

## CLOSING THE SNAP REMOVAL LOOPHOLE

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### Abstract

*Under recent statutes and Supreme Court precedent, plaintiffs' ability to hale corporate defendants into state courts for claims that are widespread is limited. Yet, even when a state court has personal jurisdiction over corporate defendants, and the federal removal statute would not typically permit removal to federal court, defendants can (and do) evade state court jurisdiction and state law by employing a procedural tactic called "snap removal." A snap removal occurs when defendants exploit a loophole in federal law by removing a diversity case involving at least one forum defendant before any defendant has been served—a tactic enabled by electronic filing of complaints.*

*Until now, the question about how the removal statute's "forum defendant rule" should properly be interpreted has not had the benefit of the view from the federal courts. This Article presents the first examination of what is actually happening in the federal courts in snap removal cases, and demonstrates how snap removals undermine state law, add delay to civil litigation, and result in the arbitrary consolidation of some cases in federal court, including in multi-district litigation proceedings. Ultimately, empirical data support*

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*the argument that the removal statute should be amended to close the snap removal loophole.*

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## INTRODUCTION

Here’s what should be an easy civil procedure hypothetical: A resident of Washington State is involved in a serious car crash while visiting California. The other driver is a Californian who, it turns out, is driving a company car with faulty brakes. Our plaintiff, the Washington driver, files suit in California state court, naming three defendants: the California driver, his employer (incorporated in Delaware but based in California), and the car manufacturer (incorporated and based in Michigan). May the defendants remove the case to federal court?

The removal statute suggests the answer is no. Even though there is complete diversity of citizenship,<sup>1</sup> and the amount in controversy is inarguably above \$75,000,<sup>2</sup> the “forum defendant rule” of the federal removal statute should prevent the defendants from removing to federal court because the driver and his employer are citizens of California.<sup>3</sup> Yet, within a few hours after the complaint is filed, and before any defendant has been served, the lone out-of-state defendant—the vehicle manufacturer—files a notice of removal in the federal district court,<sup>4</sup>

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1. The Supreme Court has long required complete diversity of the parties, *i.e.*, no plaintiff may be a citizen of the same state as any defendant, to satisfy federal diversity jurisdiction. *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 267 (1806). A proposal to require only minimal diversity was introduced in the 115th Congress. *See* H.R. 3487, 115th Congress (2017).

2. The district courts have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, and is between citizens of different States. 28 U.S.C. § 1332(a).

3. *See* 28 U.S.C. § 1441(b)(2): A civil action otherwise removable solely on the basis of diversity jurisdiction “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.” *See also* *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 between all named plaintiffs and all named defendants, and no defendant is a citizen of the forum state.”).

4. “Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants.” 28 U.S.C. § 1441(a); *see also* 28 U.S.C. § 1446.

asserting diversity jurisdiction.<sup>5</sup> The manufacturer simultaneously files an answer to the complaint in federal court, preventing the plaintiff from voluntarily dismissing the case without a court order.<sup>6</sup> In a snap, the state court is divested of jurisdiction, and our plaintiff has lost the opportunity to try his case in what he perceived to be a more favorable state forum.<sup>7</sup>

But wait, there's more: Assume the faulty brakes were caused by a manufacturing defect that has prompted a number of lawsuits. Then, the car manufacturer can also notify the Judicial Panel on Multidistrict Litigation ("JPML") that the case is a "potential tag-along action"<sup>8</sup> that should be transferred to a multidistrict litigation proceeding ("MDL"),<sup>9</sup> and file a motion to stay the proceedings in the district court where the case was removed pending transfer to the MDL. The MDL could be lodged in any federal district court in the country. In the MDL, most pre-trial discovery will be handled by other plaintiffs' attorneys<sup>10</sup> who will receive a portion of any settlement or judgment our plaintiff is awarded.<sup>11</sup> His case could sit in the MDL court for years, with no movement on his individual case, and no ruling on his motion to remand to state court.

What happened? The manufacturer defendant in this case used a forum-shopping strategy called "snap removal"<sup>12</sup> to move a properly

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5. Although 28 U.S.C. § 1446(a) requires unanimous consent of all defendants to the removal, it only requires consent of "defendants who have been properly joined *and served*." (emphasis added).

6. See Fed. R. Civ. P. 41(a)(1)(A)(i).

7. Plaintiffs' attorneys will choose the forum that offers the most favorable procedural and substantive rules for their client, among other considerations. Friedrich K. Juenger, *Forum Shopping, Domestic and International*, 63 TUL. L. REV. 553, 572 (1989). See also Debra Lyn Bassett, *The Forum Game*, 84 N.C. L. REV. 333, 395 (2006); Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PENN. L. REV. 1439, 1469-70 (2008) (historical context for plaintiffs' attempts to keep claims in state courts).

8. Panel Rule 7.1.

9. 28 U.S.C. § 1407.

10. Brooke D. Coleman, *One Percent Procedure*, 91 WASH. L. REV. 1005, 1034-35 (2016).

11. See *In re Air Crash Disaster at Florida Everglades on December 29, 1972*, 549 F.2d 1006 (5th Cir. 1977); *In re Diet Drugs*, 582 F.3d 524, 547 (3d Cir. 2009).

12. See *Breitweiser v. Chesapeake Energy Corp.*, 2015 WL 6322625, at \*2 (N.D. Tex. Oct. 20, 2015); Arthur Hellman *et al.*, *Neutralizing the Stratagem of "Snap Removal": A Proposed Amendment to the Judicial Code*, 9 FED. COURTS L. REV. 103 (2016).

I use the term "snap removal" to refer to removal before service on *any* defendant in a diversity case. While some publications refer to this practice as "pre-service" removal, *e.g.*, Matthew Curry, Note, *Plaintiff's Motion to Remand Denied: Arguing for Pre-Service Removal under the Plain Language of the Forum-Defendant Rule*, 58 CLEV. ST. L. REV. 907 (2010), the term "pre-service" removal is imprecise because it is often used to describe cases in which the out-of-state defendant is served, but the forum defendant is not, and the forum defendant rule does not apply to bar removal of a diversity case. See *id.* at 932 n.98 (citing *Copley v. Wyeth, Inc.*, No. 09-722, 2009 WL 1089663 (E.D. Pa. Apr. 22, 2009), *Test Drilling Serv. Co. v. Hanor Co.*, 322 F. Supp. 2d 953 (C.D. Ill. 2003), *In re Bridgestone/Firestone, Inc.*, 184 F. Supp. 2d 826 (S.D. Ind. 2002), and *Ott v. Consol. Freightways Corp. of Del.*, 213 F. Supp. 2d 662 (S.D. Miss. 2002)).

filed state court action to a federal forum of the defendants' choosing. Latching on to language that was added to the removal statute in 1948 to prevent plaintiffs from improperly blocking the removal of diversity cases,<sup>13</sup> defendants argue that removal is proper despite the presence of properly joined forum defendants because there is complete diversity and no forum defendant was "properly joined and served" at the time of removal.<sup>14</sup> Defendants thus turn a limitation on the removal of diversity cases into a loophole to defeat that limitation—a loophole that works only if the defendant wins the race to remove faster than the plaintiff can serve the forum defendant.

The snap removal strategy has been used by defendants for more than twenty years,<sup>15</sup> but its use increased substantially with the advent of electronic case filing systems, which allow defendants to easily monitor cases filed against them.<sup>16</sup> District courts across the country have reached conflicting decisions on the propriety of the snap removal tactic, and different judges in the same district court have come to opposite conclusions.<sup>17</sup> The issue evaded appellate review for more than a decade, and in that time only one court of appeals addressed it.<sup>18</sup>

Little academic attention has been paid to this tactic,<sup>19</sup> and it has largely focused on the arguments in favor of or objecting to snap removal. Whatever merit any of the arguments have, no one has examined the phenomenon from an empirical perspective: how widespread the practice is, in what types of cases is it used, how long these cases remain in federal court, and how are they finally resolved. This Article attempts that missing examination by looking at case-level data for snap removals over a three-year period to provide richer information about the effect of the snap removal tactic on the administration of justice. Ultimately, this information supports the argument that changes are needed to prevent the waste of judicial

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13. See *infra* Part I.

14. See *infra* Part II.A.

15. *Recognition Communications, Inc. v. American Auto. Ass'n, Inc.*, No. Civ.A. 3:97-CV-0945-P, 1998 WL 119528, \*1 (W.D. Tex. Mar. 5, 1998).

16. Zach Hughes, *A New Argument Supporting Removal of Diversity Cases Prior to Service*, 79 DEF. COUNS. J. 205 (2012).

17. See *infra* note 109. See generally, *Gentile v. Biogen Idec, Inc.*, 934 F. Supp. 2d 313, 316–18 (D. Mass. 2013) (discussing various courts' approaches to pre-service removal under § 1441(b)(2)).

18. See *infra* Part II.C. This issue was recently addressed by a federal court of appeals for the first time. See *Encompass Ins. Co. v. Stone Mansion Restaurant Inc.*, 902 F.3d 147 (3d Cir. 2018).

19. See *Hellman*, *supra* note 12; Saurabh Vishnubhakat, *Pre-Service Removal in the Forum Defendant's Arsenal*, 47 GONZAGA L. REV. 148 (2011-12); Jordan Bailey, Comment, *Giving State Courts the Ol' Slip: Should a Defendant be Allowed to Remove an Otherwise Irremovable Case to Federal Court Solely Because Removal Was Made Before Any Defendant Is Served?*, 42 TEX. TECH L. REV. 181 (2009); Matthew Curry, Note, *Plaintiff's Motion to Remand Denied: Arguing for Pre-Service Removal Under the Plain Language of the Forum-Defendant Rule*, 58 CLEV. ST. L. REV. 907 (2010).

resources on dilatory procedural tactics.

Part I of this Article briefly explores the text, history and purpose of the forum defendant rule. Part II describes the snap removal phenomenon, looks at how the district courts have addressed the arguments and arrived at different answers, explains why the issue evaded appellate review for so long, and why the issue will continue to evade appellate review in other circuits. Part III explains what types of data were gathered, and how those data were gathered. Part IV then analyzes the data, and examines the effect of snap removal on the federal courts. Finally, Part V argues that the data support calls to amend the Judicial Code, and suggests tailored approaches to address the unique challenges presented by snap removals, and close the snap removal loophole.

#### I. A SHORT HISTORY OF THE STATUTORY RIGHT TO REMOVE DIVERSITY CASES FROM STATE COURTS

Federal courts are courts of limited jurisdiction, having subject matter jurisdiction only over matters authorized by the Constitution and Congress,<sup>20</sup> while state courts are courts of general jurisdiction. In a case where state and federal courts have concurrent jurisdiction, the plaintiff may choose the forum where the case will be litigated.<sup>21</sup> The Supreme Court has long held that the plaintiff is the “master of the complaint,”<sup>22</sup> and can avoid federal court by not invoking federal law or federal diversity jurisdiction.<sup>23</sup>

While the plaintiff has the right to select a state court of competent jurisdiction, federal law has always provided the defendant the statutory right to remove from state court to federal court cases that originally could have been filed in federal court, including cases between citizens of different states.<sup>24</sup> The removal right is entirely statutory.<sup>25</sup>

Although the right of removal is as old as the federal judiciary itself,

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20. See, e.g., *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994).

21. *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913).

22. See, e.g., *Holmes Grp, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 831-32 (2002) (citation omitted); *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987).

23. *Great N. Ry. Co. v. Alexander*, 246 U.S. 276, 282 (1918) (“in the absence of a fraudulent purpose to defeat removal, the plaintiff may by the allegations of his complaint determine the status with respect to removability of a case”); *Healy v. Sea Gull Specialty Co.*, 237 U.S. 479, 480 (1915) (“the plaintiff is absolute master of what jurisdiction he will appeal to.”); *The Fair*, 228 U.S. at 25 (“the party who brings a suit is master to decide what law he will rely upon”).

24. Judiciary Act of 1789, 1 Stat. 73, c. 20, § 12; see generally 14B CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & JOAN E. STEINMAN, *FED. PRAC. & PROCEDURE* § 3721 (4th ed. 2009).

25. See *Martin v. Hunter’s Lessee*, 14 U.S. 304 (1816); *Libhart v. Santa Monica Dairy Co.*, 592 F.2d 1062, 1064 (9th Cir. 1979).

it has always been limited.<sup>26</sup> One important limitation on the right to remove in diversity cases is what has come to be known as the “forum defendant rule”—a defendant cannot remove a case to federal court on the basis of diversity jurisdiction if the defendant is sued in its home state.<sup>27</sup> The forum defendant rule has limited the statutory right of removal in diversity cases since the beginning of the federal Judicial Code.<sup>28</sup>

The common justification for this limitation is linked to a common justification for diversity jurisdiction itself. If diversity jurisdiction serves to protect out-of-state parties from the perceived prejudices against them in state courts,<sup>29</sup> then the right to remove cases based on diversity jurisdiction should only apply when an out-of-state party finds itself involuntarily subject to another state’s judicial power.<sup>30</sup> The need for protection from potential local bias is absent when a defendant is a citizen of the state in which the case is brought.<sup>31</sup> Thus, diversity jurisdiction could be invoked to remove a case from state court to federal court only if the plaintiff was a resident of the forum state and the defendant was not.<sup>32</sup> Forum defendants had no statutory right to remove a diversity case at all.

This limitation on removal in diversity cases preserves the authority of the states to regulate their own citizens, and ensure that their citizens are held to account when they violate the law. The removal of civil cases to federal court “infringes state sovereignty.”<sup>33</sup> It deprives state courts of actions properly before them, and raises significant federalism

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26. *Supra* note 24.

27. *Supra* note 3; *Martin v. Snyder*, 148 U.S. 663 (1893).

28. *See supra* note 24.

29. Alexander Hamilton, *The Federalist* No. 80, in *THE FEDERALIST PAPERS* 404-5 (Buccaneer Books, 1992) (justifying federal jurisdiction in diversity cases because federal courts have no local attachments and “will be likely to be impartial between the different States and their citizens.”); *Lumbermen’s Mut. Cas. Co. v. Elbert*, 348 U.S. 48, 54 (1954) (Frankfurter, J., concurring); *Bank of the United States v. Deveaux*, 9 U.S. 61, 87 (1809); S. Rep. No. 1830, 85th Cong., 2d Sess., reprinted in 1958 U.S. Code Cong. & Admin. News 3099, 3102 (explaining the “purpose of diversity of citizenship legislation . . . is to provide a separate forum for out-of-state citizens against the prejudices of local courts and local juries by making available to them the benefits and safeguards of the federal courts”); *McSparran v. Weist*, 402 F.2d 867, 876 (3d Cir. 1968); *see also* 14B *FED. PRAC. & PROCEDURE* §§ 3601, 3721; *Burbank*, *supra* note 7 at 1460-66.

