CONSUMER ATTORNEYS OF CALIFORNIA

FORUM

VOLUME 51, NUMBER 6

NOVEMBER/DECEMBER 2021

Class Action / Mass Torts

Snap Removal

What is it, how defendants are using it, and tips to combat it

By Wyatt Vespermann

An unexpected journey to federal court can wreak havoc on a litigant's strategy. It immediately triggers a 30-day clock ticking towards a remand deadline, neutralizes early discovery and causes the litigation to stall overall. Worse yet, an emerging trend shows sophisticated corporate defendants are finding success in keeping cases in federal court by employing the notorious tactic known as "snap removal." This article unpacks the gamesmanship and identifies approaches to combat it.

The Modern Forum Defendant Rule

Any discussion of snap removal must begin with the "forum defendant rule." The opportunity to snap remove to federal court based on diversity typically occurs when a non-resident plaintiff sues at least one resident defendant in state court. Civil Procedure 101 tells us that the forum defendant rule ought to block any attempt to remove that case. This is because "[r]emoval based on diversity jurisdiction is intended to protect out-of-state defendants from possible prejudices in state court …. The need for such protection is absent, however, in cases where the defendant is a citizen of the state in which the case is brought." (*Lively v. Wild Oats Mkts.* (9th Cir. 2006) 456 F.3d 933, 940.) Historically, that reasoning held weight; however, the emerging trend in federal courts across the country, including in the Central District of California, is to permit the maneuver under a literal interpretation of the forum defendant rule statute.

The statutory language commonly referred to as the forum defendant rule dictates that an action can be removed on the basis of diversity jurisdiction "only if none 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).) The issue is what happens if a defendant (forum resident or otherwise) manages to file a notice of removal *before service* on the forum defendant is effected?

The answer turns on what is meant by *properly joined and served*. And unfortunately, there is no definite answer. The court in *Sullivan v. Novartis Pharmaceuticals Corp.* (D.N.J. 2008) 575 F. Supp. 2d 640 conducted a "thorough examination of the published legislative history ... including review of all legislative materials available in the Third Circuit libraries in Newark and Philadelphia and the DC Circuit library in Washington." All for naught, as the court was unable to locate any specific statement from Congress or the Committee on Revision of the Judicial Code regarding the addition of the "properly joined and served" language. The court nonetheless concluded the historical context indicated the language was to prevent a plaintiff from blocking removal by naming a resident defendant it does not intend to litigate against or even serve. In essence, the statute was designed to prevent gamesmanship on the part of the plaintiff.

With this purpose in mind, and "[a]s a matter of common sense," the court in *Sullivan* was "confident, beyond any doubt, that Congress did not add the 'properly joined and served' language in order to reward defendants for conducting and winning a race, which serves no conceivable public policy goal, to file a notice of removal before the plaintiffs can serve process." Judge Carter of the Central District of California echoed this point in *Standing v. Watson Pharm, Inc.* (C.D. Cal. Mar. 26, 2009) No. CV09-0527, 2009 U.S. Dist. LEXIS 30829, finding the "purpose of the statute is to prevent gamesmanship by plaintiffs and should not allow for a similar gamesmanship by defendants."

Sorry to say, common sense has not prevailed. The Third Circuit shifted the landscape in 2018 in *Encompass Ins. Co. v. Stone Mansion Restaurant, Inc.* (3rd Cir. 2018) 902 F.3d 147. There, the defendant agreed prelitigation to accept electronic service instead of requiring formal process. Minutes later, the plaintiff sent a copy of the filed complaint and an e-service acceptance form. Withholding acceptance, the defendant removed to federal court. The district court refused

Wyatt Vespermann is with Panish | Shea | Boyle | Ravipudi, LLP. His practice focuses on mass tort pharmaceutical and medical device litigation.
www.psblaw.com

to remand on the grounds that a literal interpretation of the forum defendant rule commanded service must have first been achieved to be implicated. On appeal, the plaintiff argued that it was inconceivable that the properly joined and served language permits a resident defendant to remove an action by delaying process. The panel found the argument "unavailing," and upheld the district court's decision despite recognizing "this result may be peculiar in that it allows [the defendant] to use pre-service machinations to remove a case that it otherwise could not."

This reasoning was then adopted by a Second Circuit panel in 2019 which went so far as to speculate, with no substantiation, that Congress may have adopted the properly joined and served requirement to "provide a bright-line rule keyed on service." (*Gibbons v. Bristol-Myers Squibb Co.* (2d Cir. 2019) 919 F.3d 699, 703 [removed two days after filing].) The Fifth Circuit in 2020 went even further brazenly declaring "[w]e will not insert a new exception into Section 1441(b)(2), *such as requiring a reasonable opportunity to serve a forum defendant*." (*Tex. Brine Co. v. Am. Arbitration Ass'n* (5th Cir. 2020) 955 F.3d 482, 487.) Now, this trend is gaining traction in the Central District with remand denials based on the same distorted rationale. (*Dechow v. Gilead Scis., Inc.* (C.D. Cal. Feb. 8, 2019) 358 F. Supp. 3d 1051, *Jacob v. Mentor Worldwide, LLC* (C.D. Cal. Aug. 1, 2019) 393 F. Supp. 3d 912; see also *Plum v. Medtronic, Inc.* (C.D. Cal. Aug. 5, 2020, ECF No. 26) No. CV 20-4120-DMG.)

