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Legal Sidebar

Make it Snappy? Congress Debates "Snap" Removals of Lawsuits to Federal Court

December 4, 2019

Whether a lawsuit proceeds in state or federal court can have significant practical consequences. For various reasons, some litigants and commentators perceive state courts as more favorable to plaintiffs and federal courts as more favorable to defendants. For instance, the procedural requirements that a plaintiff must satisfy to survive dismissal of a federal lawsuit can be more stringent than the requirements that apply in many state courts. Certain observers also claim that state courts may be inclined to disfavor out-of-state defendants. These perceived differences between state court and federal court often encourage litigants to engage in *forum shopping*; that is, plaintiffs sometimes expend significant effort and resources seeking to keep cases in state court, while some defendants do the same to try to move cases to federal court. Apart from the direct consequences to the litigants themselves, the forum in which a particular lawsuit proceeds may also implicate principles of federalism, as well as issues regarding the allocation of federal and state judicial resources.

Subject to certain constitutional limitations, Congress may enact—and has enacted—legislation influencing where cases are litigated. Some have debated, however, whether existing federal laws on this subject are adequate. On November 14, 2019, the U.S. House Committee on the Judiciary's Subcommittee on Courts, Intellectual Property, and the Internet (Subcommittee) held a hearing to consider whether to amend federal law to prohibit or discourage a technique called *snap removal*, which allows defendants to avoid certain otherwise applicable restrictions on removing cases filed in state court to federal court. This Sidebar describes existing federal laws governing whether particular cases proceed in state or federal court before describing snap removals and their potential significance to Congress.

Federal Jurisdiction

Federal courts are courts of limited subject matter jurisdiction, which means that federal courts generally cannot adjudicate a case unless (1) the case involves one of the subjects listed in Article III, § 2 of the Constitution, and (2) Congress passes a law affirmatively authorizing federal courts to hear that type of case. To that end, Congress has enacted several statutes authorizing federal courts to hear specific classes of cases, such as cases arising under federal law, bankruptcy cases, certain class actions, certain lawsuits against the United States, and so forth. As relevant here, 28 U.S.C. § 1332(a)(1) grants the federal courts what is known as *diversity jurisdiction*, which permits federal courts to adjudicate lawsuits between

Congressional Research Service
https://crsreports.congress.gov
LSB10380

"citizens of different States" in which "the matter in controversy exceeds the sum or value of $75,000." Diversity jurisdiction thereby addresses certain litigants' concerns that state courts may be biased against defendants from other states by providing out-of-state defendants a supposedly neutral federal forum. Significantly, courts have interpreted 28 U.S.C. § 1332(a)(1)'s "citizens of different States" language to require *complete diversity*, which means that diversity jurisdiction will not exist if any of the plaintiffs is a citizen of the same state as any of the defendants.

There are some types of cases, such as certain intellectual property cases, that only the federal courts have jurisdiction to hear. In many types of cases, however—including diversity cases—the state and federal courts have *concurrent jurisdiction*, which means that either the federal courts or the state courts may adjudicate the case. To illustrate, suppose a South Dakotan negligently injures a North Dakotan, and the North Dakotan wants to sue the South Dakotan for $80,000. While a North Dakota state court could have jurisdiction to hear the North Dakotan's claim, the U.S. District Court for the District of North Dakota could also have jurisdiction because the parties are citizens of different states and the amount in controversy exceeds $75,000. Accordingly, the North Dakotan plaintiff could file his lawsuit in either the state court or the federal court.

Removal

When either a state court or a federal court would have jurisdiction to hear a case, the plaintiff, as the party beginning the lawsuit, makes the initial decision whether to proceed in state or federal court. Sometimes, however, a defendant may override the plaintiff's choice of a state forum. Specifically, 28 U.S.C. § 1441(a) allows defendants to *remove* a state court case to a nearby federal court if they comply with certain procedures and restrictions. As with diversity jurisdiction more broadly, courts have opined that authorizing defendants to remove cases from state court to federal court "protect[s] out-of-state defendants from possible prejudices in state court."

To illustrate how removal works, suppose the injured North Dakotan files his $80,000 lawsuit against the South Dakotan defendant in a North Dakota state court instead of federal court. Ordinarily, the South Dakotan defendant would be able to remove the case to the U.S. District Court for the District of North Dakota, which could exercise diversity jurisdiction over the case under 28 U.S.C. § 1332(a)(1).

The Forum Defendant Rule

Even though diversity jurisdiction is primarily intended to protect out-of-state defendants, diversity jurisdiction is not limited to lawsuits against *defendants* from other states. As noted above, 28 U.S.C. § 1332(a)(1) grants the federal courts diversity jurisdiction over cases between "citizens of *different* States" that satisfy that $75,000 amount-in-controversy requirement. Thus, a lawsuit between an out-of-state *plaintiff* and an in-state *defendant* can fall within the federal courts' diversity jurisdiction as well.

The fact that a federal court *possesses jurisdiction* over a particular diversity case against an in-state defendant, however, does not necessarily mean that an in-state defendant may *remove* that case to federal court. 28 U.S.C. § 1441(b)(2)—known as the *forum defendant rule*—prohibits a defendant from removing a diversity case "if any of the parties in interest properly joined and served as defendants" in the case "is a citizen of the State in which such action is brought." Jurists have justified the forum defendant rule on the ground that when at least one defendant is a citizen of the forum state, there is less reason to think that the state court may treat the defendants unfavorably.