30. *See, e.g.*, *Dresser Indus., Inc. v. Underwriters at Lloyd’s of London*, 106 F.3d 494, 499 (3d Cir. 1997) (“If diversity jurisdiction exists because of a fear that the state tribunal would be prejudiced towards the out-of-state plaintiff or defendant, that concern is understandably allayed when the party is joined with a citizen from the forum state.”); *Browne v. Hartford Fire Ins. Co.*, 168 F. Supp. 796, 797 (N.D. Ill. 1959).

31. ERWIN CHERMERINSKY, *FEDERAL JURISDICTION*, § 5.5, at 345 (4th ed. 2003)

32. *Supra* note 24.

33. *Doe v. Allied-Signal, Inc.*, 985 F.2d 908, 911 (7th Cir. 1993)

concerns.<sup>34</sup>

The power reserved to the states under the Constitution to provide for the determination of controversies in their courts, may be restricted only by the action of Congress in conformity to the Judiciary Articles of the Constitution. “Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.”<sup>35</sup>

Concerns about federalism and comity have led courts to place the burden on the party seeking removal to establish its entitlement to a federal forum.<sup>36</sup> Courts strictly construe the removal statute and resolve all doubts in favor of remanding the case to state court.<sup>37</sup>

In 1948, Congress amended the removal statute, and rewrote the forum defendant rule. Under the new iteration of the rule, a defendant could remove a diversity case “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.”<sup>38</sup> As scholars and judges have noted, the legislative history of the removal statute does not reveal the purpose of this language,<sup>39</sup> but historical context makes its purpose evident: “The purpose behind the addition of that language seems fairly clear—to bring into the statute the ‘fraudulent joinder’ doctrine and to restrict other tactics, like failing to serve a properly joined in-state defendant, which might otherwise be used to prevent removals which Congress had authorized.”<sup>40</sup>

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34. *Gasch v. Hartford Accident & Indem. Co.*, 491 F.3d 278, 281 (5th Cir. 2007) (citations omitted).

35. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941) (quoting *Healy v. Ratta*, 292 U.S. 263, 270 (1934)).

36. *Cronin v. Kentucky Horse Park Foundation, Inc.*, 5:15-197-KKC, 2016 WL 1633294, at \*2 (E.D. Ky. Apr. 22, 2016).

37. *Gasch*, 491 F.3d at 281-82; *Doe*, 985 F.2d at 911; *Harris v. Bankers Life & Casualty Co.*, 425 F.3d 689, 698 (9th Cir. 2005); *Long v. Bando Mfg. of Am., Inc.*, 201 F.3d 754, 757 (6th Cir. 2000).

38. 28 U.S.C. § 1441(b) (1948) (emphasis added).

39. See, e.g., *Hellman*, *supra* note 12 at 108; *Sullivan v. Novartis Pharmaceuticals Corp.*, 575 F. Supp. 2d 640, 644 (D.N.J. 2008); H.R. Rep. No. 80-308 (1947), as reprinted in 1948 U.S.C.C.S., Special Pamphlet: Title 28 at 1692; S. Rep. No. 80-1559 (1948), as reprinted in 1948 U.S.C.C.S., Special Pamphlet: Title 28 at 1675; Letter from Hon. Albert B. Maris, Circuit Judge, United States Court of Appeals for the Third Circuit, and Chair of the Committee, to Mildrim Thompson, Jr., Esq. (May 10, 1946).

40. *Champion Chrysler Plymouth v. Dimension Service Corp.*, No. 2:17-cv-130, 2017 WL 726943, at \*2 (S.D. Ohio Feb 24, 2017), *adopting* Report & Recommendation 2017 WL 1276727 (S.D. Ohio Apr.6, 2017), *appeal dismissed*, No. 17-3355 (6th Cir. June 12, 2017); see also 14B FED. PRAC & PROC. § 3723; *Estate of Harris v. Abbott Acquisition Co.*, No. 16-243, 2017 WL 3608138, at \*14-15 (Aug. 22, 2017); *Gentile v. Biogen Idec, Inc.*, 934 F. Supp.2d 313, 319-20 (D. Mass. 2013). Prior to

This language carries forward the statutory limitation on the right to remove cases that could have originally been filed in federal court, while at the same time discouraging removal-blocking tactics by plaintiffs. Courts have interpreted the forum defendant rule as a measure intended to prevent gamesmanship by plaintiffs who name a forum defendant they do not intend to prosecute, and do not even serve.<sup>41</sup>

Even after the “properly joined and served” language was added in 1948, it was highly unlikely that a diversity case involving a forum defendant would be removed for two reasons: (1) the defendant usually learned of the suit by service of process; and (2) there was a two-step removal process whereby the petition for removal did not automatically mean that the case was removed; rather, a district court could deny a petition for removal based on a defect in the removal.<sup>42</sup>

The “properly joined and served” language remains in § 1441(b)(2), even after the statute was amended in 2011. The removal statute now states that a diversity case “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.”<sup>43</sup> The amended statute simply restates the forum defendant rule in positive rather than negative terms.<sup>44</sup> There is no evidence in the legislative history of the 2011 amendment that Congress was concerned with the interpretation of the word “none,” or that Congress intended to preserve or override any practice under or interpretation of the forum defendant rule by leaving the remainder of the provision intact.<sup>45</sup>

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1948, the Supreme Court had held that the defendant’s “right of removal cannot be defeated by a fraudulent joinder of a resident defendant having no real connection with the controversy,” carving out an exception to the rule prohibiting removal of cases involving forum defendants. *See* *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97 (1921); *Chesapeake & O. R. Co. v. Cockrell*, 232 U.S. 146 (1914).

41. *See, e.g.*, *Stan Winston Creatures, Inc. v. Toys “R” Us, Inc.*, 314 F. Supp. 2d 177, 180-81 (S.D.N.Y. 2003).

42. The 1988 amendment to 28 U.S.C. § 1446 replaced the two-step procedure by “verified petition” for removal with a “notice of removal,” that automatically divests the state court of jurisdiction over the case. *See* Pub. L. 100-702, § 1016(b)(2); Ellen Bloomer Mitchell, *Improper Use of Removal and Its Disruptive Effect on State Court Proceedings: A Call to Reform 28 U.S.C. § 1446*, 21 ST. MARY’S L.J. 59 (1989).

43. 28 U.S.C. § 1441(b).

44. *See* H.R. Rep. No. 112-10, at 12 (stating that the revisions to 1441(b) simply “restates the substance of the . . . current subsection.”).

45. *See id.* Instead, the legislative history of the Federal Courts Jurisdiction and Venue Clarification Act of 2011 (“JVCA”) shows that Congress was focused on addressing other problems in the Act; *see, e.g., id.* at 8-10 (noting that the Act was aimed at resolving divisions of authority on questions of corporate citizenship); *id.* at 13-14 (addressing split in authority regarding time for removal in multiple-defendant cases); *id.* at 15-16 (addressing the split in authority regarding the burden of showing that the amount in controversy is satisfied in cases removed based on diversity).

## II. REMOVING IN A SNAP: TURNING A LIMITATION INTO A LOOPHOLE

Nearly fifty years after the “properly joined and served” language was added to the removal statute, three defendants attempted to skirt the limitation on removal of cases involving in-state defendants by removing a diversity case from state court to federal court before they or the forum defendant was served. In 1997, a Nevada company called Recognition Communications, Inc. filed suit in Dallas, Texas, asserting a variety of contract claims against four defendants, including one Texas defendant.<sup>46</sup> Instead of immediately serving the defendants, the plaintiff sent courtesy copies of the complaint to each defendant with a letter explaining that service of process was being withheld in anticipation of a quick and inexpensive resolution of the matter.<sup>47</sup> Fifteen days later, before any defendant was served, the three out-of-state defendants removed the case to the U.S. District Court for the Northern District of Texas.<sup>48</sup> This was the first reported instance of the use of the snap removal device.

The defendants argued that removal was proper because the requirements for diversity jurisdiction were met, and the only forum defendant was not “properly joined *and served*” at the time of removal.<sup>49</sup> Although this argument did not work in *Recognition Communications*,<sup>50</sup> defendants in hundreds of other cases have since argued that removal before service in a diversity case involving a forum defendant is not prohibited by the forum defendant rule, and several district court judges and one court of appeals have agreed.

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46. *Recognition Communications, Inc. v. American Auto. Ass'n, Inc.*, No. Civ.A. 3:97-CV-0945-P, 1998 WL 119528, at \*1 (N.D. Tex. Mar. 5, 1998).

47. *Id.*

48. Although it was not discussed by the district court, the removal occurred when there was still a conflict in the circuit courts regarding when the thirty-day limit for a defendant to remove began to run—on receipt of the complaint or upon service. *Reece v. Wal-Mart Stores, Inc.*, 98 F.3d 839, 841 (5th Cir. 1996) (holding that thirty-day time limit to remove began to run on receipt of a copy of the initial pleading, citing a plain meaning rationale); Robert P. Faulkner, *The Courtesy Copy Trap: Untimely Removal From State to Federal Court*, 52 M.D. L. REV. 374 (1993). The Supreme Court did not resolve this conflict until two years after the removal in *Recognition Communications*. See *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 347-48 (1999) (holding that a defendant's time to remove “is triggered by simultaneous service of the summons and complaint, or receipt of the complaint, ‘through service or otherwise,’ after and apart from service of the summons, but *not by mere receipt of the complaint unattended by any formal service.*”). A speedy removal by the defendants in *Recognition Communications* was likely then viewed as necessary to avoid waiving the right to remove.

49. *Recognition Communications, Inc.*, 1998 WL 119528, at \*2. The removing defendants also argued that the forum defendant was fraudulently joined. *Id.* at \*4.

50. *Recognition Communications, Inc.*, 1998 WL 119528, at \*1.

A. *Making the Case for Snap Removal*

Defendants rely on two lines of cases and a “plain language” argument to make their case for snap removal. For years, many courts have interpreted the removal statute to permit removal by an out-of-state defendant that had been served (or that had waived service or otherwise made itself subject to the jurisdiction of the state court) despite the presence of a properly joined forum defendant, as long as complete diversity existed, and the forum defendant was not served before the case was removed.<sup>51</sup> This line of cases finds support in the text and purpose of the removal statute. An additional line of cases hold that while a defendant has thirty days after service to remove a case within the original jurisdiction of the federal courts,<sup>52</sup> service is not a mandatory prerequisite to removal—a defendant may remove an otherwise removable civil action before being served.<sup>53</sup> This is partially based on the text of 28 U.S.C. § 1446(b), which provides that removal is proper within thirty days of a defendant's receipt, “through service *or otherwise*,” of the relevant pleading or other document.<sup>54</sup> Defendants argue that these lines of cases support a “plain language” interpretation of 28 U.S.C. § 1441(b)(2) that allows a defendant to remove a diversity case before it or any other defendant is served, despite the presence of a properly joined forum defendant, because removal is only precluded when a forum defendant is both joined *and* served at the time of removal.<sup>55</sup>

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51. See *Test Drilling Serv. Co. v. Hanor Co.*, 322 F. Supp. 2d 953, 956 (C.D. Ill. 2003); *In re Bridgestone/Firestone, Inc.*, 184 F. Supp. 2d 826 (S.D. Ind. 2002); *Ott v. Consol. Freightway Corp.*, 213 F. Supp. 2d 662 (S.D. Miss. 2002); *Wensil v. E.I. DuPont De Nemours and Co.*, 792 F. Supp. 447, 449 (D.S.C.1992); *Republic Western Ins. Co. v. Int'l Ins. Co.*, 765 F. Supp. 628, 629 (N.D. Cal.1991); *Windac Corp. v. Clarke*, 530 F. Supp. 812, 813 (D. Neb. 1982); see also *Stan Winston Creatures, Inc. v. Toys “R” Us, Inc.*, 314 F. Supp. 2d 177, 180 (S.D.N.Y. 2003) *Davis v. Cash*, No. Civ. 3:01–CV–1037–H, at \*1 2001 WL 1149355 (N.D. Tex. Sep. 27, 2001); *Maitra v. Mitsubishi Heavy Indus., Ltd.*, 2002 WL 1491855, at \*2 (W.D. Tex. Mar. 29, 2002).

52. 28 U.S.C. § 1446(b)(1); *Murphy Bros., Inc.*, 526 U.S. at 344.

53. *Delgado v. Shell Oil Co.*, 231 F.3d 165, 177 (5th Cir. 2000); *Arthur v. Litton Loan Servicing LP*, 249 F. Supp. 2d 924, 927 (E.D. Tenn. 2002).

54. 28 U.S.C. § 1446(b) (emphasis added). This focus on the *receipt* of the complaint outside of the context of service is a strict interpretation of the language “or otherwise” without the context or purpose of those words, as discussed by the Supreme Court in *Murphy Brothers*. See *Murphy Bros., Inc.*, 526 U.S. at 344. Defendants assert that while the Supreme Court in *Murphy Brothers* decided the outer time limit for removal, it did not hold that service was a prerequisite to removal.

55. John P. Lavelle, Jr. & Erin E. Kepplinger, *Removal Prior to Service: A New Wrinkle or a Dead End?*, 75 DEF. COUNS. J. 177 (April 2008).

*B. A Deep Conflict Develops in the District Courts*

The first few courts to address this argument rejected it.<sup>56</sup> In *Recognition Communications*, the court wrote that while the defendants' argument was "interesting," the court disagreed with it.<sup>57</sup> The court reasoned that when no defendant has been served, all defendants have the same status, so there was no reason to ignore the citizenship of a forum defendant when assessing whether removal was proper. Four years later, the U.S. District Court for the District of Maryland also rejected defendants' "plain language" argument, ruling that a motion to remand should not be denied based on the fact that an out-of-state defendant "cleverly" and "quickly" removed before service on any defendant.<sup>58</sup> A few years later, the U.S. District Court for the Northern District of Illinois rejected an out-of-state defendant's attempt to remove less than two weeks after the complaint was filed, and the day after the plaintiff asked the defendant to waive service.<sup>59</sup>

The *Holmstrom* court recognized the tension between its decision and the literal meaning of the text of the removal statute, but asserted

[t]he "joined and served" requirement makes sense . . . when one defendant has been served but the named forum defendant has not . . . . When no defendant has been served, however, the non-forum defendant stands on equal footing as the forum defendant . . . . Once served, a defendant may immediately remove an otherwise removable case without regard to the unserved forum defendant, but the protection afforded by the "joined and served" requirement is wholly unnecessary for an unserved non-forum defendant.<sup>60</sup>

Then the tide turned. Beginning in 2006, several judges adopted the interpretation of § 1441(b)(2) asserted by defendants, and denied plaintiffs' motions to remand their cases to state courts. The U.S. District Court for the Southern District of Illinois adopted the defendants' argument completely in *Massey v. Cassens & Sons, Inc.* The court respectfully disagreed with the reasoning of the *Holmstrom* and *Recognition Communications* decisions, saying that "the likely policy underlying the 'joined-and-served' requirement" did not override the clear and unambiguous language of 28 U.S.C. § 1441(b)—"where

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56. *Recognition Communications, Inc.*, 1998 WL 119528, at \*2; *Oxendine v. Merck & Co.*, 236 F. Supp. 2d 517, 526 (D. Md. 2002); *Holmstrom v. Harad*, 2005 WL 1950672 (N.D. Ill. Aug. 11, 2005).

