Snatch and Remove Before Service: Removal to Federal Court in Forum Defendant Cases

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I. **Introduction**

There are many reasons why a plaintiff’s attorney might opt to litigate in state court as opposed to federal court: many states do not limit expert testimony to the extent that *Daubert* and its progeny do; federal juries require unanimous verdicts, whereas most states do not; the attorney may prefer state courts without the heightened federal pleading standards after *Twombly* and *Iqbal*; or the attorney might be more accustomed to practicing in state court.

The forum defendant rule, 28 U.S.C. § 1441(b), enacted in 1948 and most recently revised by the Federal Courts Jurisdiction and Venue Clarification Act of 2011, enables plaintiffs’ attorneys to keep cases in state court, even when there is complete diversity, if the defendant is sued in the state court where it is incorporated or headquartered. Federal courts have long held that the plaintiff is the “master of the claim,” *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987), and can therefore avoid federal court by opting not to invoke federal law. Section 1441(b) complements this longstanding principle by preventing the use of diversity jurisdiction to remove in cases where the basis for diversity jurisdiction—the danger of bias against an out-of-state party—is negated by the plaintiff’s decision to sue the defendant in the defendant’s home state.

But some clever defense attorneys seeking to avoid state court venues in favor of the generally defense-friendly federal forum, laden with *Daubert* expert evidence rules, *Iqbal* pleading rules, and unanimous verdict requirements, attempt to divest state courts of jurisdiction in diversity cases even when a defendant is a citizen of the forum state. These attorneys electronically monitor state court dockets and, when they see that a case has been filed against one of their clients, they race to file a removal petition in federal court in the hope that the removal will be pending before the plaintiff has properly served the forum defendant. Such removals are premised on a cramped interpretation of the language of Section 1441(b), which states that an action can be removed on the basis of diversity jurisdiction “only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.” (emphasis added). This defense tactic has been used in isolated cases at least as early as 1992, see, e.g., *Wensil v. E.I. DuPont De Nemours & Co.*, 792 F. Supp. 447, 448-49 (D.S.C. 1992), and has since become common practice in the wake of several highly publicized denials of remand in federal district courts in 2007. See, e.g., *Thompson v. Novartis*, 2007 WL 1521138 (D.N.J. May 22, 2007).

Many federal district courts have since issued decisions on plaintiffs’ motions to remand in the wake of a defendant’s pre-service removal. Plaintiffs seeking remand consistently argue that the statutory language leads to a result that Congress could not have possibly intended, and that courts should therefore allow remand rather than apply the language as written. Defendants counter that the statutory language is unambiguous and therefore must be followed regardless of its consequences. The courts that have ruled on the issue are sharply divided, and dozens of cases support either side’s preferred perspective. At present, a party’s chance of getting a case remanded to state court are based entirely on which district judge draws a particular case once it is removed to federal court. Certain district judges within almost every circuit have literally interpreted the statutory language. Other judges within those same circuits have recognized the absurdity of the technicality driving these removals and have remanded cases, finding that the defendants’ interpretation would “eviscerate the purpose” of the forum defendant rule and was “demonstrably at odds with Congressional intent.” *Sullivan v. Novartis Pharm. Corp.*, 575 F. Supp. 2d 640, 647 (D.N.J. 2008). The sheer number of cases on each side of the issue makes the inclusion of a comprehensive list of cases too cumbersome for this article, but a combined search
for the statute and the phrase “forum defendant rule” will quickly yield cases to support each position in almost every federal jurisdiction.

Federal district courts are getting barraged with removals, many by pharmaceutical, chemical, and other companies who have invested in personnel to monitor state courts’ electronic dockets and immediately flag any cases in which their companies have been named, so a removal can occur before service is even effected. Though district court decisions are piling up and courts remain sharply divided on the issue, it is unlikely that an appellate court will weigh in on the matter because orders granting remand are not appealable, See Holmstrom v. Peterson, 492 F.3d 833 (7th Cir. 2007), and because orders denying remand are subject to the final judgment rule. See, e.g., 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).

This article takes the position that the forum defendant rule of 28 U.S.C. §1441(b), recognized for more than fifty years, should continue to preclude removal of cases involving forum state defendants that are not fraudulently joined. Courts should treat the decisions denying remand in this situation as an anomaly rather than persuasive authority, and judicial opinion should coalesce in favor of the position that the intent of Section 1441(b)—rather than a loophole-exploiting consequence of its phrasing—must be honored. In the short term, plaintiffs seeking to avoid removal should serve the complaint on the forum defendant as quickly as possible, though, as discussed below, even this is not a guarantee of avoiding removal in jurisdictions where forum rules make it impossible for the plaintiff to serve the forum defendant before one of the defendants has the opportunity to remove.

