons for an initial pleading on file at the time of service." That should suffice in most snap removal cases. Moreover, a defendant facing a 21-day limit can always move for an extension of time under Rule 6(b) if it sees a motion for remand coming. Perhaps in an occasional case the defendant will have to file an answer that will go for naught, but if so, the defendant brought the burden on itself by going ahead with the snap removal with the snapback provision on the books.

The Committee might also conclude that the 90-day period provided by Rule 4(m) is longer than is necessary. Given the dynamics and incentives discussed earlier, a shorter period may be sufficient. I would be guided by what this Committee hears from the lawyers in the trenches.

Finally, it may be argued that the snapback countermeasure would make the already long and complicated statutory scheme for removal even longer and more complicated. It is true that the proposal would add a new subsection to § 1447. But the *practice* of removal would be no more complicated than it is today – less so, in fact, because the new provision would forestall litigation over the many varieties of snap removal that are disputed today. Moreover, practice in each state can adapt to the particular features of the laws governing service of process in that state.

Several provisions of the Federal Courts Jurisdiction and Venue Clarification Act of 2011 could be viewed as having added to the length and complexity of the removal scheme. But from the perspective of judges and lawyers, those provisions brought simplification, because they provided step-by-step guidance for recurring situations. The snapback proposal is in the same mold.

V. Conclusion: Snap Removal in Perspective

I support legislation along the lines of the snapback proposal because such legislation would restore the symmetry that Congress sought in the 1948 revision of the forum defendant rule, and because decisions like *Encompass Insurance* leave the law in a state where the availability of diversity removal depends on fortuities such as state rules on service of process and the defendant's ability to "troll" state-court dockets. But that does not necessarily mean that the resulting arrangements would establish an optimum "balance of federal and state judicial responsibilities."[45] Here I will mention two variations on diversity removal that may warrant the Committee's attention in the long term – after the narrow and pressing issue of snap removal has been dealt with.

First, the language of the forum defendant rule prohibits removal if <u>any</u> of the parties in interest properly joined and served as defendants is a citizen of the [forum] State." As noted earlier, the assumption seems to be that there is no risk of bias against an out-of-state defendant as long as at least one in-state defendant is a party on the same side. That assumption may be justified when all of the defendants, forum and non-forum, stand in the same relation to the plaintiff and

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[45] See Grable & Sons Metal Products, Inc. v. Darue Eng'g. & Mfg., 545 U.S. 308, 314 (2006).

the claims. But in many diversity removal cases the out-of-state defendant – for example, the manufacturer of the drug that the plaintiff ingested – is not simply one defendant among many; on the contrary, it is the primary defendant – the entity from whom the plaintiff will recover if any recovery is to be had. In that situation, the joinder of (for example) a local retailer, pharmacist, or distributor is not likely to mitigate any local bias. The Class Action Fairness Act (CAFA) uses the concept of "primary defendants" to define the "home state exception" to class action jurisdiction.[46] Perhaps a similar concept could be developed to limit application of the forum defendant rule or even the complete-diversity requirement.

Second, in Part IV-D, I suggested that defendants should not be able to secure the transfer to an MDL of a case which, but for a snap removal, would have remained in state court with no possibility of transfer. The snapback proposal reflects that view, because it is consistent with the overall thrust of the forum defendant rule that the snapback mechanism would restore. But it is not necessarily the most efficient way of handling the cases. To be sure, there can be coordination between the MDL court and state courts handling similar claims. And consolidation in an MDL is often seen as "a black hole from which cases, plaintiffs and defendants cannot escape," and where various factors "often conspire to wrest control of the lawsuit away from the individual plaintiff and his chosen attorney."[47] But it may be possible to devise a more coherent set of rules for determining which cases become part of the MDL and which stay in state courts.

I offer these suggestions very tentatively, and I emphasize again that they are for the long term. In contrast, the phenomenon of snap removal warrants immediate attention. The conflict in the lower courts continues unabated, consuming court and client resources without addressing the merits of the underlying disputes. Meanwhile, two courts of appeals have established a rule under which the choice between state and federal court will depend on variables that bear little if any relation to the need for a "neutral forum" that underlies the diversity jurisdiction.[48] The problem of snap removal can be solved without

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[46] See William B. Rubenstein, 2 Newberg on Class Actions § 6.20 (5th ed. 2019 Update).

[47] Gary Wilson et al., *The Future of Products Liability in America*, 27 Wm. Mitchell L. Rev. 85, 104 (2000).

[48] See *Home Depot, Inc. v. Jackson*, 139 S. Ct. 1743, 1746 (2019).

addressing broader issues, and I welcome the opportunity to work with this Subcommittee to craft narrowly tailored legislation to that end.

Mr. JOHNSON of Georgia. Thank you.
And last, but not least, Professor Pfander. Thank you.

STATEMENT OF JAMES E. PFANDER

Mr. PFANDER. Thank you, Mr. Chairman and Ranking Member Roby.

It is true that I have been teaching civil procedure and Federal jurisdiction for some years at Northwestern, but I have only just begun to teach snap removal. It is a new thing on the Federal jurisdiction horizon, and there is a chance that a few of my first-year civil procedure students are going to be tuning in today for a little snap removal extra credit. [Laughter.]

Mr. PFANDER [continuing]. I have four points to make. The first one is that snap removal teaches us that forum shopping matters and that there is an element of inevitability in forum shopping. And my suggestion is that we not make moral judgments about the choices of the plaintiffs or the defendants, but try to fashion clear rules that allow the parties choices to be made within a clear framework so that we can concentrate our judge time and our litigant time on getting to the merits and resolving the case at hand.

All the cases affected by snap removal turn on State law and can be brought in State court. It is a presumptively proper forum for adjudication. And snap removal can't solve all the problems associated with the arguments for consolidation of related claims because it is too arbitrary to do so.

Second, snap removal strikes me as just the sort of thing the legislature should address. It doesn't have a policy justification. It is a waste of defense resources in monitoring dockets and a waste of plaintiffs' resources as plaintiffs attempt to try to work around the threat of snap removal.

It is true that some courts have ruled in favor of snap removal. And that is because of the textual reference in the relevant provision of the removal code that refers to defendants that have been properly joined and served. That makes snap removal a hard question for courts, but it should be an easy question for Congress. If Congress chooses to preserve the forum defendant rule, it makes no sense to allow a snap removal exception to that rule to remain.

Third, of the rule changes that have been proposed so far, I tend to prefer the ones that would prohibit or forbid snap removal rather than those that would allow it to happen and then try to address it after the case has already been removed. In other words, I think in this case, an ounce of prevention may be worth a pound of cure.

And so there are a number of proposals, both in my written testimony and elsewhere, that seek to prevent snap removal rather than using the snapback approach that Professor Hellman has proposed. I have great respect for Professor Hellman and his work, but in this case, I think prevention may be the better approach.

Finally, I suggest that the committee might want to consider the possibility that we will be reconvening here in a few months' time to address other similar problems. In just the past few years, the committee has addressed such things as innocent party protection, and fraudulent joinder. It may be that soon we will be dealing with the question of whether the parties have properly consented to removal. There is actually a division in the lower courts right now

as to how parties go about the business of effectuating consent to removal when they agree to the removal initiated by one of their fellow defendants.

One might address all these and similar recurring problems by empowering rulemakers, perhaps working within the Judicial Conference, to develop rules to submit to Congress for consideration. This might work in some ways like the evidence rulemaking process in which the Committee on Evidentiary Rules proposes drafts, vets them with experts in the field, and then offers them to Congress for adoption.

It is a possibility that such a rulemaking process can address the details in the procedures and stay abreast of changes in the fast-moving forum shopping world more effectively than the legislature itself. Not to say that there is not a legislative role. I do believe the legislature should be drawing the boundary lines, and then we should try to create clear rules that enable the parties to work within those lines to get their disputes resolved on the merits instead of wasting resources shuffling the cases, back and forth between State and Federal courts.

Again, happy to answer questions and delighted to be here.

[The statement of Mr. Pfander follows:]

Testimony of James E. Pfander

Owen L. Coon Professor of Law

Northwestern University Pritzker School of Law

Examining the Use of "Snap" Removals to Circumvent the Forum Defendant Rule

Before the

Subcommittee on Courts, Intellectual Property, and the Internet

of the

Committee on the Judiciary of the U.S. House of Representatives

November 14, 2019

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

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[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

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[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

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[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

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[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 pretermit 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).

Mr. JOHNSON of Georgia. Okay. I want to thank all of the witnesses for their testimony.

At this time we will begin with questions, first from the Chair of the Full Committee, Chairman Nadler.

Chairman NADLER. Thank you, Mr. Chairman.

Professors Hellman and Pfander, are you aware of any scholars who have put forward a principled justification for snap removals?

Mr. HELLMAN. No, not—not consistent with the forum defendant rule, no.

Mr. PFANDER. Nor am I.

Chairman NADLER. And why do you think that is?

Mr. HELLMAN. I think it is because the forum defendant rule rests on the assumption that as long as you have one defendant from the forum State, no defendant in the case needs protection from local bias. Snap removal interferes with that.

Chairman NADLER. And Professor Hellman, are there ways that your snapback proposal could be vulnerable to gamesmanship from plaintiffs or defendants?

Mr. HELLMAN. You know, we haven't seen them so far, but one of the great things about having a hearing like this—and I want to thank the committee really for taking up this issue—is that now this is out in the open. We published that article in a journal, which I have to say not a lot of people read, and now that this committee has turned attention to it, I hope that plaintiffs' lawyers organizations, defendants' lawyers organizations will look at it and really vet it very carefully.

Chairman NADLER. Thank you.

Do any of the other witnesses have anything to add to that on that question?

Mr. STOFFELMAYR. If I may, Congressman? I think the question about a scholarly justification for snap removal, I understand the question and the response. What concerns me is that the term "snap removal" doesn't have a clear definition. It is sort of whenever it is too fast, too quickly, we call it the snap removal. If it is not too quickly, we just call it the forum defendant rule in practice.

And so the two points I would want to make is the forum defendant rule in practice, when we don't think it is too quick, does have plenty of good justifications, and many, many people have questioned the wisdom of a rule that says, I think as Professor Hellman just said, as long as one defendant comes from the forum State, no defendant has anything to be concerned about.

In actual practice, if you represent a defendant from out of State in a local State court elsewhere, it may be very, very cold comfort that a small, local business or a local individual happens to be a co-defendant. That will not give you any sense of comfort that your interests will be protected and respected in the same way as they would be in Federal court.

Chairman NADLER. Okay. And, Ms. Relkin, we have heard suggestions that Snap Removals are very rare. Is that your experience? And, I think you said that they have increased fivefold?

Ms. RELKIN. No, Congressman Nadler, it is not very rare. It is growing every minute. It is an epidemic right now. The data that my adversarial respective colleague refers to is more than 5 to 7 years old, the study by Valerie Nannery. That was based on data

from 2012 to 2014. That is another—that is a century ago in terms of what is happening with snap removal because of the change in the electronic—mandatory electronic filing.

It is rampant, especially in the two circuits, the Second Circuit and the Third Circuit, where I happen to practice—lucky me—that have now given a somewhat green light to that practice.

Chairman NADLER. Why shouldn't Congress simply wait for the Supreme Court to resolve this, the Snap Removal question?

Ms. RELKIN. Because this is purely congressional language. The reason the Second and Third Circuit allowed it was they are referring to the plain words, "joined and served." So it is purely a congressional fix. It is really whether it is a district court or a court of appeals or the Supreme Court, it would still be the same dilemma. This really is, as the Third Circuit has said, something Congress needs to correct.

Chairman NADLER. Okay. And, it seems like the Snap Removal problem comes in part from courts reading the words "and served" in isolation from the rest of the removal statutes and without due regard to the purpose of these laws and without accounting for changing technology.