To illustrate how the forum defendant rule works, imagine that an Oklahoman sues a Texan in a Texas state court for $80,000. A federal district court in Texas would likely have diversity jurisdiction over the case because the parties are citizens of different states and the amount in controversy exceeds $75,000. Nevertheless, unless the federal court had some jurisdictional basis to hear the case other than diversity

jurisdiction, 28 U.S.C. § 1441(b)(2) would ordinarily bar the Texan from removing the case to federal court because he is "a citizen of the State in which" the Oklahoman filed his state court lawsuit—namely, Texas. Under such circumstances, the case would proceed in the Texas state court instead of federal court, even though the Oklahoman could have filed his lawsuit in federal court in the first instance if he so chose.

Snap Removals

Notably, however, 28 U.S.C. § 1441(b)(2) only purports to bar removal when any of the parties "*properly joined and served* as defendants is a citizen of the State in which such action is brought." The "and served" language refers to *service of process*—the method by which a plaintiff gives a defendant notice of a lawsuit by handing or delivering certain documents related to the case to the defendant or its agent. Courts have generally viewed 28 U.S.C. § 1441(b)(2)'s "properly joined and served" language as a congressional attempt to prevent plaintiffs from defeating removal by suing an additional, nominal in-state defendant that the plaintiff does not intend to pursue in litigation or serve with process. In recent years, however, an increasing number of defendants—including many pharmaceutical and medical device manufacturers named as defendants in product liability actions—have invoked 28 U.S.C. § 1441(b)(2)'s "properly joined and served" language for a different purpose: avoiding the application of the forum defendant rule by removing diversity cases before the plaintiff has served the in-state defendants. Courts call this technique *snap removal*, *pre-service removal*, or, less commonly, *jack rabbit removal*. Several observers attribute this recent rise in snap removals to the increasing prevalence of electronic court filing and internet access to court dockets, which has allowed defendants to learn they have been sued and remove the case to federal court before the plaintiff physically serves them with process.

A recent New Jersey case illustrates how snap removal works. In that case, a citizen of North Carolina sued two New Jersey companies in a New Jersey state court on January 17, 2018, at 3:10 PM. Because the two defendants were citizens of New Jersey, the forum defendant rule ordinarily would have barred them from removing the case. However, the defendants removed the case at 3:23 PM that same day. Because the plaintiff did not serve the defendants until 5:00 PM the following evening, the federal court deemed the removal proper.

Not all courts have agreed that 28 U.S.C. § 1441(b)(2) allows defendants to remove diversity cases before the plaintiff serves the in-state defendants. Courts considering this issue have generally taken one of two competing interpretive approaches. Courts allowing snap removal generally reason that 28 U.S.C. § 1441(b)(2)'s "properly joined and served" language unambiguously permits defendants to remove diversity cases where the plaintiff has not yet "properly . . . served" any of the in-state defendants. Courts disallowing snap removal, by contrast, have typically focused on the policy purposes of the forum defendant rule. According to these courts, snap removal improperly allows defendants to reliably "avoid the imposition of the forum defendant rule so long as they monitor the state docket and remove the action before they are served by the plaintiff." Because, at least in some jurisdictions, validly serving a lawsuit takes longer than satisfying the procedural prerequisites for removing a case, these courts reason that permitting snap removal empowers in-state defendants to virtually guarantee that diversity cases brought by out-of-state plaintiffs end up in federal court. This result, in the view of these courts, encourages forum shopping and does not advance the primary policy underlying diversity jurisdiction: to provide a purportedly neutral forum for suits against *out-of-state defendants*. Although the Supreme Court has not resolved this split of authority, the weight of judicial precedent currently favors the interpretation of 28 U.S.C. § 1441(b)(2) allowing snap removals.

Legal Considerations for Congress

Commentators have debated whether Congress should amend existing law to clarify whether snap removals are procedurally proper—and, if so, what form that amendment should take. Those who oppose legislative modifications to the existing forum defendant rule maintain that snap removals have not resulted in systematic unfairness or injustice to plaintiffs—and, if anything, have prevented litigants from reaping unfair advantages from filing lawsuits in supposedly plaintiff-friendly state courts. Others, by contrast, believe that congressional intervention is necessary because continued litigation over the propriety of snap removal undesirably "consum[es] client funds and court resources without advancing resolution of the underlying claims." In particular, those who support amending existing law to prohibit snap removals argue that snap removals unjustifiably deprive plaintiffs of the state court forum to which they would otherwise be statutorily entitled under the forum defendant rule, to the detriment of persons injured by allegedly unlawful conduct.

Those who advocate amending the existing removal rules have advanced a variety of legislative proposals, each of which raises distinct legal issues. For instance, some have explored eliminating snap removals by removing or altering 28 U.S.C. § 1441(b)(2)'s "properly joined and served" language to provide that a defendant may not remove a diversity case if any of the defendants is a citizen of the state in which the action is brought, irrespective of whether the plaintiff has served those defendants. Others have argued, however, that such an amendment could encourage plaintiffs to thwart removal by suing nominal in-state defendants that they do not intend to serve with process. For that reason, some instead advocate enacting a "snapback" provision that would not categorically prohibit defendants from removing a case before the plaintiff has served the in-state defendants, but would instead allow the plaintiff "to counter snap removal by serving one or more in-state defendants *after* removal." Under this proposal, if the plaintiff served the in-state defendant within a statutorily-specified period of time following a snap removal, federal law would require the federal court to send the case back to the state court.

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