57. *Recognition Communications, Inc.*, 1998 WL 119528, at \*2.

58. *Oxendine*, 236 F. Supp. 2d at 524.

59. *Holmstrom*, 2005 WL 1950672, at \*1.

60. *Id.* at \*2.

complete diversity is present—as it is in this case—only the presence of a ‘joined-and-served’ resident defendant defeats removal.”<sup>61</sup>

One week later, without referencing the recent decision in *Massey*, the District of New Jersey also denied a motion to remand in a snap removal case, writing that the decision in *Holmstrom* “does not adhere to the literal language of the statute” which is “unambiguous.”<sup>62</sup> The following year, three more judges in the District of New Jersey agreed,<sup>63</sup> as did two judges in the Northern District of California,<sup>64</sup> and one judge in the Eastern District of Missouri.<sup>65</sup>

The reasoning of these judges in favor of permitting snap removal and denying remand is uniform—the language of § 1441(b)(2) is unambiguous and does not preclude removal of diversity cases against at least one forum defendant when no defendant was served at the time of removal, even if forum defendants were properly joined in the action.<sup>66</sup> This rationale extended to snap removals by forum defendants themselves, who were permitted to remove diversity cases as long as they removed before they were served.<sup>67</sup> These judges rejected policy arguments in support of motions to remand, reasoning that the policy arguments are not enough to surmount the plain language of the statute.<sup>68</sup> These courts also dismissed arguments by plaintiffs that the “joined and served” language must be read in the context of the rest of the removal statute, and the Supreme Court’s decision in *Murphy*

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61. *Massey*, 2006 WL 381943, at \*3.

62. *Frick v. Novartis Pharmaceuticals Corp.*, No. Civ. 05-5429(DRD), 2006 WL 454360, at \*2-3 (D.N.J. Feb. 23, 2006).

63. *Thomson v. Novartis Pharmaceuticals Corp.*, No. 06-6280, 2007 WL 1521138, at \*3-4 (D.N.J. May 22, 2007); *Yocham v. Novartis Pharmaceuticals Corp.*, 07-1810, 2007 WL 2318493 (D.N.J. Aug. 13, 2007); *Ripley v. Eon Labs Inc.*, 622 F. Supp. 2d 137, 140-41 (D.N.J. 2007); *Jaeger v. Schering Corp.*, No. 07-3465, 2007 WL 3170125, at \*2 (D.N.J. 2007).

64. *City of Ann Arbor Employees Retirement System v. Gecht*, No. C-06-7453 EMC, 2007 WL 760568, at \*1 (N.D. Cal. Mar. 9, 2007); *Waldon v. Novartis Pharmaceuticals Corp.*, No. C07-01988 MJJ, 2007 WL 1747128, at \*1 (N.D. Cal. Jun. 18, 2007).

65. *Johnson v. Precision Airmotive, LLC*, No. 4:07CV1695 CDP, 2007 WL 4289656, at \*1 (E.D. Mo. Dec. 4, 2007).

66. *Supra* notes 61-65; *Flores v. Merck & Co. (In re Fosamax Prods. Liab. Litig.)*, No. 1:07-cv-2442, 2008 WL 2940560, at \*2 (S.D.N.Y. July 28, 2008); *Vitaoe v. Mylan Pharmaceuticals, Inc.*, No. 1:08cv85, 2008 WL 3540462, at \*5 (N.D.W.Va. Aug. 13, 2008); *North v. Precision Airmotive Corp.*, 600 F. Supp. 2d 1263, 1269-70 (M.D. Fla. 2009); *Fisher v. Pelstring*, No. 4:09-252-TLW-TER, 2009 WL 10664813, at \*4 (D.S.C. Sept. 29, 2009); *Robertson v. Iuliano*, No. RDB 10-1319, 2011 WL 453618, at \*2-3 (D. Md. Feb. 4, 2011); *Poznanovich v. AstraZeneca Pharmaceuticals LP*, No. 11-4001 (JAP), 2011 WL 6180026, at \*4 (D.N.J. Dec. 11, 2011); *Breitweiser v. Chesapeake Energy Corp.*, 2015 WL 6322625, at \*5 (N.D. Tex. Oct. 20, 2015).

67. *See* cases cited *supra* note 63; *see also Allison v. Apotex Corp.*, No. 08-60525-CIV-ZLOCH, 2008 WL 11331976, at \*3 (S.D. Fla. May 23, 2008); *Bivins v. Novartis Pharm. Corp.*, No. 09-1087, 2009 WL 2496518, at \*1 (D.N.J. Aug. 10, 2009); *Hutchins v. Bayer Corp.*, No. 08-640-JJF-LPS, 2009 WL 192468, at \*8 (D. Del. Jan. 23, 2009).

68. *See, e.g., Vitaoe*, 2008 WL 3540462, at \*5; *Breitweiser*, 2015 WL 6322625, at \*5.

*Brothers*, which both indicate that the statute does not permit removal before service.<sup>69</sup> Arguments that snap removal is improper because it violates the requirement that all defendants join in or consent to the removal have also been rejected because only properly served defendants are required to join in or consent to the removal.<sup>70</sup> Similarly, service of the forum defendant after removal has been ruled insufficient to defeat removal because the defendant's right to remove the case is determined at the time of removal.<sup>71</sup>

Suddenly, cases involving forum defendants, that before 2006 were considered non-removable, were being removed by both in-state and out-of-state defendants who received courtesy copies of a complaint along with a request to waive service,<sup>72</sup> or who monitored state court online dockets to find any case naming them as defendants.<sup>73</sup> Decisions that permit the use of the snap removal device, and the publicity given to these decisions by an active corporate defense bar,<sup>74</sup> appear to have fueled the race to remove diversity cases before service on any defendants.

Not all district court judges were persuaded by defendants "plain language" argument. As snap removals became more widespread, a wide and deep conflict developed in the district courts.

Several courts rejected snap removal by forum defendants.<sup>75</sup> In 2007, one judge in the District of New Jersey refused to adopt the defendants' arguments and declined to follow the decisions by other judges' in his

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69. *Regal Stone Ltd. v. Longs Drug Stores California, L.L.C.*, 881 F. Supp. 2d 1123, 1129 (N.D. Cal. 2012).

70. See 28 U.S.C. § 1446(b)(2)(A); *Massey*, *supra* note 61, at \*1 n.3.

71. *Vitaoe*, 2008 WL 3540462, at \*6

72. *Smethers v. Bell Helicopter Textron Inc.*, No. 6:16-CV-58, 2017 WL 1277512 (S.D. Tex. Apr. 4, 2017); *Watanabe v. Lankford*, 684 F. Supp. 2d 1210 (D. Haw. 2010); see also *infra* note 193.

73. See, e.g., *Schillmiller v. Medtronic, Inc.*, 44 F. Supp. 3d 721 (W.D. Ky. 2014); *Regal Stone Ltd.*, 881 F. Supp. 2d at 1127-28; *Poznanovich*, 2011 WL 6180026, at \*1 (D.N.J. Dec. 11, 2011) (detailing allegations of docket monitoring by defendant)

74. *Supra* notes 16, 55; Brandon D. Cox & Courtenay Youngblood Jalics, *Navigating the Muddy Waters of an MDL: Strategies to Get (and Keep) Your Case in Federal Court*, 14 THE VOICE 17 (Apr. 29, 2015); Brianne Bharkhda, *Avoiding the Forum-Defendant Rule through Pre-Service Removal*, INSIDE MEDICAL DEVICES (Feb. 7, 2014) available at <https://www.insidemedicaldevices.com/2014/02/avoiding-the-forum-defendant-rule-through-pre-service-removal> (last visited Sept. 2, 2016); Matthew J. Lavisky, *Joined and Served: Pre-Service Removal and the Forum Defendant Rule*, 32 No. 3 TRIAL ADVOC. Q. 29 (Summer, 2013); Mark Herrmann & Paula Batt Wilson, *Serviceable Notion: Removal by Resident Defendants*, LAW360 (Aug. 6, 2008); James M. Beck, *How'd The World Miss This? Thomson v. Novartis*, DRUG & DEVICE LAW BLOG (Nov. 25, 2007).

75. *In re Aredia and Zometa Prod. Liab. Litig.*, No. 3:06-MD-1760, 2007 WL 2905247 (M.D. Tenn. Oct. 3, 2007). The case was originally filed in New Jersey state court, removed before service to the District of New Jersey by the forum defendant, and transferred to an MDL in the Middle District of Tennessee.

district in similar cases.<sup>76</sup> This judge broke ranks with other judges on the same court, and held that the forum defendant is subject to the restrictions of § 1441(b) regardless of whether it had been properly served at the time of removal. He reasoned that a reading of the statute that would permit a forum defendant to remove before it is served would run counter to the purpose of diversity jurisdiction—to avoid possible prejudice to an out-of-state defendant—and frustrate the policy underlying the forum defendant rule. He rejected a “plain language” reading of the statute that would allow removal of a diversity case by a forum defendant because that reading would encourage gamesmanship by defendants, which would be an absurd result that was not intended by Congress.<sup>77</sup>

Other judges in the District of New Jersey later granted motions to remand in cases snap removed by forum defendants.<sup>78</sup> Several judges in the Eastern District of Pennsylvania likewise rejected snap removals by forum defendants.<sup>79</sup> In addition to rejecting snap removal by forum defendants as contrary to Congressional intent, it was also rejected as violating the language of the statute when the only defendant in the case is a forum defendant. For example, in *Allen v. GlaxoSmithKline PLC*, the court reasoned that the “joined and served” language can only apply when there are multiple, named defendants.<sup>80</sup> In the Northern District of Oklahoma, the judge in *In re Jean B. McGill Revocable Living Trust* held that the plain language of § 1441(b) conditions removal on *some* defendant having been served.<sup>81</sup> Judges in the Southern District of Florida,<sup>82</sup> the Northern District of Georgia,<sup>83</sup> the Northern District of Ohio,<sup>84</sup> and the Central District of California<sup>85</sup> agreed that the forum

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76. *DeAngelo-Shuayto v. Organon USA Inc.*, No. 07-2923 (SRC), 2007 WL 4365311, at \*5 (D.N.J. Dec. 12, 2007); *Fields v. Organon USA Inc.*, No. 07-2922 (SRC), 2007 WL 4365312, at \*4 (D.N.J. Dec. 12, 2007).

77. *Id.*

78. *Sullivan v. Novartis Pharmaceuticals Corp.*, 575 F. Supp. 2d 640, 642 (D.N.J. 2008); *Brown v. Organon Int'l, Inc.*, Nos. 07-3092/3456 (Consolidated Cases for Purposes of Motions to Remand), 2008 WL 2833294, at \*4-5 (D.N.J. July 21, 2008).

79. *Malone v. Glaxosmithkline PLC*, No. 07-5048 (E.D. Pa. Dec. 4, 2007) (remanding case *sua sponte* because removal by forum defendant was improper under forum defendant rule); *Evans v. Glaxosmithkline PLC*, No. 07-5046 (E.D. Pa. Jan. 10, 2008); *Hance v. Glaxosmithkline PLC*, No. 07-5047 (E.D. Pa. Jan. 10, 2008); *Scott v. Glaxosmithkline PLC*, No. 07-CV-5049, 2008 WL 4925219 (E.D. Pa. Mar. 11, 2008) (incorporating and adopting the analysis and holdings in *DeAngelo-Shuayto* and *Fields* in the District of New Jersey); *Allen v. GlaxoSmithKline PLC*, No. 07-5045, 2008 WL 2247067 (E.D. Pa. May 30, 2008).

80. *Allen*, 2008 WL 2247067, at \*5.

81. *In re Jean B. McGill Revocable Living Trust*, No. 16-CV-707-GKF-TLW, 2017 WL 75762, at \*2 (N.D. Okla. Jan. 6, 2017).

82. *Carpenter v. Apotex Corp.*, No. 08-60526, 2008 WL 11332029 (S.D. Fla. Aug. 8, 2008).

83. *Hawkins v. Cottrell, Inc.*, 785 F. Supp. 2d 1361, 1380 (N.D. Ga. 2011).

84. *Dominguez v. Acrux Staffing*, No. 1:11-cv-2443, 2011 WL 6326538 (N.D. Ohio Dec. 15,

defendant rule bars pre-service removal by a forum defendant.

Many judges rejected snap removals by out-of-state defendants, as well. These courts sometimes reached the same result by different means. Many courts adopted the reasoning used by the courts rejecting snap removals by forum defendants—allowing a defendant to remove a case before any defendant, including a forum defendant, is served would contravene Congressional intent and the purposes of diversity jurisdiction and the forum defendant rule.<sup>86</sup> Some courts followed the reasoning of the court in *Holmstrom*—that when no defendant has been served, the citizenship of all defendants must be considered in determining whether removal was proper, and the presence of a forum defendant violates the forum defendant rule.<sup>87</sup> Other courts employed an “improper joinder” or “fraudulent joinder” analysis to assess whether the plaintiff has a possible claim against the forum defendant.<sup>88</sup> Some courts have read the plain language of the forum defendant rule to require that at least one defendant has been served before the case can be removed.<sup>89</sup>

### C. *No End in Sight*

Although the Third Circuit recently resolved the long-standing conflict in the district courts of Delaware, New Jersey, and Pennsylvania,<sup>90</sup> the issue remains unresolved throughout the rest of the country. Because it is the only appellate authority on the issue, the Third Circuit’s recent decision approving of the practice will likely fuel more snap removals in a wide variety of cases both within the Third Circuit and across the country. Just as it took the Third Circuit more

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2011).

85. *Massachusetts Mut. Life Ins. Co. v. Mozilo*, No. 2:12-cv-03613-MRP-MAN, 2012 WL 11047336 (C.D. Cal. Jun. 28, 2012).

86. *Vivas v. Boeing Co.*, 486 F. Supp. 2d 726, 734 (N.D. Ill. 2007); *Ethington v. General Elec. Co.*, 575 F. Supp. 2d 855, 862 (N.D. Ohio 2008); *Mohammed v. Watson Pharmaceuticals Inc.*, No. SA CV09-0079 DOC(ANx), 2009 WL 857517, at \*3-4 (C.D. Cal. Mar. 26, 2009); *Hoskinson v. Alza Corp.*, No. 2:09-cv-03449-GEB-GGH, 2010 WL 2652467 (E.D. Cal. Jul. 10, 2010); *Laugelle v. Bell Helicopter Textron, Inc.*, No. 10-1080 (GMS), 2012 WL 368220 (D. Del. Feb. 2, 2012); *Williams v. Daiichi Sankyo, Inc.*, 13 F. Supp. 3d 426, 430-31 (D.N.J. 2014); *Little v. Wyndham Worldwide Operations, Inc.*, 251 F. Supp. 3d 1215, 2017 WL 1788427, at \*2 (M.D. Tenn. 2017)

87. *In re Avandia Marketing, Sales Practices and Products Liab. Litig.*, 624 F. Supp. 2d 396, 422 (E.D. Pa. 2009).