Congress shouldn't be playing whack-a-mole with problematic judicial instructions. Should we consider Professor Pfander's suggestion of either giving the courts the power to make rules governing removal or attempting a more comprehensive recodification of the removal statutes?

Ms. RELKIN. Well, yes, I am sitting with such learned professors. There are—it does require a lot of debate as to what is the best surgical fix to this limited, but big problem and growing problem. So it is hard to—I don't want to just answer that off the cuff.

I put in proposed suggestions that are kind of a morph, and I think any number of them could work. But it certainly needs a surgical correction.

And just to respond to Mr. Stoffelmayr, this notion of this frequent problem of misjoinder where State court, State entities are begin served that are so-called fraudulent, it is happening less and less. I have never seen it personally, and in light of the Supreme Court's decision in Bristol-Myers Squibb in 2017, which basically says you don't have jurisdiction in many circumstances, it is going away.

That, in and of itself, would take care of this alleged and really remote problem.

Chairman NADLER. Thank you. My time has expired. I yield back.

Mr. JOHNSON of Georgia. Thank you. Next we will hear questions from Ranking Member Roby.

Mrs. ROBY. Well, thank you again for your testimony today, and I, like your civil procedure students, am receiving a good lecture today. So I do appreciate all of you taking the time to come here and talk about this very specific issue.

So, Mr. Stoffelmayr, I will start with you. As a practitioner, you have used snap removal in practice. Can you explain how it is used to protect defendants from plaintiffs seeking to forum shop?

Mr. STOFFELMAYR. Yes, absolutely. So the forum shopping plaintiff is somebody who has identified a State court jurisdiction that

they will believe is going to be unusually favorable to that plaintiff. And it has changed over the years, but at any one time, there are probably 5 or 10 sort of State court hotspots that anyone will tell you are the most plaintiff-friendly State court jurisdictions.

And so any plaintiff's lawyer who thinks they have the option would rationally prefer to file their case in that State court rather than anywhere else, and that would be true whether or not the plaintiff happens to come from that location, whether or not the defendant happens to come from that location.

Under normal circumstances, let us say a plaintiff from Illinois, a defendant from New Jersey, file in California, it would be easily removable. No question about the Federal court's jurisdiction.

The forum defendant rule creates a sort of asymmetric quirk that says if the plaintiff wants that case in Federal court, they have the option of filing in Federal court. But if the defendant wants the case in Federal court, that they don't have the ability to remove.

And what preservice removal does, whether you want to call it snap removal because it was too quick or just preservice removal because you think happened at an appropriate time, it means that the out-of-State defendant has the ability to remove that case to Federal court before the local defendant is served, which will often be the case if the local defendant is a party that no one ever really had any interest in suing in the first place.

Mrs. ROBY. Okay. I appreciate that. And I think it is maybe best then to turn to you, Professor Relkin.

Ms. RELKIN. Thank you for the——

Mrs. ROBY. Ms. Relkin, sorry. Lots of smart people in this room.

So just to build off of that explanation, in your testimony, you stated that snap removal results in a loss for our system of civil justice. So I would just ask you to address whether improper joinder to defeat diversity jurisdiction results in a similar loss for our system of civil justice?

Ms. RELKIN. First of all, thank you for the question and for the advancement. I would love to be a professor.

Mrs. ROBY. I am just a student today. [Laughter.]

Ms. RELKIN. First of all, I think it is very rare, and there is a remedy. It is called fraudulent joinder, and there is a motion that can be made. And if a defendant is improperly brought just for the purpose of getting State court jurisdiction, that is how it gets corrected.

This loophole is just a different situation——

Mrs. ROBY. And how often does that actually happen? Just give me some context for that.

Ms. Relkin. Very, very rarely. In my entire career, I personally have only had one such motion.

Mrs. ROBY. Okay.

Ms. RELKIN. And I should say all of the examples I regaled you with, what is going on in New Jersey, there was no out-of-State defendant. We served Stryker Orthopedics, a New Jersey corporation. They removed.

The cases against Ethicon and J&J, they were the only—they were New Jersey defendants. So we don't have this remote problem of other defendants from elsewhere. It is typically the in-State defendant lately who is doing the removal because they would rather

be in Federal court for reasons like they don't want—they want to have a unanimous jury, which is, you know, generally most States don't require unanimous juries. They would rather sow doubt and have one juror hang the jury, and then you have to have a retrial and waste a lot of resources on everyone's part.

Mrs. ROBY. So I would ask you, I would give you an opportunity to respond to her answer as well.

Mr. STOFFELMAYR. Thank you, Congresswoman. That is a very important issue you raised and Ms. Relkin addressed about fraudulent joinder and why doesn't that solve the problem.

And the reason is the standard for fraudulent joinder is incredibly high. To say that a party has been misjoined in the sense that no one intends to pursue a real claim against them is one thing, to win a fraudulent joinder motion is something else entirely. You would have to show, the way it is usually phrased, is there is no possible colorable basis for any claim against this defendant. No State court could possibly find you have asserted a proper cause of action.

That is extraordinarily difficult to show, which is why you may not see very many motions. No one wants to file losing motions. And it doesn't nearly capture the broad swath of cases where the defendant just shouldn't be there and won't be pursued, but you couldn't possibly hope to show fraudulent misjoinder.

Mrs. ROBY. Okay, got it. I appreciate my time has expired.

Thank you.

Mr. JOHNSON of Georgia. Thank you.

Docket monitoring technology has made some Snap Removals a race against the clock that comes down to mere minutes. I would like to hear your thoughts on whether that is how—that was how the legislature intended this rule to be in effect. What are your thoughts on that, Mr. Stoffelmayr?

Mr. STOFFELMAYR. So I understand from the literature there is not——

Mr. JOHNSON of Georgia. Is that the way that the rule is supposed to work?

Mr. STOFFELMAYR. Well, I am confident in 1948, nobody—you know, nobody had a computer. There was no such thing as an electronic docket. So surely nobody had that specific intention. That is not the same thing, though, as——

Mr. JOHNSON of Georgia. And in fact, there was an assumption that you are going to have 2, 3, 4, 5 days after the case is filed to perfect service. That was the presumption?

Mr. STOFFELMAYR. I don't know. I mean, I can't say what was the presumption in 1948.

Mr. JOHNSON of Georgia. But, it certainly wasn't Snap Removal?

Mr. STOFFELMAYR. There was certainly an assumption in 1948 that it would be proper to remove before someone else has been served. Two things have changed since 1948, of course. It is easier to get information about new filings. It is also much, much easier and quicker to accomplish service. Both of these things happen much more quickly today than they did in 1948.

But the other thing I would like to address for a second is—oh, sorry.

Mr. JOHNSON of Georgia. Yes, I wish I could listen to what you have to say, but I need to move on because I am limiting myself to the 5 minutes others were limited to.

But Professor Hellman, I want to thank you for your thoughtful proposed legislation. Professor Pfander challenges your proposal by invoking the adage that an ounce of prevention is worth a pound of cure. How do you respond to that?

Mr. HELLMAN. Thank you, Mr. Chairman.

First, I should say that Professor Pfander is a friend and colleague whom I greatly respect, but I have two responses to that comment.

First, the adage about an ounce of prevention is certainly good advice in some circumstances, but not always. If the preventive medicine will have some side effects, and you don't know how many people will experience them or how bad they will be, it may be better to rely on the cure.

Second, I think the snapback proposal will have substantial preventive effects. A defendant like Stryker, as Ms. Relkin has described, may be willing to direct its process receiver to hide from the process server for 2 or 3 hours. But 2 or 3 days, 2 or 3 weeks, when, at the end of that time, the plaintiff will serve process, and under the snapback provision, the case must be remanded, that would not be rational behavior.

So I think that if the snapback provision is in effect, it will prevent many, if not all, Snap Removals.

Mr. JOHNSON of Georgia. Thank you.

Professor Pfander, judging from recent history, even a minor change to the removal statutes can spark contentious, tangled disputes that take years for the courts to work out. Why shouldn't the risk of unintended consequences counsel us against adopting any of your preventive proposals?

Mr. PFANDER. Well, I wouldn't suggest that we adopt them without thinking them through very carefully. And so just as we would want to think through Professor Hellman's proposal and think about the consequences of snapback it, it would also, I think, make sense to consider what the potential consequences of a change to the "and served" language might be or a decision to add a requirement that the removal await until one of the defendants has actually been served with process.

That approach is it does take us, to some extent, back to 1948 because, in 1948, no one knew about the pendency of the litigation until someone was served. The plaintiff had a choice about which of the defendants to serve and service would notify the world about the existence of the litigation.

And so we can rely to some extent on the traditional wisdom of that approach to managing the relationship between plaintiff and defendant, but again, I wouldn't suggest that we do it willy-nilly.

Mr. JOHNSON of Georgia. Thank you.

And lastly, we have talked about the issue of fraudulent joinder, but Ms. Relkin, I want to make sure we are all clear on why the legislation that is proposed in this hearing is needed. What will happen if Congress doesn't act to address Snap Removals?

Ms. RELKIN. State court jurisdiction and State court as a forum will go away. Many, many plaintiffs will be deprived of the ability to ever have a case in State court.

State courts where the corporations are headquartered have a duty to regulate the conduct of their own corporate citizens and other citizens, and they will not be able to develop the law as they see fit because it is only going to be adjudicated by Federal courts.

And when Federal courts are addressing an issue, they only are supposed to be applying State substantive law, Federal procedure. If they are looking at a State substantive law issue and the State courts haven't had an opportunity to rule on it, it is novel, they don't know what is their obligation. What Federal courts do is they then certify the question back to the State courts' highest court to answer it.

So we are going to have the situation where new and evolving legal issues happen, particularly now with data breach and, you know, advancing technologies, without any evolution of State court law, with Federal judges guessing what the State judges would decide. And it is, you know, our system of federalism, it is the State courts that are supposed to be deciding this.

So we are going to have a problem with knowing what the law is, and injured plaintiffs are not going to have the opportunity to have their court heard where the very defendant who committed the alleged tort or contract breach or whatever performed it.

Mr. JOHNSON of Georgia. Well, I am sure that there would be those who don't want the highest State courts legislating from the bench when they get asked these questions about what State law should be or what it would be if there is such a statute or case law in place.

So, I want to thank the witnesses for all being here today. This concludes——

Mrs. ROBY. We have Mr. Cline.

Mr. JOHNSON of Georgia. Oh, I am sorry. Okay. Mr. Cline? [Laughter.]

Mr. JOHNSON of Georgia. Mr. Cline. Okay. So next we will resort to 5 minutes of questioning from the gentleman from Arizona?

Mr. CLINE. Virginia.

Mr. JOHNSON of Georgia. Virginia.

Mr. CLINE. Thank you, Mr. Chairman. [Laughter.]

Mr. JOHNSON of Georgia. I get it wrong every time.

Mr. CLINE. No, I appreciate the opportunity——

Mr. JOHNSON of Georgia. Thank you.

Mr. CLINE [continuing]. And I thank the witnesses for being here.

I have been listening with interest, and Professor Hellman's proposal is an interesting one, and I would ask Ms. Relkin to respond to it. Do you think that this type of snapback proposal would address a lot of the problems that we face currently?

Ms. RELKIN. Yes, I do think it would be a legislative solution. Whether it is the best or whether different variants that have been discussed are better I think would require a lot of thought.

But by having the snapback, it takes away this crazy incentive to have robots and paralegals, and not lawyers, who are certifying that it is a good faith removal just remove a case without any

thought because they know that since plaintiffs would have the opportunity to then effect the service within normal human timeframe, that would happen.