The Snap

Recognizing that our new normal is that snap removal is a viable option for defendants, it is important to understand the defense bar's methods. In the past, defendants seeking to snap would have to actively monitor the state dockets, avoid service, and remove at the earliest opportunity. Snapping under these circumstances was made difficult due to the delay between filing and the publication of the docket entry. The plaintiff had a head-start upon filing, and so long as service was promptly completed, a defendant was unaware of the lawsuit, denying any opportunity to remove.

However, the emergence of e-filing has closed the gap significantly. Imagine a situation where you file your complaint at 10:00 p.m. one night and you are receiving a snarky email from opposing counsel claiming to have a copy of it by 5:00 a.m. the next morning. No indication on the court's website it has been received, let alone filed and published. It immediately begs the question of how could opposing counsel get the jump on you like that? The answer is in the fine print.

Many litigants rely on platforms such as One Legal, Green Filing, and other similar services to facilitate their court filings. The choice to use these platforms is not really much of a choice as many courts mandate civil e-filing with a limited universe of electronic filing service providers. Compelled to use them, many firms simply pick one, learn the interface and incorporate it into their standard filing procedures. It likely did not cross any minds whether any of these companies would data mine the filings and provide the information to your opponent.

But, that is exactly what is happening. Take, for example, the terms of service for One Legal (https://www.onelegal.com/terms/) which states:

> 18.7. By uploading content to or submitting any materials, you grant (or warrant that the owner of such rights has expressly granted) InfoTrack a perpetual, worldwide, royalty-free, irrevocable, non-exclusive right and license, with right to sublicense, to use, reproduce, distribute, modify, adapt, publish, publicly perform, publicly display, digitally display and digitally perform, translate, create derivative works from and distribute such materials or incorporate such materials into any form, medium, or technology now known or later developed throughout this universe ….

Other providers have similar terms. Case Anywhere (https://www.caseanywhere.com/terms-of-use/):

> 6. License of Your Content to Case Anywhere. By uploading content to or submitting any materials for use on this Web Site, you grant (or warrant that the owner of such rights has expressly granted) Case Anywhere a perpetual, worldwide, royalty-free, irrevocable, non-exclusive right and license, with right to sublicense, to use, reproduce, distribute, modify, adapt, publish, publicly perform, publicly display, digitally display and digitally

perform, translate, create derivative works from and distribute such materials or incorporate such materials into any form, medium, or technology now known or later developed throughout the universe ….

Sameday Process (https://www.samedayprocess.com/client-resources/order-service.html):

j. By uploading content to or submitting any materials for use on Contractor's web site, Client grants (or warrant that the owner of such rights has expressly granted) Contractor a perpetual, worldwide, royalty-free, irrevocable, non-exclusive right and license, with right to sublicense, to use, reproduce, distribute, modify, adapt, publish, publicly perform, publicly display, digitally display and digitally perform, translate, create derivative works from and distribute such materials or incorporate such materials into any form, medium, or technology now known or later developed throughout this universe ….

Legalex (https://legalexllc.com/terms/):

18.7. By uploading content to or submitting any materials, you grant (or warrant that the owner of such rights has expressly granted) Legalex a perpetual, worldwide, royalty-free, irrevocable, non-exclusive right and license, with right to sublicense, to use, reproduce, distribute, modify, adapt, publish, publicly perform, publicly display, digitally display and digitally perform, translate, create derivative works from and distribute such materials or incorporate such materials into any form, medium, or technology now known or later developed throughout this universe ….

It is apparent that the companies we rely on for essential court functions are double-dealing. This is because a market exists for our data in the defense bar, including taking advantage of this brief window of opportunity to snap remove a case. Once armed with this information, defendants are able to immediately utilize it and potentially upend the litigation.

Anticipating the Snap

Given the emerging trend permitting snapping, you should be prepared for the tactic anytime you are representing a non-resident plaintiff. Preparation before filing is essential to putting your case in the best position possible to avoid removal or succeed on remand.

Luckily, there are a number of approaches to combatting snap removal and ending the gamesmanship before it starts. It goes without saying that none of these options are necessarily ideal, but the alternative is a Faustian journey to federal court.

Destroy Diversity

The best approach. As discussed above, the forum defendant rule is directly tied to federal diversity jurisdiction. It imposes a condition that must be met before jurisdiction can be exercised, i.e., the absence of any resident defendants. The rule is not even implicated, however, if one of the plaintiffs resides in the forum as well. This creates an opportunity, for example, in product liability cases where a product may have injured consumers in multiple states, including the defendant's residence. By joining the resident and non-resident plaintiffs' matters together into a single complaint, the citizenship requirements for diversity jurisdiction cannot be met and removal is unavailable.