88. *See, e.g., Grizzly Mountain Aviation, Inc. v. McTurbine, Inc.*, 619 F. Supp. 2d 282, 287 (S.D. Tex. 2008).

89. *Gentile v. Biogen Idec Inc.*, 934 F. Supp. 2d 313, 318 (D. Mass. 2013); *see also Homstrom v. Harad*, No. 05 C 4716, 2006 WL 2587962, at \*3 (N.D. Ill. Sep. 7, 2006) (holding that removal before service on any defendant is premature, and that a non-forum defendant must wait until it is served to remove the action).

90. *Encompass Ins. Co. v. Stone Mansion Rest. Inc.*, 902 F.3d 147 (3d Cir. 2018).

than a decade to resolve this issue,<sup>91</sup> the issue will likely continue to evade appellate review in other circuits.

Appellate review of the issue is exceedingly difficult to obtain because orders granting remand are not appealable,<sup>92</sup> while orders denying remand are subject to the final judgment rule, and therefore not immediately appealable.<sup>93</sup> An order denying a motion to remand may be eligible for discretionary interlocutory appeal under 28 U.S.C. § 1292(b), but the statute requires both that the district court certify that the statutory requirements of § 1292 are met, and that the appellate court exercise its own discretion to accept the appeal.<sup>94</sup> This makes interlocutory review of remand denials difficult to obtain. The case law reveals only one snap removal case that was certified for interlocutory review of the order denying remand,<sup>95</sup> and the parties in that case settled before the court of appeals heard argument on the merits.

Leaving review of the order denying remand until after a final judgment virtually ensures that the issue will evade appellate review. Most cases will settle or be dismissed before judgment, so there will be no final judgment to appeal. If a plaintiff is awarded judgment in district court, there is no reason to appeal the denial of remand. If judgment is granted to defendants, a plaintiff must assess whether to spend even more time and resources to ask a court of appeals to allow the case to start over in state court where the plaintiff will have to expend more time and resources in hopes of obtaining a better result there. Even if the plaintiffs do appeal the issue after final judgment, it is unlikely that an appellate court will vacate final judgment in a case where the district court would have had original jurisdiction of the case had it been filed in that court.<sup>96</sup> Despite the objections of the plaintiff, an appellate court probably will not vacate a judgment based on a procedural error that is not jurisdictional<sup>97</sup> so that the parties can relitigate the merits in state court. Once a case is tried, “considerations

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91. The issue was first presented to the Third Circuit in 2003, *see* *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Products Liability Litigation*, 93 F. App'x 345 (3d Cir. 2004), and was presented again two years later in *In re Briscoe*, 448 F.3d 201, 213 (3d Cir. 2006).

92. 28 U.S.C. § 1447(d); *Holmstrom v. Peterson*, 492 F.3d 833, 840 (7th Cir. 2007).

93. *See, e.g., Caterpillar Inc. v. Lewis*, 519 U.S. 61, 74 (1996); *In re Briscoe*, 448 F.3d 201, 213 (3d Cir. 2006) (denying mandamus review of decision denying remand because the issue could be addressed after final judgment); *Bishop v. Bechtel Power Corp.*, 905 F.2d 1272, 1275 (9th Cir. 1990) (holding that the denial of a remand order is not a final judgment and that the court thus lacked jurisdiction to consider an appeal from a remand denial).

94. 28 U.S.C. § 1292(b).

95. *Regal Stone Ltd. v. Longs Drug Stores California, L.L.C.*, 881 F. Supp. 2d 1123, 1131 (N.D. Cal. 2012).

96. *See, e.g., Grubbs v. General Electric Credit Corp.*, 405 U.S. 699, 703 (1972).

97. *See infra* note 115.

of finality, efficiency, and economy become overwhelming.<sup>98</sup> Requiring the case to be retried after years of litigation may impose unnecessary and wasteful burdens on the parties and the courts.<sup>99</sup>

The Third Circuit is the only court so far to have had the opportunity to review a snap-removed case after judgment on the merits. In a 2015 case, the court of appeals granted a motion to summarily affirm the judgment in the case without addressing the snap removal issue.<sup>100</sup> Recently, the Third Circuit gave its approval to the use of the snap removal device<sup>101</sup> more than a decade after it had its first opportunity to address the issue.<sup>102</sup> In a few other cases, defendants appealed orders remanding cases, even though § 1447(d) prohibits such appeals.<sup>103</sup> Those appeals that don't settle before the court of appeals reaches the merits<sup>104</sup> are usually dismissed.<sup>105</sup>

One district judge is not bound by earlier decisions of other district judges, even in the same district.<sup>106</sup> So, without appellate authority mandating one result, district court judges outside of the Third Circuit are free to decide the propriety of snap removal in a way that conflicts with other judges within the same circuit,<sup>107</sup> state,<sup>108</sup> and district.<sup>109</sup> The race to remove to federal court before service that began with

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98. *Caterpillar Inc.*, 519 U.S. at 75.

99. *Id.* at 76.

100. *In re Diet Drugs*, No.14-4608 (3d Cir. Apr. 29, 2015). The author was appellate counsel for the plaintiffs in that case.

101. *Encompass Ins. Co. v. Stone Mansion Rest. Inc.*, 902 F.3d 147 (3d Cir. 2018).

102. *See In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Products Liability Litigation*, 93 F. App'x 345 (3d Cir. 2004); *In re Briscoe*, 448 F.3d 201, 213 (3d Cir. 2006).

103. *Bailey v. Monsanto Co.*, 176 F. Supp. 3d 853, 855 (E.D. Mo. 2016), *appeal dismissed* Mar. 16, 2017; *see infra* note 149; *Champion Chrysler Plymouth v. Dimension Service Corp.*, No. 2:17-cv-130, 2017 WL 726943, at \*1 (S.D. Ohio Feb 24, 2017).

104. *See infra* note 149; *Bailey*, 176 F. Supp. 3d at 870.

105. *Champion Chrysler Plymouth*, 2017 WL 726943, at \*2.

106. *See, e.g., Mosel Vitelic Corp. v. Micron Tech., Inc.*, 162 F. Supp. 2d 307, 311 (D. Del. 2000) (“[W]hile the opinion of one district judge may be found to be persuasive, it is not binding on another district judge (even if that judge happens to sit in the same district).”).

107. *See Little v. Wyndham Worldwide Operations, Inc.*, 251 F. Supp. 3d 1215, 1219-20 (M.D. Tenn. 2017) (detailing conflict among district courts within the Sixth Circuit); *see also* D.C. by and through *Cheatham v. Abbott Laboratories Inc.*, 323 F. Supp.3d 991, 2018 WL 4095093, at \*2 (N.D. Ill. Aug. 28, 2018) (detailing conflict within the Seventh Circuit).

108. *Compare Regal Stone Ltd. v. Longs Drug Stores California, L.L.C.*, 881 F. Supp. 2d 1123, 1129 (N.D. Cal. 2012) (denying motion to remand); *with Morris v. Alza Corp.*, No. 2:09-cv-03450-GEB-GGH, 2010 WL 2652473, at \*2 (E.D. Cal. Jul. 1, 2010) (granting motion to remand); *and Standing v. Watson Pharmaceuticals, Inc.*, No. CV09-0527 DOC(ANx), 2009 WL 842211, at \*8 (C.D. Cal. Mar. 26, 2009) (same).

109. *Compare Oxendine v. Merck & Co.*, 236 F. Supp. 2d 517, 526 (D. Md. 2002) (granting motion to remand); *with Robertson v. Iuliano*, No. RDB 10-1319, 2011 WL 453618, at \*4 (D. Md. Feb. 4, 2011) (denying motion to remand). *Compare Allison v. Apotex Corp.*, No. 08-60525, 2008 WL 11331976, at \*3 (S.D. Fla. May 23, 2008) (denying motion to remand); *with Carpenter v. Apotex Corp.*, No. 08-60526, 2008 WL 11332029, at \*3 (S.D. Fla. Aug. 8, 2008) (granting motion to remand).

*Recognition Communications* continues,<sup>110</sup> and will likely expand now that one court of appeals gave the green light to defendants.

### III. FINDING THE DATA ON SNAP REMOVAL CASES

Important questions about snap removals remain unanswered. They include: How often is the device used? What types of defendants are using the tactic? Is the practice concentrated in particular districts, or is it more widespread? In what types of cases is it used? How often are the cases remanded? How often is remand denied? How long do these cases remain in federal court? How are the cases ultimately resolved? While published decisions and articles indicate that the use of snap removal increased substantially in the last decade,<sup>111</sup> no one has—until now—published a study on exactly how often the practice is used.<sup>112</sup>

To study these questions, and to see whether there were other, unidentified issues relating to snap removal, I created a database of diversity cases<sup>113</sup> involving at least one forum defendant that were removed to federal court between January 1, 2012, and December 31, 2014, before service on any defendant.<sup>114</sup>

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110. See *DHLNH, LLC v. Int'l Bhd of Teamsters, Local 251*, 319 F. Supp. 3d 604 (D.R.I. 2018); *D.C. by and through Cheatham v. Abbott Laboratories Inc.*, 323 F. Supp.3d 991, 2018 WL 4095093, at \*2 (N.D. Ill. Aug. 28, 2018); *Laster v. Monsanto Co.*, No. 4:18-cv-397, 2018 WL 1566846 (E.D. Mo. Mar. 3, 2018); *Cheung v. Bristol-Myers Squibb Co.*, 282 F. Supp. 3d 638 (S.D.N.Y. 2017); *Leech v 3M Co.*, No.17-446, 2017 WL 4334224 (E.D. La. Sept. 30, 2017); *Ekeya v. Shriners Hosp. for Children, Portland*, 258 F. Supp. 3d 1192 (D. Or. 2017); *Medish v. Johns Hopkins Health Sys. Corp.*, 272 F. Supp. 3d 719, 722 (D. Md. 2017); *Little v. Wyndham Worldwide Operations, Inc.*, 251 F. Supp. 3d 1215, 1219-1220 (M.D. Tenn. 2017); *Champion Chrysler Plymouth v. Dimension Service Corp.*, No. 2:17-cv-130, 2017 WL 726943, at \*1 (S.D. Ohio Feb. 24, 2017).

111. Hellman, *supra* note 12; Hughes, *supra* note 16.

112. This may be because this a partially hidden problem: Judges are not required to write opinions or give reasons when they grant motions to remand, and they are less likely to do so because those opinions cannot be appealed. See 28 U.S.C. § 1447(d); see generally David A. Hoffman, *et al.*, *Docketology, District Courts, and Doctrine*, 85 WASH. U. L. Rev. 681 (2008) (study finding that district judges write fewer opinions at procedural moments when appeal is unlikely). Additionally, commercial legal databases like Westlaw frequently exclude short memorandum decisions and orders, so not all orders on motions to remand are readily available using ordinary legal search tools like Westlaw.

113. I included only those cases in which I could ascertain that there was complete diversity of the parties and the plaintiffs could have invoked the diversity jurisdiction of the federal court, if they so chose. I excluded cases in which an out-of-state defendant removed on the basis of diversity jurisdiction arguing that a *nondiverse* forum defendant had been improperly, or “fraudulently,” joined. The Supreme Court has long recognized that a defendant’s right of removal in diversity cases cannot be defeated by the “fraudulent joinder” of a *nondiverse* resident defendant having no real connection with the controversy. See *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97 (1921); *Chesapeake & O.R. Co. v. Cockrell*, 232 U.S. 146, 152 (1914); *Pullman v. Jenkins*, 305 U.S. 534, 538 (1939).

114. I excluded cases in which the removing defendant was served before removal. 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. See *supra* Part II.A. Several articles that discuss the “snap removal” tactic include a large number of cases in which at least one defendant was served,

Using Westlaw and Google Scholar to find cases, I identified 108 cases that met the above criteria. I used the administrative records of the district courts to identify additional snap removal cases filed during the three-year period. Specifically, the staff of the Research Division of the Federal Judicial Center assisted me by searching the electronic court records of the federal district courts for cases that originated with a notice of removal from state court in which federal jurisdiction was based on diversity of citizenship. Within that group of cases, the texts of the dockets were searched for the word “remand.” The related documents were downloaded and searched for phrases relating to the timing of removal before service and the involvement of at least one forum defendant. I examined the documents in each of the cases to determine if the case actually involved snap removal. Cases in which the merits of the snap removal issue were presented to or resolved by the district court were included in the data set. Cases that did not meet these criteria were excluded.

Review of the case documents revealed that the search of the electronic records of the district courts was both under- and over-inclusive—the search identified many cases that did not involve snap removal, but some known snap removal cases were missing from the electronic court records data set. The missing cases were identified and incorporated into the database.

Almost all of the cases in the data set involved a motion to remand arguing that removal was improper under the forum defendant rule.<sup>115</sup> In two cases in the Eastern District of Missouri, the court ordered remand *sua sponte* because the removal violated the forum defendant rule.<sup>116</sup>

After an extensive review, the final data set comprised 221 cases over the three-year period.<sup>117</sup> This is the most comprehensive collection of

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waived service, or appeared before removing the case. See *supra* note 74.

Additionally, while other snap removal cases were decided during this time period, they were excluded because they were initially removed prior to January 1, 2012.

115. There may be cases in which the plaintiff did not file a motion to remand despite the defendant’s snap removal. Because a violation of the forum defendant rule is considered a waivable procedural defect in removal by most courts, see *Lively v. Wild Oats Markets, Inc.*, 456 F.3d 933, 940 (9th Cir. 2006), it would not be addressed absent a motion for remand in most courts. *But see Hurt v. Dow Chemical Co.*, 963 F.2d 1142, 1145-46 (8th Cir. 1992) (holding that a violation of § 1441(b) is a non-waivable jurisdictional defect). Even though it is likely that there are additional diversity cases that are removed before service on any defendant, it is much harder to find them unless the plaintiff has moved to remand.

116. *Fisher v. Forest Laboratories, Inc.*, No. 4:12-cv-322 RWS, 2012 U.S. Dist. LEXIS 190158, at \*4-5 (E.D. Mo. Feb. 22, 2012); *Hernandez v. Forest Laboratories*, No. 4:12-cv-321, 2012 U.S. Dist. LEXIS 190159, at \*4-5 (E.D. Mo. Feb. 23, 2012). These two cases come from a district court in the Eighth Circuit, which has held that the forum defendant rule is jurisdictional; see *Hurt*, 963 F.2d at 1146.