The whole idea of the removal before—removal provision under the forum defendant rule is to make sure that you don't have a case, as Mr. Stoffelmayr was talking about, where a defendant was named in a complaint but was not served because the plaintiff had no intention of actually prosecuting that action.

So this fixes it because if they truly intended to have a legitimate claim against that defendant, they will have the time to name them. So it is an appropriate solution, but there are other ways to address this problem as well that I think the legislative drafters need to address, and we would be happy to consult as time goes on.

Mr. CLINE. And Professor Pfander's suggestion to move in the other direction, what do you see as potential harm or benefit of that?

Ms. RELKIN. I think both solutions would work. They are just different ways to address it. You know, prevention is worth an ounce of cure, but it is also true when you change other things, you never know what unintended consequences, just like the unintended consequence of the removal before service. Because in 1948, they certainly were not thinking about electronic service and instantaneous service.

Mr. CLINE. I believe that you—I will ask Mr. Stoffelmayr. Ms. Relkin mentioned that she didn't see the existence of use of local defendants or strawmen to exploit the forum defendant exception as a common problem. I will ask Ms. Relkin first. Did you say that?

Ms. RELKIN. Yes. In my experience, it is not. I have not personally done that, and I haven't seen it. There was a situation in—which I think has been changed by virtue of what the Missouri Supreme Court and legislature have done. There were some situations in Missouri where they had joinder with, you know, you could name like 99 plaintiffs and only 1 from the State of Missouri and 1 in-State defendant. And that has been changed.

I mean, I think that is the example that Mr. Stoffelmayr is referring to, and that problem that the defendant saw there has been fixed.

Mr. CLINE. Mr. Stoffelmayr, do you agree or disagree with that?

Mr. STOFFELMAYR. No, I would respectfully disagree with that. The Missouri situation with the multiple plaintiffs, that actually—that turned on a different question having to do with the exercise of personal jurisdiction.

What I was referring to would be cases in which literally thousands, you know, there are consolidated proceedings in the California State courts, and they involve 5,000 plaintiffs. Four thousand five hundred of those may be from out of State, and the way in which removal was avoided was by naming a local distributor. And that has happened in any number of cases and continues to happen.

And Ms. Relkin, you know, referred to changes in the law of personal jurisdiction, which may, over time, make that less common. One would have thought that had already become uncommon, and unfortunately, that doesn't seem to be the case. Courts have ap-

proached that question more flexibly than maybe people had initially thought.

Mr. CLINE. Ms. Relkin, would you agree that——

Ms. RELKIN. The Supreme Court, in the Bristol-Myers Squibb decision in 2017, has addressed that. What happened there was there were plaintiffs from different States and some California plaintiffs who filed in California. The in-State defendant was the major distributor McKesson, and the Supreme Court—the U.S. Supreme Court has determined that there was not personal jurisdiction.

Those plaintiffs didn't have jurisdiction against McKesson, and they were basically thrown out of State court. So the Bristol-Myers Squibb case has resolved the concern of the defense law there. So I don't think there is a problem anymore, except for Snap Removal.

Mr. CLINE. Thank you. Thank you, Mr. Chairman.

Mr. JOHNSON of Georgia. Thank you.

This concludes today's hearing. I want to thank the witnesses for your testimony today.

And without objection, all Members will have 5 legislative days to submit additional written questions for the witnesses or additional materials for the record.

And with that, the hearing is adjourned.

[Whereupon, at 3:18 p.m., the subcommittee was adjourned.]

APPENDIX

FEDERATION OF DEFENSE & CORPORATE COUNSEL

FDCC

DEFENSE LAWYERS. DEFENSE LEADERS.

November 12, 2019

Via Electronic & Overnight Mail

Honorable Jerrold Nadler
Chair
US House of Representatives
Committee on the Judiciary

Honorable Doug Collins
Ranking Member
US House of Representatives
Committee on the Judiciary

Honorable Henry C. "Hank" Johnson
Chair
Subcommittee on Courts, Intellectual Property and the Internet

Honorable Martha Roby
Ranking Member
Subcommittee on Courts, Intellectual Property and the Internet

US House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515

US House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515

Re: Subcommittee on Courts, Intellectual Property, and the Internet
Hearing on: Examining the Use of "Snap" Removals to Circumvent the Forum Defendant Rule
November 14, 2019

Dear Chairman Nadler:

The Federation of Defense & Corporate Counsel is comprised of 1,021 of the premier civil defense trial attorneys in the United States and is dedicated to ensuring that access to the state and federal courts in this country remains an unfettered and fundamental right to all citizens. In this respect, we have the privilege of providing this insight from the defense trial attorneys' perspective on the Hearing to be held this week by the Subcommittee on Courts, Intellectual Property and the Internet.

The Subcommittee is properly examining this issue, in light of its continued and valuable work on assessing *The Federal Judiciary in the 21st Century: Ensuring the Public's Right of Access to the Courts*, as noted by the recent Hearing held on September 26, 2019, *and Ideas for Promoting Ethics, Accountability and Transparency* on June 21, 2019. Chairman Johnson rightly provided the over-riding theme for these Hearings by quoting the time-honored admonition in his

remarks during the September 26th Hearing, "[n]ot only must Justice to be done, it must also be seen to be done."[1] It is against this principle that this issue also should be considered.

Our colleagues on the other side of the bar seem to have redefined the circumstances involving the right to pre-service and proper removal of cases filed in the state courts as "snap" removals. Such temporal categorization of the fundamental right may seek to evoke an adverse implication or the suggestion that a loop-hole exists, without further examining its prudency under the statutory mandate governing its limited uses and the public protections under which the right to removal is pursued.

They have similarly sought to advance a proposal that would adversely impact a defendant's right to due process, and which would result in a defendant constructively or impliedly having consented to waiving service of process retroactively. The general rule of waiver applied by both state and federal courts is that a finding of waiver must be prefaced upon a party having voluntarily and intentionally relinquished a known right. The statutory imposition of such a result is certainly not the kind of impact due process would countenance.

The right to remove a particular matter and afford out of state litigants' access to a neutral forum is ingrained as a fundamental, statutory right. Article III, Section 2 of the US Constitution; 28 U.S.C. § 1332(a)(1); and 28 U.S.C. 1441(b)(2) provide that the federal courts have subject-matter jurisdiction over cases involving disputes between "citizens of different States." In such situations, such diversity of citizenship must be complete as between the plaintiff(s) and the defendant(s) and the amount in controversy must be greater than $75,000. Where such removal does not meet the statutory requirements, or where removal may have been improvidently taken, application can be made to the federal court to have the matter remanded back to state court where it was initially filed.

It also strains credulity to assert that application of the present removal provisions by the Courts may be violative of a plaintiff's right to equal protection under the substantive law. As this Committee and Subcommittee are aware, every federal court having accepted a Motion for Removal of a lawsuit and sitting in diversity will apply the substantive law of the state in which the Court is located.[2] Therefore, if a plaintiff has chosen to file an action in a particular state court, and a defendant has properly removed the matter to the federal district court in that state, it is that state's substantive laws that will be fairly applied to the issues set forth in the suit.

The public and judicial protections afforded by Fed.R.Civ.P, Rule 11(b) and (c) provide that the Federal Court may impose sanctions upon any party and/or its counsel for violating the Rule that a Motion for Removal may have been *inter alia* improvidently taken, or has been filed so as to harass, cause unnecessary delay or needlessly increase the cost of litigation. All of these

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[1] Quoting *R v Sussex Justices, ex parte McCarthy,* 1 KB 256 (1924), All ER Rep 233 (1923)

[2] *See, Erie Railroad Company v. Tompkins,* 304 U.S. 64, 58 S. Ct. 817; 82 L. Ed. 1188 (1938) U.S. LEXIS 984 and its progeny. "There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State, whether they be local in their nature or "general," be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts." *Id.,* 304 US 64, 78.

provisions advance the fundamental and necessary standards of fair play and substantial justice as the foundation upon which the actions of all Counsel and parties must be based.

Despite the protests to the contrary, there has not been a single instance advanced before the Committee, nor are we aware of one, in which it can be said that a plaintiff's rights were frustrated, or its access to a neutral forum have been constrained, through maintaining the existing statutory precepts of removal whether exercised in those limited situations before service has been perfected, or afterwards. Adopting any change would only result in creating uncertainty and improperly shifting the currently balanced procedural rights of the respective parties.

In light of all the foregoing, we respectfully urge the Committee to maintain the existing statutory and operative framework and preserve the principled right of removal under the appropriate circumstances. We also respectfully wish to adopt herein by way of reference, the comments and testimony of the Lawyers for Civil Justice and the Defense Research Institute. We thank the Subcommittee and Committee for its leadership and stand ready to provide any additional information, in-person testimony, and to work further with the Committee on this and any of its other initiatives.

Yours respectfully,

Elizabeth Lorell
FDCC President

Hearing on "Examining the Use of 'Snap' Removals to Circumvent the Forum Defendant Rule"

Question for the Record
Rep. Henry C. "Hank" Johnson, Jr., Chairman

1. Are there any additional points or submissions you would like to make in response to the questions asked at the hearing?

Hearing on "Examining the Use of 'Snap' Removals to Circumvent the Forum Defendant Rule"

Question for the Record
Rep. Henry C. "Hank" Johnson, Jr., Chairman

Response by Witness Ellen Relkin, Esq.

1. Are there any additional points or submissions you would like to make in response to the questions asked at the hearing?

Response

Dear Chairman Johnson:

Thank you for this opportunity to supplement the record. At the hearing, I related some examples from my personal experience of corporate defendants' abuse of the "snap" removal tactic, among them, Howmedica Osteonics Corp. d/b/a Stryker Orthopedics' ("Stryker") recent improper "snap" removal of more than a dozen cases from New Jersey state court, despite being headquartered in New Jersey and having already been served via its registered agent for service, CT Corporation ("CT"), in each case. Stryker has argued that service on the registered agent is not effective service, an argument that highlights the problem the registered agent poses for a corporate defendant wishing to snap remove, as my respected adversary Mr. Stoffelmeyer appeared to acknowledge in his testimony: "It is the easiest thing in the world to serve a registered agent for service."

It has since come to our attention that CT, a subsidiary of Wolters Kluwer, and the registered agent for hundreds of thousands of corporations nationwide, has recently instituted a new policy requiring process servers to "register" a service "job" on an online portal *before* they can physically serve CT with process. CT will not accept service unless the process server has a "job number" matching a "job" that was pre-registered on the online portal.

This new policy is ostensibly aimed at reducing confusion and discrepancies between CT and process servers as to what entity was served on a given date. However, I am concerned that the policy has been instituted, at least in part, to enable CT to alert its corporate clients when service is about to be effected in a state court action. The policy requires process servers to enter the case number on the portal, which has two effects: (1) the case must be filed *before* the process server can even register the service "job"; and (2) CT can tell, simply by looking at the case number, whether the action was filed in federal court or state court. Thus, CT can now inform its corporate clients that a state court action has been filed and provide them with the docket number, giving corporate defendants a

chance to "snap" remove before service is effected, even by a diligent plaintiff attempting to serve the registered agent immediately after filing the complaint.

This raises concerns of whether, in light of this new policy, CT's corporate clients can still be deemed to even be in compliance with state laws requiring resident corporations to accept service through their registered agents. Moreover, it appears that this new policy could be part of a contrivance between CT and its many corporate clients to facilitate "snap" removals and deprive injured plaintiffs of the court of their choosing. This troubling development also further highlights the importance of Congress's adoption of proposed H.R. 5801, which I fully support. Without this change, I fear corporations will continue to root out every last bastion of access to state court for injured plaintiffs.

Thank you again for the opportunity to appear before you, and I thank the Subcommittee for its efforts to address the problem of "snap" removal.

