OPINION

Snap removal: not so fast (in Massachusetts, at least)

By Christopher J. Cunio, Nicholas D. Stellakis and Veronica Adams

The forum-defendant rule that many of us learned in law school was once one of the most straightforward (if arcane) principles of first-year civil procedure class: a case could not be removed from state to federal court if any defendant was a citizen of the forum state.

Were it still so simple. "Snap removal" has muddied the jurisdictional waters based on four words in the statute: "properly joined and served." Let us explain the controversial practice and how to surmount it (hint: win the race).

First, a refresher. A case filed in state court may generally be removed to federal court when the federal court has original (subject matter) jurisdiction. 28 U.S.C. §1441(a).

One branch of this original jurisdiction is diversity jurisdiction, which generally exists when the parties are completely diverse, i.e., no plaintiff is the citizen of the same state as any defendant (and the $75,000 jurisdictional threshold is met). 28 U.S.C. §1332.

But the ability to remove a case is not entirely co-extensive with diversity jurisdiction: the forum-defendant rule (many of us were taught) forecloses diversity-founded removal when any defendant is a citizen of the forum state, even if the parties are completely diverse.

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Congress created this carve-out to give plaintiffs their choice of forum in cases in which the defendant, because it is a citizen of the forum state, would not be disadvantaged in that state's courts. If anyone were harmed by home-court advantage, it was the plaintiff, it was thought. *Gentile v. Biogen Idec, Inc.*, 934 F. Supp. 2d 313, 319 (D. Mass. 2013).

But the language of the statute, owing to congressional tinkering three quarters of a century ago, has of late been used to circumvent this. The statute bars removal based on diversity "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).

As U.S. District Court Judge Douglas P. Woodlock explained in *Gentile*, the "properly joined and served" limitation was added to prevent plaintiffs from defeating removal by joining (but never serving) a forum defendant whom they did not intend to actually pursue.

Congress cured one form of gamesmanship but created another — so-called "snap" (or "swift") removal.

Snap removal works like this: A California plaintiff files a state court suit in Massachusetts against several defendants, one of whom is a citizen of Massachusetts. Complete diversity exists. But before the plaintiff can effect service of process on the Massachusetts defendant, one of the defendants removes the case to federal court. Since no Massachusetts defendant was "properly joined and served" at the time of removal (the time removability is generally assessed), the removing defendant argues the federal court has jurisdiction.

Snap removal has gained support in some circuits. The 3rd U.S. Circuit Court of Appeals permitted a defendant to use snap removal before that defendant, the sole forum-citizen defendant in the suit, was formally served. *Encompass Ins. Co. v. Stone Mansion Rest. Inc.*, 902 F.3d 147, 152 (3d Cir. 2018). The 2nd Circuit reached the same conclusion. *Gibbons v. Bristol-Myers Squibb Co.*, 919 F.3d 699, 704 (2d Cir. 2019).

The 1st Circuit has left the question open, *Novak v. Bank of New York Mellon Tr. Co., NA.*, 783 F.3d 910, 911 n.1 (1st Cir. 2015), though it has elsewhere stated that "[t]he removal of a diversity case by an in-forum defendant transgresses 28 U.S.C. § 1441(b)," *Samaan v. St. Joseph Hosp.*, 670 F.3d 21, 27 (1st Cir. 2012).

The federal District Court in Massachusetts has rejected snap removal effected before any defendant is served with process. That is what Judge Woodlock held in *Gentile*, and other judges have followed his lead. See *Adams v. Beacon Hill Staffing Grp., LLC*, No. CV 15-CV-11827-ADB, 2015 WL 6182468 (D. Mass. Oct. 21, 2015).

Woodlock determined that the plain language of the statute requires that, before removal may be accomplished, at least one defendant must have been served with process. *Gentile*, supra. That, he said, was consistent with congressional intent; Congress could not have intended to incite defendants to race to the federal courthouse before any of them could be served.

That view reflects practical realities. Gone are the days when a defendant will not know it has been sued until it has been served. That was the world in 1948. But today a defendant may know instantly, through subscription services, when its name appears on any state court docket.

Couple that with Massachusetts' archaic service-of-process rules — requiring a judge to grant a motion for a special process server in order to bypass service by a sheriff or other pre-approved agent, Mass. R. Civ. P. 4(c) — it quickly becomes apparent that any other interpretation would in effect eliminate the forum-defendant rule.

Woodlock recognized that, too, in *Gentile*. Defendants' ability to circumvent the forum-defendant rule has only gotten easier since then.

But Woodlock's view may not offer all the protection it promises. Defendants may attempt to "accept" their docket alert as service of "process," which really means waiving service of process. Or they may simply remove before any defendant has been served, in flagrant violation of *Gentile* (and other cases).

What to do? While we can wait for Congress to act, there are some measures that can be effective now. The key is to win the race. Before filing a complaint, ready the summonses, line up a trusted process server, and, simultaneously with filing, sedulously pursue a clerk to obtain approval of your special process server motion. Then direct the server to serve at least one forum defendant immediately. Often, minutes count.

What to do? While we can wait for Congress to act, there are some measures that can be effective now.

The Supreme Judicial Court can help. The federal rules permit summonses to be served by "[a]ny person who is at least 18 years old and not a party." Fed. R. Civ. P. 4(c)(2). There is no need for Massachusetts' antiquated rule. The SJC should give immediate consideration to amending Rule 4 to eliminate procedures that have outlived their usefulness. MLW

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