117. While this is not a tremendous number of cases, it is more than double the number of cases

cases involving snap removal currently available. The data set may be incomplete because for a variety of reasons,<sup>118</sup> but finding additional snap removal cases would be too time-consuming to enable a useful examination.

Using the information in the dockets and case documents, I coded the cases for nature of suit, what types of parties were involved, filing and termination dates, which defendant removed and when, whether and when a motion to remand was filed, how and when the district court ruled, how and when the cases terminated, and whether there was an appeal.

#### IV. WHAT THE DATA TELL US ABOUT SNAP REMOVALS

The data on snap removals from 2012 to 2014—the first three years after the JVCA was in effect—demonstrate that it is a persistent forum-manipulation technique that undermines state laws regarding service of process and adds delay to civil litigation. The device is most often used by defendant corporations that are sued by individuals in product liability cases, usually involving a pharmaceutical or medical device. These defendants prefer consolidated treatment of these cases in a federal forum. Even so, the snap removal device is used in run-of-the-mill state law cases involving vehicle crashes and insurance disputes that are ordinarily heard in state courts. Forum defendants themselves frequently employ the device, and the out-of-state defendants that use the device usually have a close legal relationship with the forum defendant.

Most courts that reached the issue rejected the snap removal device as a violation of the forum defendant rule, but almost 10% of courts did not. Even unsuccessful snap removals injected delay of several months into the litigation. In a small number of cases, this delay was several years. When judges denied or did not rule on plaintiffs' motions to remand, the cases remained in federal courts for extended periods. Finally, despite the widespread disagreement of federal district judges on the propriety of snap removal, very few cases reached the appellate level, and no court of appeal addressed the merits of the issue.

##### A. *What Types of Cases Were Snap Removed*

The cases that were snap removed by defendants from 2012 through

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available on Westlaw during the same time period.

118. See *supra* note 115. In addition, limitations of the source data, including unsearchable documents, would make it next to impossible to identify every snap removed case in the federal district courts.

2014 were mostly pharmaceutical product liability cases that the defendants wanted to consolidate in one federal forum.

1. Product liability cases were the most frequently snap removed.

When a defendant files a notice of removal in a federal district court, the notice is accompanied by the Civil Cover Sheet, on which the defendant must indicate the “nature of suit” by checking one box on the form, which has a numbered code for each category of cases.<sup>119</sup> Table 1 provides the total number of cases that fell into each category.

The information provided by the defendants in snap removed cases from 2012 through 2014 shows that 85% of the cases removed before service on any defendant are product liability cases involving personal injuries. Eighty-three percent of the cases in the data set were personal injury cases alleging a defect in a pharmaceutical or medical device.<sup>120</sup>

2. Defendants frequently sought to consolidate snap removed cases.

A significant number of snap removed cases were cases that the defendant sought to have consolidated in MDL proceedings or in the district court where the cases were removed. Table 2 provides details about the types of consolidation that were sought, and how many cases in the data set defendants sought to consolidate. Overall, defendants sought to consolidate 72% of the snap removed cases between 2012 and 2014.<sup>121</sup>

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119. The Judicial Conference of the United States approved the form in September 1974, and is required for the Clerk of the Court to initiate the civil docket sheet. The Civil Cover Sheet must be submitted for each complaint filed in federal court. *See* Civil Cover Sheet, *available at* [http://www.uscourts.gov/sites/default/files/js\\_044\\_1.pdf](http://www.uscourts.gov/sites/default/files/js_044_1.pdf).

120. While eighty cases were specifically coded by the removing defendants on the Civil Cover Sheet as involving claims for personal injuries caused by defective pharmaceutical products or medical devices (Nature of Suit Code 367), review of the 103 cases that the removing defendants coded 365 – “Personal Injury – Product Liability” – revealed that they all involved a pharmaceutical or medical device. Nature of Suit Code 367 for product liability suits involving pharmaceuticals and medical devices was introduced around January 2012, but not all litigants and jurisdictions started using the code at that time. Attorneys and some courts may have been using outdated versions of the Civil Cover Sheet when filing these notices of removal.

121. A large number of the related cases were removed to the Western District of Tennessee where the motions to remand were decided by the same judge. While this removal strategy might appear to skew the results of the study, it is not unlike the strategy that was pursued by the same defendants at the advent of the technique in 2006 and 2007. However, during the time period of this study, all of the cases in the Western District of Tennessee were ultimately assigned to the same judge rather than being assigned to multiple judges, as they were in the early New Jersey cases, and as they have been in other district courts.

**Table 1. Nature of Suit of Cases Removed Before Service on Any Defendant, 2012-2014**

<i>Nature of Suit Code &amp; Title</i>	<i>Number of Cases Removed</i>	<i>Percentage of Total</i>
365 - Torts/Personal Injury – Product Liability	103	47%
367 - Torts/Personal Injury – Health Care/Pharmaceutical Personal Injury/Product Liability	80	36%
190 - Contract - Other Contract	12	5%
360 - Torts/Personal Injury - Other Personal Injury	5	2%
315 - Torts/Personal Injury - Airplane Product Liability	3	1%
110 - Contract - Insurance	3	1%
370 - Torts/Personal Property - Other Fraud	3	1%
442 - Civil Rights - Employment	3	1%
220 - Real Property - Foreclosure	2	1%
350 - Torts/Personal Injury - Marine Product Liability	1	<1%
160 - Contract - Stockholders' Suits	1	<1%
196 - Contract - Franchise	1	<1%
245 - Real Property - Tort Product Liability	1	<1%
380 - Torts/Personal Property - Other Personal Property Damage	1	<1%
850 - Contract - Securities/Commodities/Exchange	1	<1%
950 - Other Statutes - Constitutionality of State Statutes	1	<1%
<b>Grand Total</b>	<b>221</b>	<b>100%</b>

**Table 2. Snap Removed Cases in Which Defendants Requested Consolidation and Types of Consolidation Requested, 2012-2014**

<i>Type of Consolidation Requested or Ordered</i>	<i>Number of Cases</i>	<i>Percentage of All Cases</i>
Transferred to an existing MDL proceeding	15 <sup>122</sup>	7%
Notice filed of potential tag-along action in district where MDL is pending, assigned to MDL judge	5	2%
Became part of MDL proceeding in the district court at a later date	2	1%
Request for conditional transfer to MDL proceeding, case remanded to state court prior to transfer	47 <sup>123</sup>	21%
Consolidated with other individual actions in the district court	89	40%
Motion to consolidate under Fed. R. Civ. P. 42(a), case remanded to state court	1	<1%
<b>Grand Total</b>	159	72%

### *B. Who Removed, When, and Where*

Based on the above information about the types of cases that are snap removed, it is not surprising that most cases are snap removed by corporate entities in cases that were filed by individuals. The tactic was used more frequently by out-of-state defendants, but forum defendants

122. Three of these cases were almost immediately remanded to state court by the MDL judge who granted unopposed motions to remand. *Hilton v. Boehringer Ingelheim Pharm. Inc.*, No. 3:13-cv-60013 (S.D. Ill.); *Markus v. Boehringer Ingelheim Pharm. Inc.*, No. 3:13-cv-60014 (S.D. Ill.); *Skipton v. Boehringer Ingelheim Pharm. Inc.*, No. 3:13-cv-60012 (S.D. Ill.).

123. A fair number of these cases were remanded while there was a motion for a stay pending transfer to the Plavix MDL pending. The Plavix MDL judge had denied motions to remand in snap removal cases previously, and thus the defendants preferred that the motions to remand be decided by the MDL judge. The district judge acknowledged the split in authority over the interpretation of the forum defendant rule in snap removal cases, but held that it was appropriate to address motions for remand before cases are transferred by the JPML. *See Stefan v. Bristol-Myers Squibb Co.*, No. 13-1662-RGA, 2013 WL 6354588 (D. Del. Dec. 6, 2013).

Eight of the cases were related to a pending MDL, but the defendants withdrew their oppositions to the motions to remand.

used the tactic in more than 100 cases. Most cases were removed to federal court within a week of the case being filed in state court. Finally, while the data show that snap removals were heavily concentrated in certain districts, the use of the procedural tactic reached beyond the districts where we might expect cases to be snap removed, based on the preceding information in Part VI.A.

1. Forum and non-forum corporate defendants use the snap removal device in cases brought by individual plaintiffs.

As Tables 3 and 4 demonstrate, between 2012 and 2014, most cases were snap removed by corporate entities in cases that were filed by individuals.

**Table 3. Types of Removing Defendants in Snap Removed Cases, 2012-2014**

<i>Type of Defendant That Removed</i>	<i>Number of Cases Removed</i> <sup>124</sup>
Corporation	210
Unincorporated company or partnership	4
Individual	8
Insurance company	2

**Table 4. Types of Plaintiffs in Snap Removed Cases, 2012-2014**

<i>Type of Plaintiff</i>	<i>Number of Cases Removed</i> <sup>125</sup>
Individual	205
Corporation	14
Unincorporated company	4

Table 5 shows that forty-six percent of the snap removed cases between 2012 and 2014 were removed by a forum defendant.

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124. The total number of types of defendants exceeds the number of cases because many cases involve multiple defendants of different types in the same case.

125. The total number of types of plaintiffs exceeds the number of cases because several cases involve multiple plaintiffs of different types in the same case.

**Table 5. Citizenship of Removing Defendant in Snap Removed Cases, 2012-2014**

<i>Citizenship of Removing Defendant</i>	<i>Number of Cases Removed</i>	<i>Percentage of Cases Removed</i>
A state other than the state in which case was filed	118	53%
State in which case was filed	101	46%
Both in-state and out-of-state	2	1%
<b>Grand Total</b>	221	100%

While out-of-state defendants were more likely to remove than forum defendants, there wasn't a sharp distinction between the out-of-state removing defendants and the non-removing forum defendants in those cases. Rather, in seventy-two cases removed by an out-of-state defendant, the removing defendant was the parent company of the forum defendant or a subsidiary company of the forum defendant. In an additional seven cases, the removing out-of-state defendants had some other close legal relationship with the forum defendant.<sup>126</sup>

2. Defendants usually removed within a week after plaintiffs filed suit.

Out of the 221 cases, 195 of them (88%) were removed within one week after the complaint was originally filed in state court. The median number of days between the state court filing and the removal was three days. The average number of days to removal was 6 days after the case was filed in state court.

Thirty-eight cases (17%) were removed the same day they were filed.<sup>127</sup> Forty-seven cases (21%) were removed the day after they were filed.<sup>128</sup>

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126. These cases involved an out-of-state employer and an in-state employee, an in-state insured and an out-of-state insurer, an in-state partner and out-of-state firm and other out-of-state partners, and an in-state president of an out-of-state company.

127. Twenty-seven of these cases were removed to the Western District of Tennessee. Six were in the Eastern District of Pennsylvania. Two were in the Western District of Kentucky. There was one case removed to each of the following districts: the District of Delaware, the Northern District of Illinois, and the Western District of Pennsylvania.

128. Thirty of these cases were removed to the Western District of Tennessee. Seven cases were removed to the Eastern District of Pennsylvania. Seven were filed in the Western District of Kentucky. There was one case removed to each of the following districts: the Eastern District of Missouri, the

Only seven cases were removed more than thirty days after the state court complaint was originally filed. The longest time to removal was ninety-eight days.<sup>129</sup>

3. The snap removal device is used across the country, but cases are concentrated in the home states of pharmaceutical companies.

Over the three-year period, twenty-seven different district courts in twenty-two states and Puerto Rico were presented with diversity cases that were removed before service on any defendant.

**Table 6. Location of Cases Removed before Service on Any Defendant, 2012-2014**

<i>District</i>	<i>Number of Cases Removed</i>
Western District of Tennessee	69
District of Delaware	54
Eastern District of Pennsylvania	19
Western District of Kentucky	16
District of New Jersey	15
Southern District of New York	11
Eastern District of Missouri	8
Central District of California	6
Northern District of California	3
Western District of Missouri	2
Western District of Pennsylvania	2
Northern District of Alabama	1

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Central District of California, and the District of New Jersey.

129. Even though removing after more than three months might not be considered removing “in a snap,” removal before service on any defendant undermines state laws that permit extended time for service, or that allow the time for service to be extended.

Southern District of California	1
Middle District of Florida	1
Northern District of Illinois	1
Southern District of Indiana	1
District of Kansas	1
District of Massachusetts	1
District of Montana	1
District of New Hampshire	1
District of New Mexico	1
Northern District of Ohio	1
Western District of Oklahoma	1
District of Puerto Rico	1
Southern District of Texas	1
Eastern District of Virginia	1
Southern District of West Virginia	1
<b>Grand Total</b>	221

A large number of pharmaceutical companies are incorporated or have their primary place of business in Delaware, Pennsylvania, and New Jersey, so it is not surprising to see that there were many snap removals in the District of Delaware, the Eastern District of Pennsylvania, and the District of New Jersey. Almost all of the cases in the Western District of Tennessee and the Western District of Kentucky were also cases against pharmaceutical and medical device companies that were at home in those states. However, the data show that snap removals occur in other states, as well. This demonstrates that while there are some fair generalizations about where snap removal cases occur, snap removals also happen outside of the areas of concentration.

### C. What Happened After Removal

In most cases in the data set (99% of the cases), the plaintiffs filed motions to remand to state court arguing that the removals violated the forum defendant rule,<sup>130</sup> *inter alia*.<sup>131</sup> District judges did not always rule on these motions,<sup>132</sup> but when they did, judges took, on average, more than three months to rule on them. The overwhelming majority of district courts that addressed the issue held that removal before service on any defendant in a diversity case involving a forum defendant was improper. But most cases were not remanded. In a substantial number of cases, the court denied remand on other grounds, or didn't rule on the motion to remand. Cases that were remanded remained in federal court for more than five months, on average. Cases that were not remanded remained in federal courts much longer than the average civil case.

**Table 7. Frequency of Rulings on Motions to Remand Snap Removed Cases, 2012-2014**

<i>Did Judge Rule on Motion to Remand?</i>	<i>Number of Cases</i>	<i>Percentage of Cases</i>
Yes	200	90%
No, plaintiff withdrew motion	10	5%
No, case terminated before a ruling on the motion	6	3%
No, case is still pending <sup>133</sup>	3	1%
<b>Grand Total</b>	219	99%

1. Plaintiffs waited at least two months for a ruling on their motions to remand. When judges did not rule on the plaintiff's motion to remand, cases remained in federal court for extended periods.

The median time for a ruling on a motion to remand was sixty-five days.<sup>134</sup> The shortest time a plaintiff had to wait for a ruling on a motion

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130. In two cases in the Eastern District of Missouri, the court remanded *sua sponte* based on a violation of the forum defendant rule. The judge ordered the cases remanded within two days of the removals.