Respectfully submitted,

Date: 3/6/20

Ellen Relkin

Supplementary Statement of

Arthur D. Hellman
Professor of Law Emeritus
University of Pittsburgh School of Law

House Committee on the Judiciary
Subcommittee on Courts, Intellectual Property, and the Internet

Hearing on
Examining the Use of "Snap" Removals to
Circumvent the Forum Defendant Rule

November 14, 2019*

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* On February 4, 2020, Representative Henry C. "Hank" Johnson, Jr., the Chairman of the Subcommittee, invited me to submit "additional points or submissions … in response to the questions asked at the hearing." This Supplementary Statement responds to that invitation.

February 18, 2020

Outline**

** Thanks to Steven Gensler, Lonny Hoffman, James E. Pfander, Thomas D. Rowe, Jr., Joan Steinman, and, especially, Brendan McDonough for comments on earlier drafts of this supplementary statement and of the revised statutory proposal it contains.

Introduction and Summary

The forum defendant rule, embodied in 28 U.S.C. § 1441(b)(2), prohibits removal of civil actions based on diversity of citizenship jurisdiction "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." Pointing to the phrase "properly joined and served," defendants have argued that § 1441(b)(2) does not bar removal of a diversity action if a citizen of the forum state has been joined as a defendant but has not yet been served. The stratagem of removing before service to avoid the prohibition of § 1441(b)(2) is known as "snap removal." Two courts of appeals and many district judges have held that snap removal is permissible; other district judges have held that it is not.

On November 14, 2019, the Subcommittee on Courts, Intellectual Property, and the Internet of the House Judiciary Committee held a hearing to examine the practice of snap removal.[1] Three of the four witnesses agreed that snap removals are contrary to the intent of Congress as manifested in the forum defendant rule and that action by Congress is needed to close the loophole.[2] Two different kinds of action were suggested. Professor James Pfander outlined three proposals, each of which would require amending the text of an existing subsection of the Judicial Code.[3] I offered one proposal, a standalone addition to the Code that would create what has been called a "snapback" mechanism.

The snapback mechanism is designed to operate as a kind of time machine. It sends the parties back to where they were at the moment before the defendant snap-removed, and it gives the plaintiff a chance to complete the service of process that would have prevented the removal under § 1441(b)(2). The case stays in federal court only long enough for the plaintiff to take the steps

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[1] This supplementary statement assumes familiarity with the issue as discussed in the statements submitted for the hearing record. All of the statements, as well as a webcast of the hearing, can be found at https://judiciary.house.gov/legislation/hearings/examining-use-snap-removals-circumvent-forum-defendant-rule. Parts I through III of my statement provide background. See https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3489213.

[2] The fourth witness disputed the existence of a problem requiring Congressional action. For a brief response to his arguments, see infra Part III.

[3] All references to Professor Pfander's statement are to the text posted on the House Judiciary Committee website. https://docs.house.gov/meetings/JU/JU03/20191114/110208/HHRG-116-JU03-Wstate-PfanderJ-20191114.pdf.

that will allow the case to return to state court, where all further proceedings will take place.

I believe that the snapback mechanism will address the problem described at the hearing without opening new loopholes or generating uncertainty about other aspects of removal practice. In contrast, each of the alternative proposals would create serious risks of reopening settled law and disrupting removal practice in ways that cannot be anticipated.

On February 7, 2020, Rep. Henry C. "Hank" Johnson, Jr., Chairman of the Subcommittee, introduced H.R. 5801, the "Removal Jurisdiction Clarification Act of 2020."[4] H.R. 5801 embodies a revised version of the snapback proposal outlined at the hearing.[5]

This supplementary statement addresses the major issues raised at the hearing. Part I analyzes the proposals offered by Professor Pfander. Part II offers a revised version of the snapback proposal, with commentary on the policy and drafting choices that it reflects. Part III responds briefly to the arguments made by the hearing witness who disputed the need for legislative action. Part IV addresses Professor Pfander's tentative suggestion that Congress "assign some authority over the details of removal and remand procedure to a rule-making body within the Judicial Conference of the United States."

I. Text Editing or a Standalone Fix?

In his statement for the hearing, Professor Pfander offered three proposals that he characterized as "preventative" approaches to snap removal.[6] As already noted, each of the three would require amending the text of an existing section of the Judicial Code. Professor Pfander acknowledged that the text editing approach implicates "the problem of unintended consequences" and runs "the risk of inadvertently creating new problems." That cautionary note applies to all three of the "preventative" proposals in the statement. In addition, each of the three is problematic in its own way.

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[4] The bill has 13 co-sponsors, including Rep. Jerrold Nadler, Chairman of the Judiciary Committee.

[5] For the text of the bill, see https://www.congress.gov/116/bills/hr5801/BILLS-116hr5801ih.pdf.

[6] Professor Pfander has authorized me to say that in his statement he was offering possible approaches developed by others to be considered by the Committee. He was not necessarily endorsing any of the proposals he described.

A. Text editing and the risk of unintended consequences

As I suggested in my initial statement, any attempt to change the law through what might be called "text editing" – adding, deleting, or changing words in existing statutory text – runs a serious risk of inadvertently unsettling other doctrines of removal law. Removal law is complex and interconnected. The statutory language provides only a framework; most of the law is contained in a vast corpus of decisions, many of which deal with issues that remain almost invisible because they have never reached the Supreme Court.

The dangers inherent in the text-editing approach are exemplified by a recent development involving the Removal Clarification Act of 2011. A "conforming amendment" that was part of the Act inserted three words – "or relating to" – into the preexisting text of the federal officer removal statute, 28 U.S.C. § 1442(a)(1). The purpose of adding the three words was very narrow:

> to clarify that state pre-suit discovery proceedings are removable even though the state proceeding is not technically "for" the conduct of a federal officer performing his or her official work, but merely seeks information from the federal officer, that is, the proceeding is a of a type that "relates to" the conduct of a federal officer.[7]

That limited purpose was understood by all participants in the drafting process and was made explicit at the hearing on a predecessor bill.[8] The language was reviewed by two law professors (including myself), the General Counsel of the House of Representatives, and a Deputy Assistant Attorney General in the Department of Justice. No one thought that the bill, or the three-word insertion, would do more than fix the narrow problem that was the subject of the hearing. Indeed, the principal drafter of the bill emphasized that "[t]he bill leaves in place the current law and practices governing federal officer removal in nearly all respects."[9]

Notwithstanding this careful process, several courts have interpreted the three-word insertion to effect a significant expansion of the right of removal,

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[7] En Banc Amicus Curiae Brief of U.S. Congressman Henry C. "Hank" Johnson, Jr., in Support of Appellee and Affirmance at 10, *Latiolais v. Huntington Ingalls, Inc.*, No. 18-30652 (5th Cir. July 12, 2019). Rep. Johnson was the sponsor of the bill.

[8] See id. at 10-12 (summarizing statements at hearing).

[9] *H.R. 5281, "Removal Clarification Act of 2010"*: Hearing Before the Subcommittee on Courts and Competition Policy of the House Committee on the Judiciary at 16 (2010) (statement of Irving Nathan).

available not only to government officials, but also to government contractors.[10] There could not be a better illustration of the "unintended consequences" that can flow from revising a longstanding statutory text. Congress should not pursue that approach when a narrowly tailored fix is available, as it is here.

B. Three text-editing proposals

Apart from the general concern about unintended consequences, each of the proposals outlined by Professor Pfander raises problems of its own.

1. Deleting the service requirement in 28 U.S.C. § 2241(b)(2)

The first proposal discussed by Professor Pfander is to delete the words "and served" from the phrase "properly joined and served" in § 1441(b)(2). Preliminarily, Professor Pfander's cautionary note about unintended consequences applies in full force to this suggestion. The language in question – "properly joined and served" – has been part of the statute for more than 70 years.[11] Hundreds of decisions have interpreted it. No one can be certain which judicial constructions would be called into question if the language were altered. It is simply not possible to turn the clock back to 1948, before the current wording was adopted, and restore whatever understanding may have existed of the words "properly joined" without "and served."

But it is not necessary to rely solely on the risk of unintended consequences, because there are also particular reasons for not abrogating the service requirement in § 1441(b)(2). As the Third Circuit explained, Congress adopted the "properly joined and served" language "to prevent a plaintiff from blocking removal by joining as a defendant a resident party against whom it does not intend to proceed, and whom it does not even serve."[12] Deleting the words "and served" would encourage the gamesmanship that Congress intended to prevent when it added the words in 1948.

Moreover, abrogating the service requirement of § 1441(b)(2) would not necessarily eliminate litigation over compliance with the forum defendant rule, at

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[10] See *Latiolais v. Huntington Ingalls, Inc.*, 918 F.3d 406, 413-14 (5th Cir. 2019) (Jones, J. concurring) (citing cases), rehearing en banc granted, 923 F.3d 427 (5th Cir. 2019).

[11] The wording of the statute was changed by the Federal Courts Jurisdiction and Venue Clarification Act of 2011, but the phrase "properly joined and served" was retained intact.

[12] *Encompass Ins. Co. v. Stone Mansion Restaurant Inc.*, 902 F.3d 147, 153 (3rd Cir. 2018) (citation omitted).

least where the plaintiff sues both forum and non-forum defendants. To be sure, in that situation, none of the defendants could attempt snap removal. But if the plaintiff has asserted insubstantial or thinly grounded claims against the forum defendant, the out-of-state defendant might remove anyway based on an argument that the local defendant has been *improperly* – i.e. fraudulently – *joined.*[13] Litigating that question is likely to be more difficult and costly than litigating snap removal.[14] Indeed, the Second Circuit made that very point:

> Congress may well have adopted the "properly joined and served" requirement in an attempt to both limit gamesmanship and provide a bright-line rule keyed on service, which is clearly more easily administered than a fact-specific inquiry into a plaintiff's intent or opportunity to actually serve a home-state defendant.[15]

Professor Pfander downplays the concern that deleting the "and served" language "would encourage the assertion of more frivolous claims against jurisdictional spoilers." He believes that the fraudulent joinder doctrine will limit "attempts by plaintiffs to join jurisdictional spoilers to prevent removal." But in making this argument, he explicitly assumes that to defeat removal when the defendant asserts fraudulent joinder, "the plaintiff must assert substantial claims against all of the [spoiler] parties." (Emphasis added.) That is not the law in any

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[13] Although the fraudulent joinder doctrine is more frequently applied to defendants who share citizenship with the plaintiff, it also comes into play when the "spoiler" is a citizen of the forum state, and the doctrine is generally applied in the same way. As a district court in Missouri observed a few years ago, "The standards for determining whether a *resident* defendant is fraudulently joined are the same as the standards for determining whether a diversity-destroying defendant is fraudulently joined." *Byrd v. TVI, Inc.*, 2015 WL 5568454 (E.D. Mo. Sept. 21, 2015) (emphasis added). Accord, *In re Ethicon, Inc., Pelvic Repair Sys. Prods. Liab. Litig.*, 2013 WL 6710345 at *3 n. 2 (S.D. W. Va. Dec. 19, 2013) ("In *Musewicz*, the issue is diversity of citizenship, while in *Hammons* and *Delacruz*, the issue is the home state defendant rule. However, the fraudulent joinder analysis remains the same in both instances."); *Aguayo v. AMCO Ins. Co.*, 59 F. Supp. 3d 1225, 1257 (D. N.M. 2014) ("the Court sees no principled reason to limit fraudulent-joinder doctrine's application to the joining of nondiverse parties to defeat complete diversity, while excluding the functionally identical practice of fraudulently joining forum-citizen defendants to defeat the forum-defendant rule."). But see *Morris v. Nuzzo*, 718 F.3d 660 (7th Cir. 2012) (questioning equivalence but not deciding the issue).