II. Analysis

A. The Burden of Proving Proper Removal Favors Remand.

In all circuits, the removing party bears the burden of demonstrating that removal was proper. See, e.g., Boyer v. Snap-On Tools Corp., 913 F.2d 108, 111 (3d Cir. 1990); Doe v. Allied-Signal, Inc., 985 F.2d 908, 911 (7th Cir. 1993). Furthermore, removal statutes “are to be strictly construed against removal and all doubts should be resolved in favor of remand.” Batoff v. State Farm Ins. Co., 977 F.2d 848, 851 (3d Cir. 1992). As Boyer held, the district court “must resolve all contested issues of substantive facts in favor of the plaintiff and must resolve any uncertainties as to the current state of the controlling substantive law in favor of the plaintiff.” Boyer, 913 F.2d at 111; see also Rossello–Gonzalez v. Calderon–Serra, 398 F.3d 1, 11 (1st Cir. 2004).

B. The Core Argument for Remand: Removal Thwarts the Clear Intent of Congress

Prior to a flurry of removals in 2007, several removals before service within the Seventh Circuit were remanded, generating case law that has been relied upon by pro-remand district judges throughout the county. One such oft-cited case is Holmstrom v. Harad, No. 05 C 2714, 2005 WL 1950672 (N.D. Ill. Aug. 11, 2005). In Holmstrom, the plaintiff filed a shareholder derivative suit against twenty-eight officers and directors of OfficeMax. Two of the twenty-eight defendants were residents of Illinois, where the suit was filed. Before any defendant was served, one of the non-forum defendants removed the action to the United States District Court for the Northern District of Illinois. The district court granted the plaintiff’s motion for remand because the presence of the forum defendants defeated the attempted removal. See id. at *2. The court noted
that the “joined and served” requirement in Section 1441(b) only made sense “when one defendant has been served but the named forum defendant has not.” *Id.* The court refused to apply the “joined and served” requirement because no defendant had been served, and held that removal under Section 1441(b) was premature.

The *Holstrom* court relied on *Recognition Communications, Inc. v. American Automobile Association*, No. Civ. A. 3:97-CV-0945-P, 1998 WL 119528 (N.D. Tex. Mar. 5, 1998), which concluded that although the literal language of the rule favors the removing defendant in this scenario, Congress did not intend that a fast-acting defendant should have an end-run through strategic pre-service removal especially since no non-resident defendants had been served. Instead, Congress created the forum defendant rule to protect defendants from plaintiffs who listed among multiple defendants a resident of the forum state they did not intend to pursue but merely named to defeat removal. *Id.*

*Holmstrom* was followed in *Vivas v. The Boeing Co.*, 486 F. Supp. 2d 726 (N.D. Ill. 2007). The plaintiffs sued Boeing in Illinois state court in connection with a plane crash in another country. Though Boeing was an Illinois citizen, it removed the case before it or any other defendant had been served. The U.S. district court refused to allow Boeing to use the fact that one may file a notice of removal before formal service to defeat the “properly joined and served” language of Section 1441(b), and it granted plaintiffs’ motion to remand. *Id.* The *Vivas* court noted that any doubt regarding removal should be resolved in favor of remand, and then followed the *Holmstrom* analysis, explaining that the interpretation urged by defendants would thwart the intent of the statute:

> Combining the permission granted in 28 U.S.C. § 1446(b) for defendants to file a notice of removal before being served with the joined and served requirement of 28 U.S.C. § 1441(b) to allow a resident defendant to remove a case before a plaintiff even has a chance to serve him would provide a vehicle for defendants to manipulate the operation of the removal statutes. Allowing either party to do that would be against what the courts have long understood to be Congress’s intent.

*Id.* at 734. But though removal before service of the forum defendant is a clear perversion of Congressional intent, there remains stark contrast between and within the district courts on this issue.

### C. The Core Argument for Removal: Plain Language of the Statute

The defense argument in all cases arguing against remand under Section 1441(b) is that even if Congress probably did not intend (or even consider) the possibility of remand before service, the plain language of the statute trumps the forum defendant rule. One of many similarly-reasoned opinions denying remand first noted that plaintiff argued that the statute contemplated multiple defendants (the only defendant in the case was the forum defendant) and that applying the defendant’s suggested construction of the statute would “offend the purpose of the statute.” *Terry v. J.D. Streett & Co.*, 4:09CV01471 FRB, 2010 WL 3829201, at *1 (E.D. Mo. Sept. 23, 2010). Though the court acknowledged that the plaintiffs “make a strong argument for why this case should be remanded,” it ultimately found that:

> The text of § 1441(b), however, is clear, and this Court must apply the statute as it is written. Cases in this Court have held that the Court must apply the statute as it is written, and not as plaintiffs maintain it is intended. A case premised upon
diversity jurisdiction is removable to federal court if none of the parties “properly joined and served as defendants is a citizen of the State in which such action is brought.” 28 U.S.C. § 1441(b). In the case at bar, defendant had not been served before it removed the case to this Court, and the forum defendant rule therefore fails to aid plaintiffs.