131. Plaintiffs sometimes raised additional arguments in favor of remand, including that there was not federal question jurisdiction, or there was not diversity jurisdiction because the defendant did not prove that amount in controversy met the jurisdictional threshold. Plaintiffs also frequently argued that the snap removal was not proper because the non-removing defendants did not consent to the removal.

132. See Table 7.

133. As of October 2017.

134. The average time for a ruling on a motion to remand was 109 days. Excluding the outlier

to remand was twelve days, and the longest time the plaintiff waited for a ruling on a motion to remand was 1,700 days, or more than four-and-a-half years.

Even when the motion to remand on forum defendant grounds was not opposed, or the defendant withdrew its opposition, plaintiffs had to wait more than two months for rulings on their motions to remand on forum defendant grounds. The median time for a ruling on an unopposed motion to remand was eighty-four days.<sup>135</sup> The shortest time a plaintiff had to wait for a ruling on an unopposed motion to remand was sixty-six days. The longest time a plaintiff had to wait for a judge to rule on an unopposed motion to remand was 107 days.

District court judges did not always rule on motions to remand, though.<sup>136</sup> Six of these cases terminated before a district court judge ruled on the motions to remand. These plaintiffs waited between seventy-four and 1,917 days, *i.e.*, more than five years, from the date they filed their motions to remand to the date the cases finally terminated. On average, 492 days passed between the filing of the motion to remand and the termination of cases. Half of those cases were in MDL transferee courts when they terminated.

There are three cases in which district court judges still have not ruled on motion to remand. Plaintiffs in these cases have been waiting between 932 and 1,441 days, or between two-and-a-half and almost four years, since they first moved to remand on forum defendant grounds, as of July 25, 2017. All three cases are currently pending in MDL transferee courts.

2. Judges were much more likely to grant a motion to remand based on a violation of the forum defendant rule than to deny remand based on the “plain language” of the statute. Many motions to remand were denied on other grounds.

Excluding *sua sponte* remands on forum defendant grounds, district courts granted motions to remand on forum defendant grounds in ninety

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cases, the average time a plaintiff had to wait for a ruling on a motion to remand was 102 days. In addition to excluding the cases that were remanded after twelve days and 1,700 days, this average excludes cases in which there was no ruling, as well as a group of six cases in which the judge ordered remand *sua sponte* for lack of subject matter jurisdiction based on the forum defendant rule *after* the plaintiffs withdrew their motions to remand. In four of those cases, the judge initially entered an order denying the motions to remand based on the request to withdraw the motions, and did not enter any order on the motions to remand in two cases. All six of these cases were remanded based on the forum defendant rule an average of 424 days after the motion to remand was filed, and more than a year after the plaintiffs requested to withdraw the motions.

135. On average, plaintiffs waited eighty-three days for rulings on their unopposed motions to remand based on the forum defendant rule.

136. These cases are not included in the above average of time from motion to ruling.

cases, and denied such motions based on a plain language reading of the forum defendant rule in only nineteen cases. Thus, the data show that less than 10% of snap removals are successful based on the defendants' argument that they are permitted by the text of § 1441(b)(2).<sup>137</sup>

Courts granted unopposed motions to remand on forum defendant grounds in an additional twelve cases.

In seventy-three cases, the district court held that removal was improper under the forum defendant rule, but denied the motion to remand on other grounds.<sup>138</sup> Judges in four cases in two different districts denied motions to remand even though they found that the snap removals violated the forum defendant rule because the plaintiff did not move to remand within thirty days of the removal. One district court held in sixty-seven separate cases that although the forum defendant rule barred removal based on diversity jurisdiction, removal was proper under federal question jurisdiction.<sup>139</sup> In the two remaining cases, one judge denied the motion pending settlement by the parties, and one judge denied the motion to remand because he found that there was federal officer jurisdiction.<sup>140</sup>

3. Snap-removed cases that were remanded usually remained in federal court for more than two and a half months. Cases that were not remanded remained in federal courts for extended periods.

If a case was remanded to state court after a snap removal, either *sua sponte* or on a motion to remand, it had been in the federal district court

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137. Six of these nineteen cases (32% of them) became part of MDL proceedings. Two additional cases were subject to a conditional transfer order to MDL proceedings, but the parties stipulated to voluntary dismissal prior to the cases being transferred.

138. Removing defendants often state more than one basis of federal jurisdiction in their notices of removal.

139. This holding conflicts with decisions of other district courts in virtually identical cases. *Compare, e.g.,* Dooley v. Medtronic, Inc., 39 F. Supp. 3d 973, 988 (W.D. Tenn. 2014) (holding that snap removal based on diversity jurisdiction was improper, but that there was a substantial federal question based on a federal preemption defense) *with* Miller v. Medtronic, Inc., 41 F. Supp. 3d 644, 654 (W.D. Ky. 2014) (holding that snap removal was improper under diversity jurisdiction and that there was no federal question jurisdiction based on federal preemption defense). Both the Kentucky cases and the Tennessee cases are properly within the data set because they are cases that meet all the criteria of a snap removed case, and the forum defendant issue was raised and passed on by the court. The fact that the judge in Tennessee did not remand these cases on other grounds while other courts remanded identical cases would have skewed the median and average times that non-remanded cases remained in federal courts, so they were not included in those calculations. See Part IV.C.3.

140. *See* 28 U.S.C. § 1442. In so holding, the court declined to address whether removal based on diversity jurisdiction was proper, “refrain[ing] from addressing the split in California federal district courts regarding proper application of the ‘joined and served’ requirement,” but noting that removal before service was not, in itself, improper. Fontalvo v. Sikorsky Aircraft Corporation, No. 3:13-cv-331-GPC-KSC, 2013 U.S. Dist. LEXIS 87149, at \*23 (N.D. Cal. June 20, 2013).

for an average of 152 days.<sup>141</sup> The median number of days these remanded cases were in federal district court was seventy-nine. The shortest amount of time a case was in federal court before it was remanded was one day. The longest amount of time was 1,706 days, or almost five years, before the case was remanded.

The median number of days that the nineteen cases in which district courts denied motions to remand snap removed cases based on the forum defendant rule remained in federal district court was 403 days.<sup>142</sup> If the case was a part of an MDL proceeding, the median time from filing to termination in the district court more than doubled to 864 days.

In four cases where the motions to remand were denied solely because the plaintiff failed to move to remand within the thirty-day limit for filing the motion, the median number of days from filing to termination was 1,110 days.

Nine cases remained in federal court without any ruling on the plaintiffs' motions for remand. Six out of the nine, or two-thirds of these cases, were transferred to MDL courts. The three non-MDL cases remained in federal court between 74 and 429 days, with a median number of 133 days. The MDL cases remained in federal district court much longer, on average. The shortest amount of time one of these cases was in federal district court was 107 days.<sup>143</sup> The longest amount of time a case was pending in federal district court without a ruling on the plaintiff's motion to remand was 1,917 days. Three cases remain pending in MDL proceedings, and have been in federal court between 958 and 1,470 days as of July 25, 2017.

Like all federal civil cases, the cases that were not remanded, including the nineteen cases that were not remanded based on the district court's "plain meaning" reading of the forum defendant rule, usually settled or were voluntarily dismissed. Only one case went to trial, in which the plaintiff prevailed.

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141. If the motion to remand was not opposed, the courts disposed of the cases more quickly, on average after 109 days. If the motion to remand was contested, the case remained in the federal district court for 157 days on average.

142. The average number of days from filing to termination was 520 days. The shortest time from filing to termination was sixty-six days in a case that was dismissed before its imminent transfer to an MDL. The longest time from filing to termination in the district court was 1,607 days. That case was a part of an MDL proceeding.

143. The plaintiff in that case voluntarily dismissed the case nine days after it was transferred to an MDL, after the transferor court did not rule on the motion to remand.

4. No court of appeals ruled on the merits of the snap removal issue. Appeals added to the length of time snap removed cases remained in federal court.

In snap removed cases where the district court denied a motion to remand based on the forum defendant rule, plaintiffs rarely requested certification of the order for interlocutory appeal. Only two plaintiffs moved for the order to be certified for interlocutory appeal under 28 U.S.C. § 1292(b), and the judge denied the motions in both cases.<sup>144</sup>

In only one of the nineteen snap removed cases was the propriety of the snap removal appealed after final judgment.<sup>145</sup> After briefing was complete, the motions panel entered an order summarily affirming the judgment on the merits without addressing the propriety of the removal.<sup>146</sup> That case remained in the federal court system for a total of 1,085 days, or almost three years. The case was on appeal for 16% of that time.

Another case was appealed not from a grant or denial of a remand motion, but from a grant of a motion to voluntarily dismiss the case.<sup>147</sup> The court of appeals in that case expressed strong disdain for the snap removal device, but did not rule on the merits of the issue because it was not before the court.<sup>148</sup> By the time that appeal terminated, the case had been in federal courts for 1,020 days, with almost 74% of that time spent on appeal.

A few other cases involved appeals by defendants after motions to remand were *granted* on forum defendant grounds.<sup>149</sup> The defendants appealed, and the Third Circuit directed the parties to address the court's authority to hear the appeal under 28 U.S.C. § 1447(d). The cases eventually settled less than two months before the date of the hearing on the appeal. At the time the appeals terminated, these cases had been in

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144. *Valido-Shade v. Wyeth, LLC (In re Diet Drugs)*, 875 F. Supp. 2d 474 (E.D. Pa. 2012) (order denying motion for certification of interlocutory appeal); *Heineman v. Am. Home Prods. Corp.*, No. 12-20002 (E.D. Pa. 2012) (same).

145. *Valido-Shade*, 875 F. Supp. 2d 474, *aff'd* (3rd Cir. 14-4608) (Apr. 29, 2015). The author of this Article was appellate counsel for plaintiffs.

146. *Id.*

147. *Goodwin v. Reynolds*, 757 F.3d 1216, 1222 (11th Cir. 2014).

148. *Id.*

149. The district court judge remanded six cases *sua sponte* based on the forum defendant rule, even though plaintiffs' counsel had submitted a letter six months earlier requesting to withdraw the motions. *Weiss v. Forest Laboratories, Inc.*, 1:13-cv-2292, (D.N.J. Jul. 2, 2014); *Dowdy v. Forest Laboratories, Inc.*, 1:13-cv-2260, (D.N.J. Jul. 2, 2014); *Hinds v. Forest Laboratories, Inc.*, 1:13-cv-2259, (D.N.J. Jul. 2, 2014); *Theriot v. Forest Laboratories, Inc.*, 1:13-cv-2250, (D.N.J. Jul. 2, 2014); *Huls v. Forest Laboratories, Inc.*, 1:13-cv-1988, (D.N.J. Jul. 2, 2014); *Vincent v. Forest Laboratories, Inc.*, 1:13-cv-1989, (D.N.J. Jul. 2, 2014) (using a "fraudulent joinder" analysis in ordering remand for lack of diversity jurisdiction for violation of the forum defendant rule).

federal court between 789 and 803 days, or an average of 795 days. More than 40% of the time these cases spent in federal court was the time on appeal.

Finally, there was one case in which the court denied the plaintiff's motion to remand on forum defendant grounds, and the plaintiff ultimately prevailed at trial. The defendant appealed the case, but the plaintiff did not cross-appeal the propriety of the snap removal.<sup>150</sup>

#### V. CLOSING THE SNAP REMOVAL LOOPHOLE (AND COPING WITH IT UNTIL IT IS CLOSED)

As noted earlier, the persistent forum manipulation technique called snap removal is a loophole created by the combination of changes in the removal process,<sup>151</sup> modern technology, and the “properly joined and served” language that was added to the statute in 1948, when removal of a case involving a forum defendant before service on any defendant was not in the realm of possibilities. Now, defendants can learn of suits filed against them instantaneously, and can remove cases just as quickly. Even though most courts rejected the use of the snap removal device between 2012 and 2014, the fact that any given removal might be unsuccessful does not appear to be enough to deter snap removals. Even if a defendant's forum choice does not prevail, the resolution of the case on the merits in the proper forum is delayed for months, and sometimes much longer. Such delay usually benefits defendants.<sup>152</sup>

The courts that permitted snap removals contributed to interstate, intrastate, intracircuit, and intradistrict conflicts in authority and uncertainty that ensure the continued use of the snap removal device. Now that a court of appeals has weighed in and given the go-ahead to defendants, the number of snap removals will likely increase. Enough judges have permitted snap removals that even when other judges order remand of snap removed cases, they cannot say that the snap removal was “objectively unreasonable,” and so they decline to impose fees or costs under 28 U.S.C. § 1447(c).<sup>153</sup>

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150. *Giacone v. Virtual Officeware, LLC*, 647 Fed. Appx. 137, 144 (W.D. Pa. 2016), *aff'd* (3d Cir. 15-1940).

151. Mitchell, *supra* note 42.

152. See, e.g., Christopher R. McFadden, *Removal, Remand, and Reimbursement Under 28 U.S.C. Section 1447(c)*, 87 MARQ. L. REV. 123, 133 (2003) (explaining how delays due to removal harms plaintiffs); Carrie E. Johnson, *Rocket Dockets: Reducing Delay in Federal Civil Litigation*, 85 CAL. L. REV. 225, 231 (1997) (explaining how delay in the resolution of the merits disproportionately benefits defendants).

153. Even though the removal statute permits the district court to “require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal,” 28 U.S.C. § 1447(c), the Supreme Court in *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005), held that “[a]bsent unusual circumstances, courts may award attorney's fees under § 1447(c) only where the

Although one court of appeals endorsed the practice, the lack of appellate authority in other circuits leaves district courts outside of the Third Circuit divided—an untenable situation because the statutory right to remove, and its limitations, should not vary depending on the judge hearing the motion to remand. Congress intended the removal statute to have uniform application nationwide.<sup>154</sup> There are several ways Congress can close the snap removal loophole, by expanding or contracting the right of removal, or simply by expressly barring removal before service. Participants in the civil justice system must cope with the snap removal device until the loophole is closed.

### A. Legislative Options

While the current statute’s text and history can be and has been read to not permit removal of diversity cases if no defendant has been served,<sup>155</sup> the fact that it is arguable, and that courts continue to reach different conclusions,<sup>156</sup> means that there is room for clarification by Congress.<sup>157</sup>

The right to remove a case from a state court to a federal court is purely statutory.<sup>158</sup> Congress can decide whether and on what terms to make the right available to any litigant in any case within the original jurisdiction of the federal courts.<sup>159</sup> The right of removal has expanded and contracted throughout the nation’s history.<sup>160</sup> The right to remove

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removing party lacked an objectively reasonable basis for seeking removal. Conversely, when an objectively reasonable basis exists, fees should be denied.” Applying this standard, all district court judges have denied fees under § 1447(c) even when they order remand of a snap removal. *E.g.*, *Champion Chrysler Plymouth v. Dimension Serv. Corp.*, No. 2:17-cv-130, 2018 WL 1443685 (E.D. Ohio Mar. 23, 2018). *See also* *Rogers v. Gosney*, No. CV-16-08154-PCT-GMS, 2016 WL 4771376, at \*5 (D. Ariz. Sept. 14, 2016) (granting remand but denying attorneys’ fees because defendants’ arguments in support of snap removal were not objectively unreasonable). *But see* *Rivas v. Bowling Green Assoc.*, No. 13-cv-7812 (PKC) 2014 WL 3694983, at \*5 (July 24, 2014) (imposing Rule 11 non-monetary sanctions on attorney and his law firm for snap removing a case on behalf of a forum defendant).