[14] In some cases in which courts have allowed snap removal, the court noted that it did not need to address the defendant's alternative argument that the "spoiler" had been fraudulently joined. E.g., *Howard v. Crossland Const. Co.*, 2018 WL 2463099 at *3 (N.D. Okla. June 1, 2018); *Pathmanathan v. Jackson Nat'l Life Ins. Co.*, 2015 WL 4605757 at *5 n.1 (M.D. Ala. July 30, 2015).

[15] *Gibbons v. Bristol-Myers Squibb Co.*, 919 F.3d 699, 706 (2nd Cir. 2019)

circuit. Far from it; typically the defendant must show that there is "no possibility" that state law would impose liability on the spoiler.[16] The fraudulent joinder doctrine thus provides little protection against the assertion of insubstantial claims against a spoiler as a means of precluding removal through the forum defendant rule.[17]

It would be a serious mistake for Congress to abandon the "bright-line rule keyed on service" in order to combat abuse of the rule by a relatively small number of defendants. The far better approach is to enact a standalone provision that limits snap removal without encouraging gamesmanship by plaintiffs or disrupting other aspects of removal law.

2. Making the forum defendant rule jurisdictional

The second proposal offered by Professor Pfander is to make the forum defendant rule jurisdictional – "to fram[e] the barrier to removal of cases involving forum defendants in jurisdictional terms." If that were done, he explains, the forum defendant rule would "resemble the jurisdictional rule of complete diversity, which operates as a barrier to removal that snap removal cannot overcome."

This would be a substantial change from current law, and in my view a highly undesirable one. In all but one of the ten circuits to have considered the question, the courts of appeals have held that the forum defendant rule is not jurisdictional.[18] Although the courts have decided the question as one of statutory construction, they have also adverted to policy concerns. For example,

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[16] See, e.g., *Henderson v. Washington Nat'l Ins. Co.*, 454 F.3d 1278, 1283 (11th Cir. 2006) ("we may deny the motion [to remand a case on fraudulent grounder grounds] only if the defendants have proven by clear and convincing evidence ... that there is *no possibility* that [plaintiff] can establish a cause of action against the resident defendant") (cleaned up) (emphasis in original); *In re Briscoe*, 448 F.3d 201, 217 (3rd Cir. 2006) ("if there is *even a possibility* that a state court would find that the complaint states a cause of action against any one of the resident defendants, the federal court must find that joinder was proper and remand the case to state court") (emphasis added). Even under the Innocent Party Protection Act, passed by the House in 2017, the defendant would have to show that the claim against the spoiler was "not plausible." See H.R. 725, 115th Cong. § 2 (2017). That certainly would not require the plaintiff to show that the claim was "substantial."

[17] For further discussion of fraudulent joinder, see infra Part III.

[18] *See Lively v. Wild Oats Markets, Inc.*, 456 F.3d 933, 940 (9th Cir. 2006) (collecting cases). The outlier is the Eighth Circuit. See *Horton v. Conklin*, 431 F.3d 602, 605 (8th Cir. 2005); see also infra note 20.

as the Ninth Circuit observed, a procedural characterization of the forum defendant rule honors the purpose of the rule, "because the plaintiff can either move to remand the case to state court within the 30–day time limit [of § 1447(c)], or allow the case to remain in federal court by doing nothing. Either way, the plaintiff exercises control over the forum."[19]

Making the forum defendant rule jurisdictional would mean that the rule could never be waived or forfeited, no matter how late in the litigation the presence of a forum defendant was discovered.[20] It would be equally irrelevant that one of the parties had deliberately concealed facts relating to its citizenship.[21] A rigid rule of that kind would be particularly troublesome in an era when litigation often involves unincorporated associations, whose citizenship is determined by the citizenship of each of its members.[22] There are LLCs whose members are LLCs, and so forth up the chain.[23] It would be extremely inefficient if, after years of litigation, the parties had to start all over again because no one had previously realized that one ultimate non-LLC member was a citizen of the forum state.[24]

As with the first proposal in Professor Pfander's statement, this one would affect a wide range of cases in which no defendant is abusing the forum defendant rule. Congress should not take that step unless there is no other way to combat the abuse.

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[19] *Lively*, 456 F.3d at 940.

[20] See *Doe XY v. Shattuck-St. Mary's School*, 2015 WL 269034 *1 (D. Minn. Jan. 21, 2015) (plaintiff asserted that violation of forum defendant rule was harmless, and he did "not object to remaining in federal court," but court found that "remand cannot be avoided" because Eighth Circuit treats the forum defendant rule as jurisdictional).

[21] See *Owen Equipment Co. v. Kroger*, 437 U.S. 365, 377 n.21 (1978) ("Our holding is that the District Court lacked power to entertain the respondent's lawsuit against the petitioner. Thus, the asserted inequity in the respondent's alleged concealment of its citizenship is irrelevant.").

[22] See, e.g., *Zambelli Fireworks Mfg. Co. v. Wood*, 592 F.3d 412, 420 (3d Cir. 2010).

[23] See id. (noting that "where an LLC has, as one of its members, another LLC, the citizenship of unincorporated associations must be traced through however many layers of partners or members there may be to determine the citizenship of the LLC") (cleaned up).

[24] I recognize that a proposed amendment to the Federal Rules of Civil Procedure (currently in the public-comment stage) would require a party in a case based on diversity jurisdiction to disclose the citizenship of "every individual or entity whose citizenship is attributed to that party at the time the action is filed." Even if the rule is adopted, complex ownership arrangements could still result in inadvertent mischaracterizations of citizenship.

3. Prohibiting removal before service

The third text-editing proposal is that Congress amend § 1446 to prohibit removal before the removing defendant has been served. This suggestion – which Professor Pfander credits to Professor Kevin Clermont of Cornell Law School – would, like the others, constitute a sharp departure from current law. The Court of Appeals for the First Circuit, in a thorough opinion four years ago, found that "every one" of the federal courts to consider the question since the Supreme Court construed the statute in 1999[25] had concluded "that formal service is not generally required before a defendant may file a notice of removal."[26]

Professors Clermont and Pfander seem to suggest that prohibiting removal before service would be easy to implement, but I do not think that is so. The limitation would be an amendment to either § 1446(a) or § 1446(c)(2).[27] Congress would have to integrate the new prohibition with the carefully constructed timing scheme enacted in the Federal Courts Jurisdiction and Venue Clarification Act of 2011 (JVCA). I helped to draft the JVCA, and I can testify that it took quite a bit of effort to get all of the moving parts in § 1446 to fit together. The task would be even more complex if Congress had to consider another set of moving parts for the starting dates for the removal periods. And the greater the complexity, the higher the likelihood that the drafters will miss some combination of circumstances and create new problems and litigation points down the line.

The prospect of unintended consequences looms especially large because the proposed amendment to § 1446(a) would not be limited in its application to snap removals. The new prohibition would apply to all diversity removals, all federal question removals, and indeed to federal officer removals under § 1442. To be sure, Professors Clermont and Pfander contemplate that the restriction might be limited to diversity suits. Yet even if that were done, the new law would still apply not only to evasive defendants like the medical device companies whose stratagems were described at the hearing, but also to defendants with completely legitimate grounds for removal who have a right to be in federal court and want to get there as soon as possible.

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[25] See *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344 (1999).

[26] *Novak v. Bank of N.Y. Mellon Trust Co. N.A.*, 783 F.3d 910, 914 (1st Cir. 2015).

[27] The professors suggest the latter as a means of limiting the change to diversity suits, but the primary proposal is an amendment to § 1446(a), applicable to all removals of civil actions. See discussion infra.

It would be a great mistake for Congress to change the law and impose this new limitation on all defendants – or even all defendants in diversity cases – because a relatively small number of defendants have arguably abused the system in a narrow and discrete category of cases. (Not only narrow and discrete, but atypical – atypical in that the plaintiff has chosen to bring suit outside his or her home state.)[28] The better approach is to craft a precisely tailored fix that will solve the problem of snap removal without changing – or even raising questions about – other aspects of removal practice.

C. Prevention and cure

In his written statement and again in his testimony at the hearing, Professor Pfander invoked the adage that "an ounce of prevention is worth a pound of cure." I have worked with Professor Pfander on other projects, and I have great respect for him as a Federal Courts scholar. But I think that this suggestion is off the mark in two respects.

First, the adage about an ounce of prevention is certainly good advice in some circumstances – but not always. If the preventive medicine will have side effects, and you don't know how many people will experience them, or how bad they will be, it may be better to rely on the cure.

Second, and contrary to the premise of the Professor Pfander's comment, I think the snapback proposal will have substantial preventive effects. A defendant like the medical device manufacturer whose maneuvers were described at the hearing may be willing to direct its process receiver to hide from the process server for two or three hours. But would the corporation send the employee into hiding for two or three days? Or for two or three weeks? When at the end of that time the plaintiff will serve process and under the snapback provision the court must remand?

Such behavior would not only be futile; it would also risk antagonizing the federal judges in the corporation's home state. So I think that if the snapback provision is in effect, it will prevent most if not all snap removals. I turn now to the details of the snapback mechanism.

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[28] See infra Part III.

II. Snapback: The Preferable Solution

The preferable legislative response to snap removal is a standalone addition to the Judicial Code that would allow the plaintiff to counter the stratagem by serving one or more in-state defendants after removal. Under this proposal, if the plaintiff takes that step within 30 days (or within the time for service under state law, if that is shorter) and moves to remand within the 30-day period specified by current § 1447(c), the district court must send the case back to state court.

The proposed solution has been called the "snapback."[29] It closes a loophole that Congress did not anticipate, without creating new loopholes or raising questions about other aspects of removal practice. Except for a minor conforming amendment, it makes no changes in the existing law of removal.[30] In particular:

- The forum defendant rule is retained in its present form. It prevents removal if even one properly joined and served defendant is a citizen of the forum state.
- If a defendant removes in violation of the forum defendant rule, the plaintiff can secure remand under § 1447(c), as the plaintiff can do today.
- If the plaintiff is content to stay in federal court, the plaintiff can complete service under 28 U.S.C. § 1448, again in accordance with current practice.[31]

All that is new is that the plaintiff can secure remand in the narrow class of situations where an in-state defendant has been properly joined, but the defendant removes before any in-state defendant has been properly served. [32]

The proposal is based in large part on the draft legislation included in an article authored by five Federal Courts scholars and published in the Federal

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[29] As noted in my hearing statement, credit for suggesting this term goes to Professor Steven Gensler of the University of Oklahoma Law School.

[30] The new subsection would implicitly confirm that the forum defendant rule is not jurisdictional. This would codify decisional law in all but one of the circuits to have considered the question. For discussion, see infra Parts I-A-1 & II-A-3.

[31] For discussion of § 1448, see infra Part II-B.

[32] Other advantages of the snapback approach are outlined in Part IV-C of my hearing statement. I will not repeat that discussion here.

Courts Law Review in 2016.[33] The proposal has been modified in several respects to address concerns expressed at the hearing and in post-hearing discussions.[34]

The proposal includes three elements: a new subsection to be added to 28 U.S.C. § 1447, the Judicial Code section that deals with procedures after removal; a conforming amendment to 28 U.S.C. § 1448; and an "effective date" provision.

A. New subsection in 28 U.S.C. § 1447

The principal element of the proposed fix is a new subsection (f) to be added at the end of 28 U.S.C. § 1447. It would read as follows.

> (f) **Removal before service on forum defendant**
>
> (1) This subsection shall apply to any case in which
>
> (A) a civil action was removed solely on the basis of the jurisdiction under section 1332(a) of this title, and
>
> (B) 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 no such defendant had been properly served.
>
> (2) The court shall remand the civil action described in paragraph (1) to the state court from which it was removed if –
>
> (A) within 30 days after the filing of the notice of removal under section 1446(a), or within the time specified by state law for service of process, whichever is shorter, a defendant described in subparagraph (1)(B) is properly served in the manner prescribed by state law, and
>
> (B) a motion to remand is made in accordance with, and within the time specified by, the first sentence of subsection (c).