Two points of caution with this approach. You should be mindful of fraudulent misjoinder, which occurs when "plaintiffs ... each have a claim but are improperly joined in the same lawsuit." (*In re Roundup Prods. Liab. Litig.* (N.D. Cal. 2019) 396 F. Supp. 3d 893, 896.) Although a high standard is applied—joinder "so egregious" that it is akin to fraud—there must be at least some questions of fact and law common to all of the plaintiffs. Otherwise, you risk the district court severing and remanding the resident plaintiffs' claims while maintaining jurisdiction over the non-residents. Additionally, the Class Action Fairness Act's (CAFA) mass action removal provisions can pose problems for litigation involving over 99 claimants. CAFA allows removal of actions involving 100 plaintiffs who propose to try their cases together, subject only to minimal diversity. (28 U.S.C. § 1332(d)(11)(A).) To avoid CAFA, limit any multiple-plaintiff complaints to a maximum of 99 claimants, with at least one plaintiff of common citizenship with one defendant.

Withhold the Summons

The high-risk, high-reward approach. Even courts employing the strictest interpretation of the forum defendant rule acknowledge there are scenarios where the "literal interpretation of the 'properly joined and served' clause could produce absurd results." (*Dechow*, 358 F. Supp. 3d at 1055.) One established scenario is where the defendants filed their notice of removal on diversity grounds *before* the superior court made the summons available to the plaintiff. (*Vallejo v. Amgen, Inc.* (C.D. Cal. Aug. 30, 2013) 2013 WL 12147584.) This is because the properly joined and served language contemplates the plaintiff having at least *some opportunity* to serve the resident defendant.

This strategy accordingly calls for filing the complaint but not submitting a summons. Then wait. A careless defendant will remove to federal court without a summons being issued. Upon receiving the notice of removal, a litigant can finally request the state court summons and effect service on the resident defendant without rushing. Because the defendant's removal was premature and did not afford any opportunity for service, the case law dictates that remand is warranted. This strategy was employed with positive results, where, upon learning of their mistake, defense stipulated to remand. *(Markham v. Allergan, Inc.* (C.D. Cal. Apr. 10, 2020, ECF No. 24) No. 8:20-cv-00494.) However, this approach is not for the faint-of-heart as it all but guarantees a trip to federal court.

Play the Game

The old approach. It simply involves embracing the gamesmanship and competing willingly in the race. Ideally (but costly), a litigant will retain a process server to be on stand-by near the defendant's registered agent for process. As soon as the sealed summons and conformed complaint is received from the court, it is immediately routed to the process server to effect service on the resident defendant before a notice of removal is filed. As long as service on the resident defendant is effected first, the forum defendant rule is triggered and, if removed, the case will be remanded.

As discussed previously, the success rate with this approach is fading as technology advances. Plaintiffs traditionally enjoyed a head-start that has all but been eliminated by the nature of e-filing and service providers' unscrupulous practices. This allows the defendant to gain the momentum,

prepare their removal notice, and file it simultaneous with publication of the court docket entry. You should assume now that the moment a document is uploaded to the internet it can be in your adversary's hands.

Go Off the Grid

The outside-the-box approach. This strategy seeks to gain back the head-start and deny any chance for momentum for the defense. To do this requires a litigant to completely avoid e-filing. Rather, file the complaint through traditional paper filing where the docket entry is not immediately published online. This buys precious time to promptly serve the resident defendant before the court clerks can publish the filing online.

An obstacle to this method is the fact that many Superior Courts, such as Los Angeles, mandate electronic filing. However, where snap removal poses an existential threat to your case, desperate measures may be warranted. California Rules of Court, Rule 2.253(b) identifies two circumstances where mandatory e-filing can be avoided: self-represented parties or upon a showing of undue hardship or significant prejudice. (https://www.courts.ca.gov/ documents/efs007.pdf) It may be worth considering seeking an exemption, or even having your client appear pro per initially, to gain that critical time for service on the resident defendant.

Conclusion

It is vital that litigation against sophisticated corporate defendants kicks off on the plaintiff's terms and chosen turf. Snap removal is a substantial threat to any litigation relying on the forum defendant rule to keep a case in state court. Technological advances are only giving the defense bar more tools to disrupt meritorious litigation. You must account for the threat and take steps before filing suit to counter the maneuver.

Additionally, you must be cognizant that there is a market in the defense industry to harvest our data. Snap removal offers just one example where our seemingly innocent data can be weaponized against our clients to their detriment. Careful selection of e-filing providers with guarantees from those providers that they will not sell your information to your adversaries is an absolute necessity. ■

In Esquire Bank, you'll find a formidable, forward-thinking ally who makes your business—and its success—our top priority.

Watch and learn about better financing options

Succeed **Boldly**.

DISABILITY INSURANCE CLAIM ADVICE
ART FRIES

Representing attorneys, physicians, dentists and other professionals on THEIR personal disability claims.
Since 1995:
Over 100 articles written related to disability claims.
Over 150 testimonial letters received.
Over 1000 disability claimants represented in a consult capacity.

TOLL FREE 800-567-1911
www.afries.com friesart@hotmail.com