154. *Grubbs v. General Electric Credit Corp.*, 405 U.S. 699, 705 (1972); *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 104 (1941).

155. *Gentile v. Biogen Indec, Inc.*, 934 F. Supp. 2d 313, 318 (D. Mass. 2013); *Hawkins v. Cottrell, Inc.*, 785 F. Supp. 2d 1361, 1369 (N.D. Ga. 2011); *Chrysler Plymouth v. Dimension Service Corp.*, No. 2:17-cv-130, 2017 WL 726943, at \*5-6 (S.D. Ohio Feb 24, 2017).

156. *Encompass Ins. Co. v. Stone Mansion Restaurant, Inc.*, 902 F.3d 147 (3d Cir. 2018) (holding that the forum defendant rule did not apply to bar removal of a diversity action by the forum defendant because service had not been made at the time of removal).

157. The need for clarification will be even greater if Congress enacts H.R. 3487, which would expand diversity jurisdiction, and would likely increase the number of snap removals.

158. *Martin v. Hunter’s Lessee*, 14 U.S. 304, 378 (1816); *Libhart v. Santa Monica Dairy Co.*, 592 F.2d 1062, 1064 (9th Cir. 1979).

159. *Id.*

160. *See Rothner v. City of Chicago*, 879 F.2d 1402, 1412-14 (7th Cir. 1989) (detailing expansion

diversity cases could expand or contract to close the snap removal loophole.

1. Expand the right of removal in MDL-related cases.

After the Class Action Fairness Act (“CAFA”) made it easier to remove class actions and other aggregate litigation from state court to federal court, many plaintiffs’ lawyers remodeled their cases to make them non-removable under CAFA’s class and mass action provisions.<sup>161</sup> Some plaintiffs’ attorneys joined multiple (but fewer than 100) plaintiffs in one action against non-diverse defendants in state court.<sup>162</sup> Other attorneys filed multiple, separate individual lawsuits in the home state of at least one defendant, and excluded class allegations. Snap removal can be seen as defendants’ response to one of the plaintiffs’ bar’s responses to CAFA. It can also be seen as a relatively new attempt to transform the federal courts into courts of general jurisdiction in product liability cases, even outside of the class action and mass action context.

Before the advent of snap removal, states used methods of consolidation of similar non-removable cases for pretrial proceedings in state courts.<sup>163</sup> The snap removal device gives certain types of defendants an opportunity to take these cases out of state consolidated proceedings, and into their preferred forum<sup>164</sup> for consolidation of product liability cases.<sup>165</sup> As noted above in Part IV.A., consolidated treatment of these cases, at least for pre-trial purposes, in a preferred federal forum appears to be the aim of most defendants who remove

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and contraction of removal right from 1875 through 1949).

161. See generally Linda S. Mullenix, *Class Actions Shrugged: Mass Actions & the Future of Aggregate Litigation*, 32 REV. LITIG. 591 (2013).

162. The Supreme Court’s recent decision in *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco Cty.*, 137 S. Ct. 1773 (2017), will limit where these cases can be filed, if they can continue to be filed in state courts, at all.

163. See, e.g., CAL. CODE OF CIV. PRO. §§ 403 & 404; N.J. Court R. 4:38A.

164. PRACTICAL LAW, *Major League Baseball “Removes” A-Rod: Why Defendants Often Prefer Federal Court*, Oct. 16, 2013, at 1-2 2013 WL 4-545-2805 (listing favorable procedural rules, more favorable rules of discovery, and rules of evidence among the number of reasons defendants would want to remove a case to federal court); Neal Miller, *An Empirical Study of Forum Choices in Removal Cases under Diversity & Federal Question Jurisdiction*, 41 AM. U. L. REV. 369, 395-96 (1992) (similar) (presenting survey results); see also Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates & Removal Jurisdiction*, 83 CORNELL L. REV. 581 (March, 1998) (using regression analysis to show that removal takes the defendant to a favorable forum where the plaintiff is less likely to prevail).

165. The Supreme Court’s recent decision in *Bristol-Myers Squibb Co.*, 137 S. Ct. 1773, will likely limit the state court *fora* in which plaintiffs can bring these cases, and may reduce the number of snap removals involving out-of-state defendants. But the *Bristol-Myers Squibb* decision will not reduce or change the snap removal device when there is personal jurisdiction over a defendant in state court, even when the defendant is sued in a state where it is “at home.”

cases based on diversity jurisdiction prior to service on any defendant.<sup>166</sup> Defendants in these types of cases are usually contesting their liability related to one product in multiple federal and state courts. A small, but significant number of these defendants asked for the snap-removed cases to be transferred to an MDL.

Some might argue that consolidated treatment in federal court is the preferred, most efficient choice for these types of cases,<sup>167</sup> and that snap removals that accomplish this should not be considered problematic. If that is the case, Congress should unambiguously facilitate removal in these situations, rather than leaving defendants to the mercies of individual district judges. Congress could choose to expressly expand the right of removal in diversity cases that are related to pending MDL litigation, notwithstanding the presence of a forum defendant.<sup>168</sup> Congress has expanded the removal right in certain types of mass torts and “mass actions,”<sup>169</sup> and it could expand the right to remove in other diversity cases, as well. Congress could then also carve out individual state law actions that happen to satisfy the requirements of diversity jurisdiction, and where state sovereignty over the enforcement of state law is strongest,<sup>170</sup> by prohibiting removal before service in other diversity cases.<sup>171</sup>

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166. See Cox & Jalics, *supra* note 74.

167. Greater consolidation of cases may not result in greater efficiency. See J. Maria Glover, *Mass Litigation Governance in the Post-Class Action Era: The Problems and Promise of Non-removable State Actions in Multi-District Litigation*, 5 J. TORT L. 3, 22-23 & n.81 (2014) (citing multiple sources questioning the purported efficiency gains of MDLs).

168. Different proposals along these lines have been made over the years. See, e.g., William W. Schwarzer, Alan Hirsch, & Edward Sussman, *Judicial Federalism: A Proposal to Amend the Multidistrict Litigation Statute to Permit Discovery Coordination of Large-Scale Litigation Pending in State and Federal Courts*, 73 TEX. L. REV. 1529, 1532 (1995); Linda S. Mullenix, *Mass Tort Litigation and the Dilemma of Federalization*, 44 DEPAUL L. REV. 755, 760-61 (1995).

169. For example, the Multiparty, Multiforum Trial Jurisdiction Act (“MMTJA”) created a broad grant of federal jurisdiction—including a right of removal—in multistate cases arising from “a single accident, where at least 75 natural persons have died in the accident at a discrete location.” 28 U.S.C. § 1369(a). It applies in cases that involve “minimal diversity,” and a defendant can remove a case without regard to the forum defendant rule. See 28 U.S.C. § 1441(e)(1). In addition, the CAFA creates federal jurisdiction, and permits removal, even by in-state defendants, 28 U.S.C. § 1453(b), in cases filed in state court “in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground the plaintiffs’ claims involve common questions of law or fact.” 28 U.S.C. § 1332(d)(11)(B)(i).

170. See, e.g., *Encompass Ins. Co. v. Stone Mansion Rest. Inc.*, 902 F.3d 147 (3d Cir. 2018) (state law claim for contribution from a joint tortfeasor); *Medish v. Johns Hopkins Health Sys. Corp.*, 272 F. Supp. 3d 719, 721 (D. Md. 2017) (medical negligence); *Watanabe v. Lankford*, 684 F. Supp. 2d 1210, 1212 (D. Haw. 2010) (fatal car accident suit against an in-state employee and out-of-state employer); *Parker Hannifin Corp. v. Federal Ins. Co.*, 23 F. Supp. 3d 588, 589 (W.D. Pa. 2014) (insurance coverage dispute); *Chrysler Plymouth v. Dimension Service Corp.*, No. 2:17-cv-130, 2017 WL 726943 (S.D. Ohio Feb 24, 2017) (application for an order confirming an arbitration award); *Campbell v. Hampton Road Bankshares*, 925 F. Supp. 2d 800, 803 (E.D. Va. 2013) (breach of contract/severance agreement).

171. See *infra* Part V.A.2.

This type of statutory amendment would likely increase the number of cases consolidated in MDLs. And as the data in this small sample demonstrates, consolidating cases in MDL proceedings appears to substantially increase the length of time from filing to termination.<sup>172</sup> The number of cases that are currently non-removable that would become removable might overwhelm the JPML and individual MDL judges, nullifying any efficiencies gained by consolidation. Consolidation and any efficiencies gained would come at the expense of the jurisdiction and judicial power of state courts, and the constitutional design of limited federal power. It would also place greater importance on the already charged issue of selection of plaintiffs' counsel leadership in MDLs,<sup>173</sup> and further diminish individual plaintiffs' autonomy over their cases.<sup>174</sup>

## 2. Prohibit removal before service.

Based on the data on how quickly cases were snap removed between 2012 and 2014,<sup>175</sup> it would be reasonable to assume that in most snap removal cases the defendants removed before the plaintiff had a fair opportunity to serve the forum defendant under state law. By removing before service, defendants are flouting state laws regarding service of process for the purpose of usurping the plaintiffs' choice of forum.

In many states, immediate service on a forum defendant is not possible. For example, in New Jersey, litigants are not permitted to serve an already-filed complaint upon a defendant until a Track Assignment Notice ("TAN") is issued by the court clerk, who has ten days to do so.<sup>176</sup> Pennsylvania requires that original service of process in 61 of its 66 counties be made only by the county sheriff in all but limited circumstances, and the sheriff has thirty days to effectuate service.<sup>177</sup> Snap removals divest state courts of jurisdiction over cases before the state officer perfects service under state law.

Although other states do not require government involvement in the service process, and service may be made much sooner,<sup>178</sup> many states

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172. See *supra* Part IV.C.3.

173. See Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 71, 88 (Apr. 2015).

174. See Martin H. Redish, Julie M. Karaba, *One Size Doesn't Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism*, 95 B.U. L. REV. 109, 151 (Jan. 2015).

175. See Part IV.B.2.

176. N.J.R.C.P. 4:5A-2. In the face of rising snap removals, TANs are no longer used in Multicounty Litigation cases in New Jersey. See Multicounty Litigation Center, *available at* <https://www.judiciary.state.nj.us/attorneys/mcl/index.html> (last visited on May 5, 2017); *infra* Part V.B.

177. Pa.R.C.P. No. 400(a).

178. See Mo. Sup. Ct. R. 54.01(a), Mo. Sup. Ct. R. 54.13(a); W. Va. R. Civ. P. 4(b), W. Va. R.

still encourage litigants to reduce costs by waiving service.<sup>179</sup> If a defendant can simply remove a case upon receipt of a request for a waiver of service, plaintiffs are discouraged from reducing costs by requesting waivers of service. When a case can be removed within a matter of hours, plaintiffs are discouraged from using other cost-effective means of service, like service by mail, where available.<sup>180</sup>

Snap removal also eliminates the time that plaintiffs are given to make service of process under state law. Plaintiffs may have a hard time serving an in-state defendant due to circumstances beyond the plaintiffs' control.<sup>181</sup> In addition, plaintiffs in some states may use the time for service to discover the name of "Doe" defendants, amend their complaints, or simply locate the forum defendant. Thus, admonitions from some district judges that plaintiffs can avoid snap removal by serving the forum defendant<sup>182</sup> unfairly assumes an unnecessary delay on the plaintiffs' part.

In each of these examples, snap removal circumvents and undermines state laws regarding service of process. There are no strong policy reasons to permit this circumvention of state law. Under the Supreme Court's decision in *Murphy Brothers*,<sup>183</sup> and recent amendments to 28 U.S.C. § 1446,<sup>184</sup> each defendant in a case has thirty days *after service*

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Civ. P. 4(c)(2).

179. See, e.g., Ariz. R. Civ. P. 4(f)(1) (giving additional time for response to the complaint when a defendant waives service).

180. See, e.g., Me. R. Civ. P. 4(c)(1); 2 MAINE PRAC., MAINE CIVIL PRACTICE § 4:3 (3d ed.) (noting that service by mail is "the most common means of service . . . in ordinary civil actions because of its obvious simplicity and low cost.").

181. Thomson v. Novartis Pharmaceuticals Corp., No. 06-6280, 2007 WL 1521138, at \*1 (D.N.J. May 22, 2007) (plaintiffs repeatedly attempted to serve the in-state defendant before and after Christmas, but were unable to because the office of that defendant was closed for the holiday season, which did not stop the in-state defendant from removing the case to federal court during the time it was closed for the holidays); Encompass Ins. Co. v. Stone Mansion Restaurant, Inc., 902 F.3d 147 (3d Cir. 2018) (defense counsel agreed to accept service electronically, but instead filed a notice of removal). Cf. Westfield Ins. Co. v. Interline Brands, Inc., No. 1:12cv6775, 2013 U.S. Dist. LEXIS 41911, at \*5 (D.N.J. Mar. 25, 2013) (denying motion to remand in a case where service on two forum defendants was not possible before service on out-of-state defendant because the in-state businesses were closed as a result of the effects of the "Super Storm," Hurricane Sandy); May v. Haas, 2:12-cv-1791, 2012 U.S. Dist. LEXIS 148972, at \*3 (E.D. Cal. Oct. 16, 2012) (denying motion to remand where non-forum defendant was served, while forum defendant evaded service, which was attempted 10 times before removal).

182. See, e.g., City of Ann Arbor Employees' Retirement System v. Gecht, No. C-06-7453 EMC, 2007 WL 760568, at \*8 (N.D. Cal. Mar. 9, 2007); Vitaoe v. Mylan Pharmaceuticals, Inc., No. 1:08-cv-85, 2008 WL 3540462, at \*6 (N.D.W.Va. Aug. 13, 2008).

183. There, the Supreme Court held that "a named defendant's time to remove is triggered by simultaneous service of the summons and complaint, or receipt of the complaint, 'through service or otherwise,' after and apart from service of the summons, but *not by mere receipt of the complaint unattended by any formal service.*" *Murphy Bros. v. Michetti Pipe Stringing*, 526 U.S. 344, 347-48 (1999) (quoting § 1446(b)).