Three aspects of this proposal deserve attention: the structure of the new subsection in 28 U.S.C. § 1447; policy choices that differ from those in the original proposal; and drafting choices.

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[33] See Arthur D. Hellman, Lonny Hoffman, Thomas D. Rowe, Jr., Joan Steinman, & Georgene Vairo, *Neutralizing the Stratagem of "Snap Removal": A Proposed Amendment to the Judicial Code*, 9 Fed. Courts L. Rev. 103 (2016).

[34] See infra note 40 and accompanying text.

1. Structure of the proposed new subsection

The proposed new subsection contains two numbered paragraphs. Paragraph (1) describes the class of cases in which the snapback is permitted, and paragraph (2) specifies the actions by the plaintiff and the district court that will send the case back to state court.

The description in paragraph (1) is narrow and precise; it targets only the class of cases in which defendants have attempted snap removal. Because it is set off in a separate paragraph, it will make the provision easy to find. Because it is so narrow, it reduces to an absolute minimum the likelihood of inadvertently changing the law applicable to other cases.

Paragraph (2) delineates the two actions the plaintiff must take to invoke the snapback – serving one in-state defendant and making a motion to remand – and makes clear that if the plaintiff takes those steps within the time periods specified, the district court must remand the case to the state court from which it was removed.

Conversely, if the plaintiff does not take both steps within the time period specified, § 1447(f) gives the district court no authority to remand. The case is then controlled by other provisions of Chapter 89. In particular, if the plaintiff is content to litigate in federal court, all the plaintiff need do is to serve any unserved defendants (forum or non-forum) in accordance with the law that is otherwise applicable to removed cases.[35] The case will then stay in federal court.

The availability of this last option necessarily establishes that the forum defendant rule is not jurisdictional. As already noted, that position accords with the decisions of all but one of the circuits that have considered the question.[36] It also represents sound policy in light of the purpose of diversity jurisdiction to provide "a neutral forum for parties from different States."[37] By definition, the forum defendant rule comes into play only when the plaintiff is not a citizen of the forum state.[38] To be sure, the plaintiff has filed the lawsuit in state court, but

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[35] See infra note 41 & Part II-B.

[36] See supra Part I-B-2.

[37] See *Home Depot, Inc. v. Jackson*, 139 S. Ct. 1743, 1746 (2019) (noting that diversity jurisdiction provides "a neutral forum for parties from different States when the claims are grounded in state law.").

[38] If the plaintiff is a citizen of the forum state, the complete-diversity requirement would preclude a diversity suit against a forum defendant, and the forum defendant rule will be irrelevant.

if, after removal, the plaintiff prefers the neutral federal forum, there is no reason not to accommodate that preference. As the Ninth Circuit commented in holding that the forum defendant rule is not jurisdictional, allowing the plaintiff to "exercise[] control over the forum" honors the purpose of the rule.[39]

2. Policy choices in the snapback provision

This version of the snapback proposal reflects two policy choices that warrant discussion. These relate to the manner of service and the deadline for perfecting the snapback. I believe that these policy choices – which as noted earlier diverge from those in the original proposal – go far toward answering the criticisms of that proposal made by Professor Pfander in his hearing statement.[40]

Manner of service. The proposed legislation requires the plaintiff to serve at least one in-state defendant "in the manner prescribed by state law." The question arises: why not give the plaintiff the option of using the methods available under federal law – specifically, Rule 4 of the Federal Rules of Civil Procedure? After all, 28 U.S.C. § 1448 gives plaintiff that option in the ordinary run of removed cases.[41]

The answer is that the object of the snapback is to put the parties in the position they would be if the defendant had not jumped the gun and removed before service on the in-state defendant. If the defendant had not jumped the gun, the plaintiff would of course have been required to comply with state methods of service. It therefore seems desirable to adhere to that requirement in the snapback.

Time limit for service. The proposed legislation requires the plaintiff to serve an in-state defendant within 30 days of removal or within the time provided by state law, whichever is shorter. Because it is not self-evident that that is the best approach, it will be useful to explain why the requirement has been defined in that way.

An alternative approach would require that an in-state defendant be served within the same 30-day period specified in subparagraph (2)(B) for filing the

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[39] See supra note 19 and accompanying text.

[40] I appreciate the constructive criticisms by Professor Pfander and others, which have resulted in a substantially improved proposal.

[41] Section 1448 authorizes the plaintiff to complete service begun in state court or to have "new process issued in the same manner as in cases originally filed in [the] district court." For further discussion of § 1448, see infra Part II-B.

motion to remand. That would mean that in a state like New Jersey, where state law requires service to be made within 15 days, the plaintiff would get more time than state law allows. That seems counter to both federalism and efficiency. In this setting, uniformity within the state is more important than uniformity throughout the nation.

At the other end, there is no reason to give more time than 30 days for service, even if state law would allow it. The view of the plaintiffs' bar is that 30 days from snap removal is more than enough time to complete service and file the motion to remand. If the plaintiffs' bar is satisfied with 30 days, it is hard to imagine anyone else arguing that the period should be extended.

Based on this reasoning, the new draft proposes that if a forum defendant is properly served within 30 days after the filing of the notice of removal, or within the time allowed by state law for service of process, whichever is shorter, the civil action will be subject to remand.

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As noted at the outset, under the snapback proposal, the case stays in federal court only long enough for the plaintiff to take the steps that will allow the case to return to state court, where all further proceedings will take place. It therefore makes sense to keep the involvement of federal law to a minimum. That is the approach taken in this proposal with respect to both the timing and the manner of service of process.

3. Drafting choices in the snapback provision

In drafting the proposed § 1447(f), the language has been chosen for maximum integration with other provisions of Chapter 89, particularly the forum defendant rule as embodied in 28 U.S.C. § 1441(b)(2) .

Subparagraph (1)(A). This subparagraph specifies the first-level category of cases to which the paragraph applies. The language – "solely on the basis of the jurisdiction under section 1332(a) of this title" – is taken verbatim from § 1441(b)(2). Two comments are in order. First, it is not clear that the words "of this title" are necessary. Second, "under" could be replaced by "conferred by." Both changes would conform to the approach taken in the revision of 28 U.S.C. § 1446(c) by the Federal Courts Jurisdiction and Venue Clarification Act of 2011. However, since new § 1447(f) is so closely related to §1441(b)(2), it seems preferable to use the formulation in the latter.

Subparagraph (1)(B). This subparagraph specifies the subcategory of diversity cases in which defendants have attempted snap removal: "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 no such defendant had been properly served." Four drafting choices warrant comment.

First, the draft refers to "one or more parties in interest properly joined as defendants." This phrase slightly modifies the language of § 1441(b)(2), which refers to "any of the parties in interest properly joined ... as defendants." It would be possible to use the language of § 1441(b)(2) verbatim, but in this context "one or more" seems clearer. Moreover, "'one or more" fits better with the final reference to "no such defendant," discussed below.

Second, the draft refers to forum state citizenship "at the time of removal." The phrase is not included in § 1441(b)(2), but it is implicit because § 1441(b)(2) is a limit on the removal itself. In contrast, proposed new § 1447(f) deals with steps to be taken after removal. It seems prudent to make clear that what counts is forum-state citizenship at the time of removal.

Third, the draft includes the phrase "but no such defendant had been properly served." This phrase is necessary for a complete definition of the subcategory. If even one forum defendant has been served, there is no need to invoke subsection (f); the forum defendant rule itself will bar the removal. It is preferable to include the qualification to clearly define the universe of cases to which the new provision applies.

Finally, the subsection applies only when no forum defendant has been properly served. "Properly served" is the phrase used in § 1441(b)(2). If the forum defendant rule treats improper service as tantamount to no service, the snapback mechanism should do the same.[42]

Subparagraph (2)(A). This subparagraph requires that the defendant be "properly served in the manner prescribed by state law."

As already noted, "properly served" is the phrase used in § 1441(b)(2). Since new subsection (f) is designed to protect the thrust of § 1441(b)(2), it seems desirable to use the same language.

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[42] I have found very few cases in which a defendant has argued that removal was not barred by the forum defendant rule because a forum defendant had not been properly served at the time of removal. E.g., *Crawford v. Barr Pharmaceuticals, Inc.*, 2019 WL 3288137 (D. N.J. Aug. 29, 2008) (holding that service was proper under state law, so forum defendant rule barred removal).

Some readers of earlier drafts suggested that "a manner" would be preferable to "the manner." The concern is that "the manner" would be read to imply that there is only one way under state law to accomplish service. But if state law, like Rule 4 of the Federal Rules of Civil Procedure, specifies different procedures for different types of defendants or different types of claims, "a manner" could be read as negating those specific directives. I think that "properly served in the manner prescribed by state law" is naturally and plausibly read to mean "properly served in the manner prescribed by state law for the particular defendant and the particular claim."

It should also be clear that "the manner" of service includes all procedural aspects of service, e.g., who may or must serve process, whether service by email or social media is permissible, or how service is to be made upon a corporation or other entity. "Manner of service" excludes timing requirements, which are specified in the first two phrases of subparagraph (2)(A).

Subparagraph (2)(B). This subparagraph requires that the motion to remand be made "in accordance with, and within the time specified by, the first sentence of subsection (c)."[43] The first sentence of § 1447(c) provides: "A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a)." The snapback thus conforms to the timing requirement for motions to remand "on the basis of any defect other than lack of subject matter jurisdiction." This means that the plaintiff has 30 days to seek the remand.

The subparagraph also states that the remand motion must be made "in accordance with" the first sentence of § 1447(c). This language should be read as further confirming that the forum defendant rule is not jurisdictional. As noted earlier, that conclusion is implicit in paragraph (2) as a whole, because the remand order is conditioned on the plaintiff's taking the two required steps within the specified time.[44] But explicitly referencing the first sentence of § 1447(c) reinforces the point.

It may be argued that "in accordance with" would include the 30-day deadline in § 1447(c), so that it is unnecessary to also say "within the time specified by." But the short deadline is such an important part of the legislation that it is desirable to specify it anyway.

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[43] This draft follows the model of § 1446 as revised by the JVCA and refers to "subsection (c)" rather than § 1447(c).

[44] See supra Part II-A-1.

B. Conforming amendment to 28 U.S.C. § 1448

The snap removal legislation should include a conforming amendment to 28 U.S.C. § 1448, which has the title "Process after removal." Section 1448, by its terms, applies, inter alia, to "all cases removed from any State court to any district court ... in which any one or more of the defendants has not been served with process." That phrase precisely describes the cases covered by new § 1447(f). But § 1448 allows service to be made "in the same manner as in cases originally filed in [the] district court." Under current law (Rule 4(m)), that would give the plaintiff 90 days, not 30 days, to serve unserved defendants. It is therefore necessary to amend § 1448 so that it would begin: "Except as provided in section 1447(f), in all cases ..."

Some readers of prior drafts have expressed the view that the proposed conforming amendment is unnecessary. As I understand their position, it is that § 1448 is addressed to actions that will remain in federal court, while new § 1447(f) is aimed at getting cases back to the state court in which they were filed. That is true, but it does not change the fact that the permissive rule of § 1448, made applicable to "all cases" in which a defendant has not been served at the time of removal, is in conflict with the short deadline specified in § 1447(f) for the cases within its ambit. It is therefore necessary to make clear that the permissive rule of § 1448 does not apply to snap removal cases covered by § 1447(f).