Id. at *2 (internal case citations and quotation marks omitted).

D. Long-Standing Judicial Interpretation of Legislative Intent and Public Policy Factors Weigh Against Defendants’ Literal Construction of Rule 1441(b).

Civil procedure treatises recognize that the rationale underlying the forum defendant rules is “the belief that federal diversity jurisdiction is unnecessary because there is less reason to fear state court prejudice against the defendants if one or more of them is from the forum state.” See Erwin Chemerinsky, Federal Jurisdiction, § 5.5, at 345 (4th ed. 2003). And the Ninth Circuit expressed the same rationale for the forum defendant rule while considering whether it is jurisdictional or procedural:

Removal based on diversity jurisdiction is intended to protect out-of-state defendants from possible prejudices in state court. See Tosco Corp. v. Cmtys. for a Better Env’t, 236 F.3d 495, 502 (9th Cir. 2001) (“The purpose of diversity jurisdiction is to provide a federal forum for out-of-state litigants where they are free from prejudice in favor of a local litigant.”) (internal quotation marks omitted). The need for such protection is absent, however, in cases where the defendant is a citizen of the state in which the case is brought. Within this contextual framework, the forum defendant rule allows the plaintiff to regain some control over forum selection by requesting that the case be remanded to state court. A procedural characterization of this rule honors this purpose because the plaintiff can either move to remand the case to state court within the 30-day time limit, or allow the case to remain in federal court by doing nothing. Either way, the plaintiff exercises control over the forum.

Lively v. Wild Oats Markets, Inc., 456 F.3d 933, 940 (9th Cir. 2006). Accordingly, many of the district courts that have considered this issue have concluded that Congress could not have intended removability to depend on the timing of service. See, e.g., Oxendine v. Merck & Co., Inc. 236 F. Supp. 2d 517, 526 (D. Md. 2002). And courts have noted that this conclusion makes particular sense today given that the shift to electronic docketing allows for savvy defendants to game the system. Vivas, 486 F. Supp. 2d at 734-35; Fields v. Organon USA Inc., 2007 WL 4365312, at *4 (D.N.J. Dec. 12, 2007).

Defendants typically argue that the letter of the statute must be followed because to allow remand would read out the “and served” language in the statute. But they do not acknowledge that allowing forum defendants to remove diversity actions prior to service would essentially read out the entire forum defendant rule from the statute in jurisdictions where service on the defendant is necessarily delayed until after the defendant has the opportunity to file the removal papers in federal court.

In addition to violating the clear intent of Section 1441(b) in cases where defendants can remove before even the most diligent plaintiffs can effect service, the defense bar’s interpretation of the statute ensures that plaintiffs in different states would be subject to different standards for
removal. In states such as Missouri and West Virginia, where there is no government involvement in the service process, plaintiffs could ensure that the forum defendant rule would retain its effect by diligently serving forum defendants moments after filing their complaints in state court. But the Supreme Court has found that it is improper for states to have differing standards for proper removal to federal court: the “removal statute, which is nationwide in its operation, was intended to be uniform in its application, unaffected by local law definition or characterization of the subject matter to which it is to be applied.” Shamrock Oil & Gas v. Sheets, 313 U.S. 100, 104 (1941). Interpreting Section 1441(b) to allow for a non-forum defendant to remove before forum defendants are served ensures non-uniform application of the federal rules.

E. The 2011 Revisions to Section 1441(b) Lend No Support to Defendants’ Position.

As mentioned at the outset of this article, Section 1441(b) was revised by the Federal Courts Jurisdiction and Venue Clarification Act of 2011 (“FCJVCA”). Though Congress rearranged much of Section 1441, it retained the “properly filed and served” language that constitutes the forum defendant exception as written.¹

Some defendants have argued that the unaltered language is a sign that Congress intended the result that the forum defendant rule be rendered moot by the reality of modern electronic filing and delays written into various states’ requirements for service. At least one court has adopted this argument, noting that “the amendment reinforces the conclusion that Congress intended for the plain language of the statute to be followed. Munchel v. Wyeth LLC, Civ. A. 12-906-LPS, 2012 WL 4050072, at *4 (D. Del. Sept. 11, 2012). Munchel notes that the U.S. Supreme Court has found that “Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change.” Id. (citing Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239-40 (2009)). But here, of course, for several years leading up to the 2011 legislation, there was not a judicial interpretation of the statute, but rather two wholly antagonistic judicial interpretations of the statute, both gaining support at the district court level and both escaping appellate review.