184. In 2011, Congress made clear that the thirty-day time limit to remove a case began to run

on them to remove a case that could have originally been filed in federal court. So there is no need to race to remove in order to avoid waiving the right to remove. No interest is served by allowing removal to occur before service.

Indeed, until the plaintiff serves any party in interest properly joined in the action as a defendant, the plaintiff remains the sole party before the state court. Until the plaintiff perfects service, the plaintiff may do any of a number of things, including dismiss the case voluntarily, file an amended complaint, or choose to serve only certain parties. Until a defendant is served, waives service, or makes a general appearance, the state court has no authority over the defendant, and, under the Supreme Court's decision in *Murphy Brothers*, the defendant has no obligation to remove the complaint.<sup>185</sup> The plaintiff may never actually serve any defendant at all. The complaint may ultimately be dismissed by the court for failure to prosecute. The plaintiff carries the burden of bringing all the parties in interest before the state court. Only when a defendant is brought before the state tribunal should that defendant be able to exercise its statutory right of removal.

Regardless of whether Congress chooses to expand the right of removal in some diversity cases, it could still prevent premature, preemptive removals that frustrate plaintiffs' choice of forum and undermine the authority of state judiciaries over their own laws and citizens by making clear that a defendant may remove only after it has been served, waived or accepted service, or otherwise made itself subject to the jurisdiction of the state court. This would require an amendment to 28 U.S.C. § 1446, which was suggested by the American Law Institute in its Federal Judicial Code Revision Project in 1999,<sup>186</sup> to bring the statute in line with the Supreme Court's decision in *Murphy Brothers*. ALI proposed a number of amendments to § 1441 and § 1446 that would bar removal by a defendant before it has been served "or otherwise brought within the personal jurisdiction of the State court."<sup>187</sup> This type of change would necessarily bar removals by forum defendants even if the "properly joined and served" language remains in § 1441(b).<sup>188</sup> Providing that service, or waiver thereof, triggers the right of removal would also bring the text of the statute expressly in line with

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when each defendant was served, and that earlier served defendants can consent to a later removal by another defendant. 28 U.S.C. § 1446(b)(2).

185. *Murphy Bros.*, 526 U.S. at 350-56.

186. American Law Institute, FED. JUD. CODE REVISION PROJECT 436, 450 (2004).

187. *Id.* at 339; *see also id.* at 333, 339-40, 365-67, 449-54.

188. If Congress wanted to make it even clearer, it could adopt language in § 1441(b) that explicitly prohibits removal by a forum defendant, as earlier iterations of the removal statute did. *See, e.g.*, 28 U.S.C. § 71 (1940) (permitting removal of diversity cases "by the defendant or defendants therein, being nonresidents of that state").

the many courts that have read the current statute to contain such a trigger.<sup>189</sup>

Expressly providing a trigger for removal may not, in itself, prevent defendants from removing non-removable cases from state courts, but it would make these removals much less likely. The proposed amendments would make these removals *per se* unreasonable. Plaintiffs would then be entitled to fees under 28 U.S.C. § 1447(c), and sanctions under Fed. R. Civ. P. 11. Defendants might be able to automatically divest a state court of jurisdiction and inject some delay into the resolution of the case, and force plaintiffs to move to remand, but they will have to pay for the delay. It would stop the proliferation of snap removals, and keep state law cases where they belong—in state court.

3. Rewrite the limitation on removal of diversity cases and move to an “improper joinder” standard.

Another legislative option for Congress is to rewrite the forum defendant rule to move towards an “improper joinder” standard in all cases involving forum defendants. Congress could accomplish this simply by removing the “and served” language from § 1441(b)(2) and § 1446(b)(2)(A). Removal of this language would shift the focus of the forum defendant rule from service on the forum defendant to the underlying question of whether there is a real controversy between the plaintiff and the forum defendant.

In the modern age, where all defendants can become aware of suits filed against them long before they are served, the fact of service does not tell the court or the parties whether the forum defendant is a proper party to the case. By continuing to focus on service on the forum defendant to determine whether these cases are removable, the statute and the federal courts tread on the jurisdiction of state courts, and defendants can circumvent state laws regarding service of process. It creates a race to remove before service that results in cases where a forum defendant removes based on diversity only to itself move for remand once the defendant realizes that it was actually served at the time of removal,<sup>190</sup> and cases where the district court has to resolve the intricacies of whether service on the forum defendant was perfected under state law prior to removal in order to determine whether the case

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189. See *Grizzly Mountain Aviation, Inc. v. McTurbine, Inc.*, 619 F. Supp. 2d 282, 286 (S.D. Tex. 2008); see also *infra* note 196.

190. See *Mecikalski v. AbbVie Inc.*, No. 1:14-cv-2441 (N.D. Ill. Apr. 4, 2014); *Reid Jr. v. AbbVie, Inc.*, No. 1:14-cv-2443 (N.D. Ill. Apr. 4, 2014); *Martin v. AbbVie Inc.*, No. 1:14-cv-4089 (N.D. Ill. Apr. 4, 2014); *Couch v. AbbVie Inc.*, No. 1:14-cv-4093 (N.D. Ill. Apr. 4, 2014); see also *Pritchard v. Medtronic Inc.*, No. 5:14-cv-184 (E.D. Ky. 2014) (forum defendant was served same day as removal, and defendant did not oppose motion to remand).

is removable.<sup>191</sup> It also makes removal of otherwise non-removable cases possible when a plaintiff serves by mail, when the forum defendant evades service,<sup>192</sup> and when plaintiffs ask defendants to waive service.<sup>193</sup> It also unintentionally creates a market for electronic docket-monitoring services that are akin to high-frequency trading that enable certain wealthy defendants to quickly remove cases.

Removing the “and served” language from the statute would still permit removal of diversity cases involving a forum defendant if that defendant is not properly joined. This would likely result in an extension of the inaptly named “fraudulent joinder” doctrine to determine whether the forum defendant is properly joined,<sup>194</sup> which would be fair. It makes little sense to apply one standard for improper joinder when the parties are indisputably completely diverse and a different standard when the parties are not.<sup>195</sup> Indeed, some courts already use the same standard when addressing whether removal is proper under the forum defendant rule.<sup>196</sup> A move toward an “improper joinder” analysis to the forum defendant rule would likely provide greater uniformity in the application of the rule.

The Seventh Circuit in *Morris v. Nuzzo* suggested that extending the doctrine to assess the propriety of the joinder of a diverse forum

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191. *United Steel Supply, LLC v. Buller*, No. 3:13-cv-00362-H, 2013 WL 3790913, at \*1 (W.D. Ky. Jul. 19, 2013); *Mahana v. Enerplus Resources U.S.A. Corp.*, No. CV-12-31-BLG-RFC-CSO, 2012 WL 1947101, at \*2 (D. Mont. 2012); *Giovanni v. Mentor Worldwide, LLC*, No. 1:12-cv-4435, 2012 U.S. Dist. LEXIS 166912, at \*8 (D.N.J. Nov. 21, 2012); *In re Aredia and Zometa Products Liab. Litig.*, No. 3:07-cv-0779, 2007 WL 2905247, at \*2 (M.D. Tenn. Oct. 3, 2007). *But see* *Hokanson v. Kerr Corp.*, No. 13-4534 (MLC), 2014 WL 936804, at \*3 (D.N.J. Mar. 10, 2014) (refusing to entertain the hour-by-hour details of who was served when, and reasoning that the parties' disagreements about the timing of service demonstrated why remanding cases with unserved forum defendants was correct).

192. *May v. Haas*, No. 2:12-cv-1791, 2012 U.S. Dist. LEXIS 148972, at \*9 (E.D. Cal. Oct. 16, 2012)

193. *Johnson v. Emerson Elec. Co.*, No. 4:13-cv-1240-JAR, 2013 WL 5442752 (E.D. Mo. Sept. 30, 2013); *Giacone v. Virtual Officeware, LLC*, No. 2:13cv1558 (W.D. Pa. 2013).

194. Congress currently has a bill pending that would specifically apply a statutorily defined “fraudulent joinder” standard to motions to remand for either lack of diversity or for violation of the forum defendant rule. *See* H.R.725, 115th Congress § 2 (2017). However, that bill would alter the “fraudulent joinder” doctrine itself. Simply deleting the words “and served” from § 1441(b)(2) would result in applying the same standard to all removals involving an improperly joined defendant, and would not disturb the inaptly-named, but well-developed “fraudulent joinder” doctrine as it stands.

195. *See Ekeya v. Shriners Hosp. for Children*, 258 F. Supp. 3d 1192, 1200 (D. Or. 2017).

196. *Bahalim v. Ferring Pharm. Inc.*, No. 16-C-8335, 2017 WL 118418, at \*2-4 (N.D. Ill. Jan. 12, 2017); *Turner v. DePuy Orthopaedics, Inc.*, No. 2:14cv5861, 2014 U.S. Dist. LEXIS 104081, at \*4-5 (C.D. Cal. 2014); *Jones v. DePuy Orthopaedics, Inc.*, 2:14cv5458, 2014 U.S. Dist. LEXIS 97253, at \*5-6 (C.D. Cal. 2014); *Taylor v. DePuy Orthopaedics, Inc.*, 2:12cv7955 (C.D. Cal. 2012).

Some courts remand based on the forum defendant rule using the fraudulent joinder framework even when the non-forum defendant was served and the forum defendant was not served at the time the case was removed, contrary to the text of the statute. *See* *Parker v. Pinnacle Entertainment, Inc.*, 4:14cv791, 2014 U.S. Dist. LEXIS 106154, at \*1 (E.D. Mo. 2014); *Ludwig v. Diamond Resorts Int'l Marketing, Inc.*, 6:14cv3111, 2014 U.S. Dist. LEXIS 197374, at \*3 (W.D. Mo. 2014)

defendant might “substantially *increase* the number of removal petitions filed in federal court,” but called the issue “a very close question.”<sup>197</sup> The court suggested that the “joined and served” requirement actually protects the removal right in cases where a forum defendant might be fraudulently joined. If, however, that is the purpose of the “joined and served” requirement, that only supports moving towards an analysis of whether the forum defendant is improperly joined. It is worth noting that in most snap removal cases, the defendants do not assert that the forum defendant was “fraudulently joined,” and requiring them to so allege and prove would likely decrease the number of snap removals.

### B. Options for State Lawmakers & Judiciaries

While snap removal may be a loophole in federal law, there is one thing that state lawmakers and rule-makers can do to decrease the chances that their state courts will be stripped of jurisdiction over state law cases by a speedy defendant: Expand the options for service on in-state defendants.

As noted above, *supra* Part V.A.2., state laws often limit how service may be made on in-state defendants. In addition, some states require specific action by the clerk’s office before service can be made. Reducing or eliminating the use of systems that require plaintiffs to wait before they can attempt service on an in-state defendant will make it easier to serve an in-state defendant immediately, and reduce the chances that the case will be removed to federal court before the state court ever exercises jurisdiction in the case.

For example, after becoming aware of the increased use of the snap removal device, a New Jersey state court judge *sua sponte* entered an order in a mass tort proceeding she was overseeing that relaxed the New Jersey state rules regarding when service can be made on an in-state defendant. To prevent what she called “a strategic-end run around” the “long standing understanding” that an in-state defendant cannot remove a diversity case to federal court, Judge Carol Higbee relaxed the state court rules to allow plaintiffs to serve complaints without waiting for action by the state court.<sup>198</sup> As of August 5, 2010, New Jersey no longer requires state court action before service may be made in all Multicounty Litigation cases.<sup>199</sup> This appears to be a direct response to

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197. *Morris v. Nuzzo*, 718 F.3d 660, 668 (7th Cir. 2013) (emphasis added).

198. Hermann & Wilson, *Serviceable Notion*, *supra* note 74; James M. Beck, *Thomson v. Novartis Fallout: Judge Higbee Reacts*, DRUG & DEVICE L. BLOG (Nov. 30, 2007); Curry, *Plaintiff’s Motion to Remand Denied*, *supra* note 19 at 907-08.

199. *See* New Jersey Courts, Multicounty Litigation, available at <http://www.njcourts.gov/attorneys/mcl/index.html>.

the number of snap removals that occurred in New Jersey state courts. Even with this change, the snap removal device continued to be used to remove cases to the District of New Jersey.<sup>200</sup>

Other states might look at their own procedural rules that may put up roadblocks to immediate service of in-state defendants, and decide for themselves whether those requirements should be relaxed or eliminated.

### *C. Options for the Judicial Conference of the United States*

Finally, the Judicial Conference of the United States, the policy-making body of the federal judiciary, might adopt a position or propose legislation along the lines of Part V.A.2. or Part V.A.3. to close the snap removal loophole. If the removal statute is amended, the Judicial Conference may find it necessary to direct the Advisory Committee on the Federal Rules of Civil Procedure to propose an amendment to Rule 81 to reflect the legislative changes.

### *D. Coping with Snap Removal in the Meantime*

Unless and until Congress acts to close the snap removal loophole, all parties and participants in the civil justice system will have to deal with the use of the snap removal device. Defendants will continue to use the device for tactical advantage. Plaintiffs' attorneys should be aware of the potential for a snap removal in any case they file in a state court where there is complete diversity of the parties, and the amount in controversy is satisfied. They may choose to craft their complaints differently, or take a different approach to service of process. They might immediately move to voluntarily dismiss snap-removed cases, in addition to moving for remand.

District court judges will continue to face these snap removals, and may decide to expedite consideration of motions to remand, or consider entering orders to show cause why a snap-removed case should not be remanded, if the law of the circuit so permits. They might even consider certifying an order denying a motion for remand based on the forum defendant rule in a snap-removed case for interlocutory appeal. Courts of appeal might consider permitting such an interlocutory appeal. Indeed, unless there is congressional action, interlocutory appeal may be the only way the snap removal issue will ever be resolved. The removal issue the Supreme Court resolved in *Murphy Brothers*, the so-called "courtesy copy trap," had vexed district courts for a long time until it was ultimately resolved on interlocutory appeal of an order denying a

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200. See Table 6. Notably, none of the judges in these cases used a "plain language" reading of the forum defendant rule to deny a motion to remand.

motion to remand.<sup>201</sup> Expedited consideration of the appeal could ease concerns about any additional delay occasioned by the appeal.

#### CONCLUSION

The rise of the use of the snap removal device “stall[s] the administration of justice at both the state and federal levels,”<sup>202</sup> and imposes additional costs on the parties and the federal courts. Every snap removal forces plaintiffs to quickly move to remand, and expend resources litigating procedural issues unrelated to the merits of the case—costs that they will not recover, even if their motions to remand are successful. It forces courts to use judicial resources assessing not the merits of the case, but the propriety of dilatory procedural tactics. Legislation could resolve this issue, but participants in the civil justice system have a variety of options for dealing with snap removals until Congress acts.

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201. *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 349 (1999).

202. *Morris*, 718 F.3d at 668.