Under new § 1447(f) and the conforming amendment, a plaintiff who is content to stay in federal court would still have 90 days to serve process on the in-state defendant. But if the plaintiff wants to use the snapback, he or she must serve within the shorter period specified by § 1447(f)(2)(A).

C. Effective date provision

The snapback bill should include a section specifying the effective date of the new provision. In the Federal Courts Jurisdiction and Venue Clarification Act of 2011, the amendments to Title 28 were made applicable to actions "commenced" 30 days after enactment; however, for removed cases, an action was deemed to commence "on the date the action ... was commenced, within the meaning of State law, in State court." (Emphasis added.) That is probably a good model for legislation dealing with snap removal. Thus, the section might read: "The amendments made by this Act shall take effect upon the expiration of the 30-day period beginning on the date of the enactment of this Act, and shall apply to any action commenced on or after such effective date. An action commenced in State court and removed to Federal court shall be deemed to commence on the

date the action or prosecution was commenced, within the meaning of State law, in State court."[45]

It may be possible to combine the two sentences into one, since the Act applies only to cases removed from state to federal court. But that would probably produce a cumbersome sentence.

There may be a concern that 30 days after enactment does not give sufficient notice to the practicing bar. I do not think this will be a problem. As noted in my hearing statement, snap removal situations will generally involve savvy and knowledgeable attorneys on both sides. We can expect that the attorneys would be following the progress of the snap removal legislation and would be ready when it is enacted.

Out of caution, Congress might choose to delay the effective date so that it would apply, for example, only to cases commenced in state court 60 days or more after enactment. But I think that the 30 days specified in the JVCA is sufficient.

III. A Brief Response to Lawyers for Civil Justice

As noted at the outset, three of the four witnesses at the hearing agreed that snap removal is a problem and that legislative action is desirable. The fourth witness was attorney Kaspar J. Stoffelmayr, testifying on behalf of Lawyers for Civil Justice, "a national coalition of law firms, corporations and defense trial lawyer organizations that promotes excellence and fairness in the civil justice system to secure the just, speedy, and inexpensive determination of civil cases."[46] Mr. Stoffelmayr argued that there is "no basis for doing away with the salutary provision permitting pre-service removal when the anomalous results are infrequent and can result in no injustice to the disappointed plaintiffs." I will comment on four of the points made by Mr. Stoffelmayr in support of this position.

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[45] The JVCA's effective-date provision referred to an "action or prosecution commenced in State court …" The reference to prosecutions was necessary because the JVCA included amendments to the provisions dealing with removal of criminal cases. No such reference is needed for the snapback provision, which applies only to civil suits.

[46] All references to Mr. Stoffelmayr's statement are to the text posted on the House Judiciary Committee website. https://docs.house.gov/meetings/JU/JU03/20191114/110208/HHRG-116-JU03-Wstate-StoffelmayrK-20191114.pdf.

First, Mr. Stoffelmayr argued that "pre-service removal is relatively rare." He relied on an empirical study by Valerie Nannery published in 2018.[47] However, as another witness, attorney Ellen Relkin, pointed out, the empirical study looked only at cases removed to federal court "between January 1, 2012, and December 31, 2014, before service on any defendant."[48] The cutoff period for the study was thus more than five years ago. Ms. Relkin testified that the incidence of snap removals has exploded in the years since then.

Ms. Relkin also pointed out that Ms. Nannery's study period antedated the two court of appeals decisions holding that snap removal is permissible. Defendants in those circuits (including the Third Circuit, the epicenter of snap removal even before the court of appeals ruling) now know that they will not have to persuade a district judge to allow the removal.[49] There is thus every reason to believe that, without legislation, defendants will take advantage of the stratagem whenever they are in a position to do so.

Second, Mr. Stoffelmayr emphasized that snap removal can become an issue "only when the plaintiff, contrary to normal practice, has elected to file a lawsuit in a state court outside of the plaintiff's own home state." He is quite correct about that.[50] But it is equally important to emphasize that the forum chosen is the home state of the defendant. The Supreme Court, in several recent decisions, has reiterated that defendants can always be sued in their home state no matter where the claims arose.[51] Moreover, the home state may be the only state where plaintiffs from different states with similar claims can all join.[52] Allowing the plaintiffs to sue together in the defendant's home state makes for efficiency.

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[47] See Valerie M. Nannery, *Closing the Snap Removal Loophole*, 86 U. Cin. L. Rev. 541 (2018).

[48] Id. at 559.

[49] District court decisions are not binding on other judges within the district. Whether snap removal was allowed thus depended on which judge was drawn – typically by lot – to hear the case.

[50] See supra note 38.

[51] See, e.g., *Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014) (noting that the state of incorporation and the state where the corporation has its principal place of business "afford plaintiffs recourse to at least one clear and certain forum in which a corporate defendant *may be sued on any and all claims*") (emphasis added).

[52] A Supreme Court decision in 2018 narrowed plaintiffs' options in that respect. See *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2018) (holding that a California state court could not exercise specific personal jurisdiction over claims by non-resident consumers against a defendant incorporated in Delaware and headquartered in New York).

Third, in response to a question at the hearing, I commented that the forum defendant rule rests on the assumption that as long as there is at least one defendant from the forum state, no defendant in the case needs protection from bias at the hands of the state court. Snap removal, I said, is inconsistent with that assumption. Mr. Stoffelmayr took issue with the assumption. He said that when an out-of-state defendant is sued in state court, the fact that a small local business or a local individual is also joined as a defendant will give only "cold comfort." In "actual practice," he told the Subcommittee, the out-of-state defendant would have little confidence that its interests would be protected in the same way that they would be in federal court.[53]

I agree with Mr. Stoffelmayr that the assumption underlying the forum defendant rule is open to question, particularly when the out-of-state defendant is the primary defendant (for example, the manufacturer of the drug the plaintiff ingested) and the in-state defendant is a local merchant or employee. The problem is that any overlap between the circumstances that allow for snap removal and those that would justify relaxing the forum defendant rule is completely coincidental. For example, in the medical-device cases described by Ms. Relkin, there is only one defendant, and that defendant is an in-state corporation.[54] As long as the forum defendant rule is retained in its present form, it is hard to justify allowing ad hoc circumvention in situations where defendants can monitor state-court dockets electronically or where state law does not allow plaintiffs to perfect service quickly.[55]

Out-of-state defendants may have a legitimate grievance if, under current law, plaintiffs can assert frivolous or insubstantial claims against an in-state defendant and use those claims to frustrate the right of removal that an out-of-state defendant would have if sued alone.[56] If so, the solution is to reform the law

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[53] This exchange begins at about 1:06 in the webcast cited supra note 1.

[54] That was also the situation in the Third Circuit case that held snap removal permissible. See *Encompass Ins. Co. v. Stone Mansion Restaurant Inc.*, 902 F.3d 147, 149 (3rd Cir. 2018).

[55] As Professor Pfander put it, "[no] sensible system of jurisdictional allocation would foreclose removal by forum defendants and then create an exception for nimble docket-monitoring forum defendants."

[56] In an article aimed at plaintiffs' lawyers, the author stated: "Plaintiff attorneys too often focus their attention on 'target defendants,' even though others may also be liable for their clients' injuries. ... You should therefore consider suing [non-diverse defendants], regardless of whether you anticipate receiving a substantial recovery from them, in order to keep your lawsuit in state court." Erik Walker, *Keep Your Case in State Court*, Trial, Sept. 2004, at 22.

of fraudulent joinder, not to reject the snapback.[57] There may be a kind of rough justice if some defendants take advantage of snap removal while some plaintiffs benefit from artful joinder.[58] But two wrongs do not make a right, and Congress should not be satisfied with rough justice. It should seek to enact carefully crafted legislation that addresses each problem in a way that respects the purpose of the constitutionally authorized diversity jurisdiction.

Finally, Mr. Stoffelmayr commented that there is "no … unfairness or injustice that would justify rewriting statutory language that has served the courts well for decades." I agree with that also, and that is why I oppose the suggestions outlined in Professor Pfander's statement. But the snapback proposal would not rewrite any statutory language; it would add a new, narrowly tailored provision that would deal with snap removal without upsetting other aspects of removal law.

IV. Clarifying the Law of Federal Jurisdiction: Finding a Better Process

In his written statement and his oral testimony, Professor Pfander called attention to the fact that snap removal is only one of many issues in removal practice that have given rise to conflicting decisions in the lower courts.[59] These

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[57] In 2016 and again in 2017, the House passed legislation aimed at modestly strengthening the fraudulent joinder doctrine. See Innocent Party Protection Act, H.R. 725, 115th Cong. (2017); H.R. Rep. 115-17 (2017).

[58] The term "artful joinder" is used here because of the parallel to the doctrine of "artful pleading." The artful pleading doctrine embodies the principle that "a plaintiff may not defeat removal by omitting to plead *necessary federal questions*." *Rivet v. Regions Bank of La.*, 522 U.S. 470, 475 (1998) (internal quotation omitted) (emphasis added). In the cases referenced by Mr. Stoffelmayr, the plaintiff seeks to defeat removal by joining *unnecessary defendants* – unnecessary in this sense: if the plaintiff has a valid claim at all under the applicable law, he or she will ordinarily be able to obtain full redress from other defendants, and in particular the out-of-state corporation.

At the hearing in November 2019, the Ranking Member of the Subcommittee, Rep. Martha Roby, spoke in a similar vein. She said that plaintiffs often join non-diverse parties who "are not necessary to the litigation and at times are only included to keep … a case in a state court that maybe seems favorable to the plaintiff." See https://www.law360.com/articles/1242121/new-house-bill-fights-snap-removals-to-federal-court.

[59] Professor Pfander gave as an example the question of what parties must do to consent to removal under 28 U.S.C. 1446(b)(2). See *Crowther v. Mountain Productions, Inc.*, 2019 WL 3288137 *3-*4 (E.D. Pa. July 22, 2019) (noting that four circuits "have held that a statement in one defendant's timely notice that its codefendant or codefendants have consented to removal is sufficient," but that three circuits have rejected that rule). Courts also disagree over what constitutes an "other paper" that triggers the second removal window under § 1446(b)(3).

unsettled issues add to delay, burden courts, and impose costs on the parties, without advancing resolution of the underlying disputes. Professor Pfander suggested that we "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."

I agree with Professor Pfander that the present process for addressing problems in removal and remand procedure leaves much to be desired. Indeed, the same can be said of federal jurisdiction generally, though removal is certainly an area particularly in need of study and reform.[60] I also agree with the suggestion that Congress should look to the Judicial Conference of the United States for assistance in addressing these matters.

Perhaps out of (unnecessary) modesty, Professor Pfander did not mention that there already exists an entity within the Judicial Conference that is empowered to study matters of federal jurisdiction and make recommendations for amendments to the Judicial Code. That is the Committee on Federal-State Jurisdiction;[61] for several years, Professor Pfander served with distinction as consultant to the Committee. The most far-reaching package of revisions to the basic jurisdictional statutes since 1990 – the Federal Courts Jurisdiction and Venue Clarification Act of 2011 (JVCA) – originated in a proposal presented by the Committee at a hearing held by this Subcommittee in 2005.[62] The most

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Compare *Morgan v. Huntington Ingalls, Inc.*, 879 F.3d 602, 612 (5th Cir. 2018) (the "removal clock begins ticking upon receipt of the deposition transcript"), with *Huffman v. Saul Huffman Ltd. Partnership*, 194 F.3d 1072, 1078 (10th Cir. 1999) ("the removal period commences with the giving of the testimony, not the receipt of the transcript").

[60] A good example, not involving removal, is "the law around cross-appeals," which a recent commentator described as "still unclear, obscure and evolving." Michael Soyfer, Patent Decision Highlights Cross-Appeal Considerations, Law360, Dec. 3, 2019, https://www.law360.com/articles/1224083/print?section=aerospace.