Though the House Report for the bill contains a detailed 19-page long “section-by-section analysis” of the FCJVCA, it is silent on the forum defendant rule. H.R. Rep. No. 112-10 at 12 (2011), reprinted in 2011 U.S.C.C.A.N. 576, 580. Furthermore, the “Legislative History” section of the House Report notes that the relevant section of the bill is “based on another bill, H.R. 5440,” that had last been marked up by members of the judiciary committee in 2006, before the vast majority of these removal cases were filed in federal courts. Id. at 577. The House Report further notes that:

Given the press of other agenda items in 2010, the Judiciary Committee could not devote ‘formal’ process to the evaluation of H.R. 4113 during the 111th Congress. In other words, while the bill was considered important, the Committee did not have time to conduct a hearing on H.R. 4113, followed by a markup.

Id. Rather than having the bill go through formal process in the judiciary committee, “the Administrative Office of the U.S. Courts functioned as a clearinghouse to vet the bill and newly-

¹ For an extended analysis of the legislative history of the removal statute from its inception to the period just prior to the 2011 changes, see Hawkins v. Cottrell, Inc., 785 F. Supp. 2d 1361, 1364 (N.D. Ga. 2011), a forum defendant case in which the court ordered remand.
developed revisions to it with the Judicial Conference’s Federal-State Jurisdiction Committee, academics, and interested stakeholders.” *Id.*

If any of the many federal courts reviewing the statute had voiced even a vague notion of why Congress might have intended the result of the plain language, proponents of allowing removal would have a much stronger argument. But here—where there is clearly no reason for Congress to intend the result of the statute’s plain language, the House Report is silent on the split of judicial authority interpreting the forum defendant rule, and the Judiciary Committee had not reviewed the bill since before the split of authority gained momentum in 2007—there is no sound basis to infer that the unaltered language is an expression of legislative intent. Rather than presuming that the legislators surveyed the unintended consequences of their earlier drafting, and saw that they were good, the better explanation is that legislators rewriting the statute were simply unaware of the conflict. And in fact several judges have issued pro-remand decisions in 2012. See, e.g., *Perez v. Forest Labs., Inc.*, 4:12CV01064 ERW, 2012 WL 4811123, at *2 n.4 (E.D. Mo. Oct. 10, 2012) (“Because this action was commenced after January 6, 2012, the [FCIVCA] applies to this case. The court notes, though, that the changes to Section 1441(b) do not impact the Court’s analysis on the relevant issues.”); see also *Laugelle v. Bell Helicopter Textron, Inc.*, Civ. A. No. 10-1080 (GMS), 2012 WL 368220, at **2-3 (D. Del. Feb. 2, 2012).

F. Defendants’ Interpretation of Section 1441(b) Leads to Results that are “Plainly at Variance with the Policy of the Legislation as a Whole.”

The principal of statutory construction that calls for courts to apply the plain meaning of unambiguous language is indeed well established. See *United States v. Am. Trucking Ass’ns*, 310 U.S. 534, 542-43 (1940). But courts also recognize that it has its limits. Though plain language is in most cases the best indicator of statutory intent, in some cases adherence to plain language leads to results the drafters could not possibly have intended. *Id.* In such cases, courts must look beyond the plain meaning of the statutory language, just as many courts considering the language of the forum defendant rule have done:

> When the meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, even when the plain meaning did not produce absurd results but merely an unreasonable one “plainly at variance with the policy of the legislation as a whole” this Court has followed that purpose, rather than the literal words.

*Id.* at 543; see also *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring). In light of the *Am. Trucking* standard, one district judge deciding a pre-service removal case noted that:

> At a minimum, this Court finds that a plain meaning of the interpretation of the statute produces unreasonable results at variance with the policy of the legislation as a whole. The purpose of the statute is to prevent gamesmanship by plaintiffs and should not allow for similar gamesmanship by defendants. Further ... the result of blindly applying the plain “properly joined and served” language of section 1441(b) is to eviscerate the purpose of the forum defendant rule, as defendants could effectively always prevent imposition of the forum defendant rule by monitoring state dockets and removing an action before a plaintiff can serve any party.


III. Conclusion
Because recent statutory changes have not aided in the resolution of district courts’ split over the forum defendant rule and cases interpreting the statute continue to evade appeal, the issue will likely be with us for some time. Though plaintiffs’ position is more defensible, whether a case in federal court as a result of pre-service removal is ultimately litigated in federal court or state court depends entirely upon the federal judge to which the case is assigned.