[61] As a hierarchical matter, it should be noted that the Committee makes its recommendations to the Judicial Conference, which must approve them before they can be transmitted to Congress.

[62] See *Federal Jurisdiction Clarification Act*: Hearing Before the Subcomm. on Courts, the Internet and Intellectual Property of the House Judiciary Comm., 109th Cong. (2005) [hereinafter JVCA Hearing]. Judge Janet Hall testified on behalf of the Judicial Conference committee. I also testified. At that time, venue reform was not part of the proposed legislation.

important components of the JVCA were those relating to removal jurisdiction and procedure.[63]

Unfortunately, the current mode of operation of the Federal-State Jurisdiction Committee includes several features that substantially diminish the Committee's effectiveness as a forum for identifying problems and proposing solutions. The Committee itself is almost invisible. Neither its mission nor its membership is described on the Judiciary website.[64] The Committee makes no public announcements of its agenda or its proposals. For example, after the 2005 hearing, when the Committee unveiled the first version of the bill that became the JVCA, there was no further public disclosure of revised versions or of the many issues that arose as the bill made its way to approval by Congress and the President.[65]

The JVCA provides a good illustration of the possible consequences of a closed process. At the 2005 hearing, the Judicial Conference offered a pair of proposals that would have allowed a plaintiff to avoid removal based on diversity jurisdiction by filing a "declaration" (i.e. stipulation) reducing the amount in controversy below the minimum specified in 28 U.S.C. § 1332(a). This was an innovative approach that would have helped to "avoid needless litigation over the proper forum for [a diversity] case."[66] But the provisions were deleted from the final version of the bill because they had generated controversy.[67] If the debate

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[63] See Arthur D. Hellman, *The Federal Courts Jurisdiction and Venue Clarification Act Is Now Law*, Jurist, Dec. 30, 2011, https://www.jurist.org/commentary/2011/12/arthur-hellman-jvca/.

[64] A press release issued on October 1, 2019, announced that Chief Justice Roberts had appointed a new chair, Judge D. Michael Fisher of the Third Circuit Court of Appeals. Judge Fisher's appointment was effective on the same day.

[65] There was some vetting, but it was not public. As the House Judiciary Committee report on the bill noted, the Administrative Office of US Courts (AO) functioned "as a clearinghouse to vet the bill and newly-developed revisions to it with the Judicial Conference's Federal-State Jurisdiction Committee, academics, and interested stakeholders." H.R. Rep. 112-10 at 2-3 (2011). But all of those communications were private, and lawyers and judges outside the tight circle had no way of knowing even what issues were being contested, let alone what changes were being made.

[66] JVCA Hearing, supra note 62, at 14 (statement of Judge Hall). See also id. at 43 (statement of Arthur D. Hellman) (endorsing proposals).

[67] See Arthur D. Hellman, *The Federal Courts Jurisdiction and Venue Clarification Act: Some Missing Pieces*, Jurist, Jan. 4, 2012, https://www.jurist.org/commentary/2012/01/arthur-hellman-jvca-ii/ (noting that "any provision that generated any controversy was simply dropped from the bill").

had taken place out in the open, with a larger number of participants, it might have been possible to find common ground, at least on a narrow version of the idea.

I think there is a better way. This is not the place for a detailed proposal, but here are some steps that the Federal-State Jurisdiction Committee could take that would enhance its ability to help Congress in addressing jurisdictional issues:

- The Committee could periodically announce its agenda – matters that it is actively considering for possible recommendations.
- When a proposal has reached a sufficiently mature stage, the Committee could post it on the Judiciary website and invite comments.
- The Committee could invite judges, lawyers, and scholars to submit suggestions about aspects of federal jurisdiction that have given rise to confusion, conflict, or uncertainty in the lower courts.
- The Committee could establish a web page that would serve as a forum for judges, lawyers, and other interested persons to discuss jurisdictional problems and vet possible solutions.

Two caveats are in order. First, I am not suggesting that Congress should delegate authority to the Judicial Conference to promulgate rules governing matters of federal jurisdiction. There may be narrow issues on which delegation is appropriate; for example, Congress has authorized the Supreme Court to prescribe rules that "define when a ruling of a district court is final for the purposes of appeal under [28 U.S.C. § 1291]."[68] But when it comes to civil litigation, even technical rules about district court jurisdiction may involve policy choices that plaintiffs and defendants will view differently. Jurisdictional rules may also implicate questions of federalism – the allocation of judicial power between the national government and the states.[69]

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[68] See 28 U.S.C. § 2072(c). This provision was enacted in 1990. No rules of that kind have been adopted. The 1990 law also authorized the Supreme Court to promulgate rules defining new categories of interlocutory appeals. See 28 U.S.C. § 1292(e). One such rule, authorizing appeals from orders granting or denying class certification, has been adopted. See Rule 23(f) of the Federal Rules of Civil Procedure.

[69] Justice Felix Frankfurter liked to quote former Justice Benjamin Curtis: "[Q]uestions of jurisdiction [are] questions of power as between the United States and the several States." *Irvin v. Dowd*, 359 U.S. 394, 412 (1959) (Frankfurter, J., dissenting) (citation omitted).

Congress, as the representative branch of the national government, should retain ultimate authority to decide what the law of federal jurisdiction will be. But if the Judicial Conference submits proposed legislation that has been endorsed by the Federal-State Jurisdiction Committee after input from the bench and bar, Congress could move forward with confidence that the hard issues have been dealt with. Vetting by interest groups and scholars would also help to minimize the prospect of unintended consequences.

Second, I would not suggest that the Committee on Federal-State Jurisdiction should adopt the complete panoply of procedures followed today for rulemaking under the Rules Enabling Act. The Committee can borrow some elements of that process, but there is no need for such an elaborate set of protocols when the Committee would only be making recommendations to Congress.

To continue the conversation that Professor Pfander invited, I will suggest that a good first step would be for the Chairman and Ranking Member of this Subcommittee to write to Chief Justice Roberts, in his capacity as Chair of the Judicial Conference, expressing a desire that the Committee on Federal-State Jurisdiction take on a more robust role in considering jurisdictional issues and making recommendations to the House and Senate Judiciary Committees. The letter could specify some of the steps the Committee could take and perhaps even identify some issues that have come to the Subcommittee's attention. There is precedent for such a letter; in 2002, after a hearing on the operation of the federal judicial misconduct statutes, the Chairman and Ranking Member of the Subcommittee wrote to Chief Justice Rehnquist offering "recommendations ... to improve the operations of Article III courts and instill even greater confidence in [the courts'] work."[70]

That is a suggestion for the longer term. For now, I urge the Subcommittee to move forward with the snapback legislation – a targeted measure that would deal with a narrow problem without disrupting other aspects of removal practice or foreclosing Congress's options if it should want to consider more widely applicable reforms in the future.

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[70] The letter is reprinted in H.R. Rep. 107-459 at 16-18 (2002).

Statement of James E. Pfander

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Examining the Use of "Snap" Removals to Circumvent the Forum Defendant Rule

Before the

Subcommittee on Courts, Intellectual Property, and the Internet

of the

Committee on the Judiciary of the U.S. House of Representatives

February 18, 2020

My name is James E. Pfander. On November 19, 2019, I offered oral and written views at the Subcommittee's hearing on the subject of "snap" removal. Others testified as well, including my friend, Professor Arthur Hellman, an advocate of a solution to the snap-removal problem that has come to be known as snapback. Snapback would require the federal court to send a snap removed case back to state court if the plaintiff perfects service on a properly joined forum defendant.

On February 4, 2020, I received an invitation to submit additional comments. In particular, Subcommittee Chairman, Representative Henry "Hank" Johnson, Jr. asked if "there [are] any additional points or submissions [I] would like to make in response to the questions asked at the hearing?" I have three such submissions.

1. During the hearing, questions arose as to how best to fix the snap removal problem. Attention focused on the comparative merits of a preventative approach (a statutory amendment that would bar snap removal altogether) and the curative approach suggested by Professor Hellman. I expressed concern with the potentially cumbersome character of the snapback solution, suggesting instead that prevention might be the wiser course. I also raised questions about the extent to which the Hellman snapback fix took adequate account of the provisions of the removal statute in 28 U.S.C. § 1448, giving effect to the state law rules governing the timing of post-removal service of process.

   To Professor Hellman's credit, he has worked diligently with his associates to iron out potential problems with the snapback solution. While I would still prefer a preventative approach as a matter of best practices, Professor Hellman's latest version of the snapback provision offers a workable solution to the problem. The Subcommittee might reasonably conclude that the search for the "best" possible approach in theory should not become an enemy of a good practical solution.

2. Nonetheless, I see very little downside to an amendment that would forbid removal of an action before at least one party has been served. The Supreme Court already interpreted the statute governing removal procedure to mean that, for defendants, the time for effecting removal of an action begins to run when a party has been formally served with process and has received a copy of the complaint. *See* Murphy Bros. v. Michetti Pipe Stringing, Inc., 526 U.S. 344 (1999). Just as *Murphy Bros.* prevented the plaintiffs from gaming the system by providing defendants with pre-service "notice" of the claim, so too should the law prohibit defendants from gaming the system by monitoring dockets and evading removal limits by snap removing the action before it has been formally served. If removal must await service of process on at least one defendant, plaintiffs could choose to serve the forum defendant first, thereby bringing the forum defendant rule into operation and satisfying the rule's requirement that the defendant in question have been "properly joined and served."

   Congress might decide to enact such a rule itself. In doing so, Congress might build upon and support an approach to snap removal that has begun to emerge in the lower federal courts. Recently, the United States District Court for the Northern District of Alabama

interpreted the forum-defendant rule as requiring service of process on at least one defendant before removal can properly occur. *See* Bowman v. PHH Mortgage Co., __ F. Supp. 3d __ (N.D. Ala. 2019); *see also* Gentile v. Biogen Idec, Inc., 934 F. Supp. 3d 313 (D. Mass. 2013). That some federal courts have already embraced a pre-removal service requirement to forestall snap removal might help to allay fears of the unintended or disruptive consequences to which Professor Hellman points in defending a stand-alone snapback approach.

Indeed, in the end, the Hellman approach closely resembles (albeit with more moving parts) an approach that would block removal until service has been perfected on at least one party. As Professor Hellman describes the problem, defendants "jump the gun" in removing the proceeding before it has been served. He proposes to allow the plaintiff to secure a remand of the action after the fact by effecting service on these gun-jumping defendants in accordance with either state or federal procedure. Why one wonders would it not make sense to require the gun-jumping defendants to await initial service, thereby allowing the matter to remain in state court without the back and forth of removal and remand? A preventative approach would also preserve state court control of assessments of the propriety of the forum defendants' joinder and service, rather than transferring the assessment of those state law issues to the federal district court under snapback.

3. The friendly debate between Professor Hellman and me about the best way to tackle snap removal helps to underscore the need for a rule-making process to deal with recurring technical problems that arise in the administration of federal jurisdiction statutes. While Congress remains very much in control of the scope of lower federal court authority, Congress may wish to enlist the assistance of a standing committee within the Judicial Conference to deal with some of the nuanced issues of jurisdiction and venue that inevitably arise in the course of federal practice. Congress has assigned initial responsibility for the development of Rules of Evidence to such a committee, subject to the principle that any rule changes take effect only upon enactment into law. A similar approach might better ensure an effective dialog between Congress, the courts, and the practicing bar about the many house-keeping rules that govern access to the federal courts. Professor Hellman has generously highlighted (and no doubt exaggerated) my role as the former consultant to the Federal-State Jurisdiction Committee of the Judicial Conference, an alternative "forum" in which such house-keeping rules might take shape.

I appreciate the invitation to participate in the hearing on snap removal and I am pleased to have been given this opportunity to supplement my remarks.