

Ninth Circuit Shuts Down “Super” Snap Removals, Leaves Question of “Non-Super” Snap Removals (AKA Pre-Service Removals) Open for Another Day

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Many defendants prefer federal court to state court. Accordingly, when sued in state court, they will remove whenever possible. This bulletin addresses a wrinkle in the law about when removal is possible. The removal statute codifies the “forum-defendant rule.” That rule, contained in 28 U.S.C. § 1441(b)(2), prohibits removal based on diversity jurisdiction “if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.” 28 U.S.C. § 1441(b)(2) (emphasis added). The question is whether an in-state defendant can avoid the forum-defendant rule by removing before it is served with the complaint. Courts refer to that procedure as a “snap removal,” or a “pre-service removal.”

On April 10, 2024, the Ninth Circuit weighed in for the first time on what it deemed a “super” snap removal, holding that it was closing the book on such “snappier” removals. **Casola v. Dexcom, Inc.**, 2024 WL 1547021, at *15 (9th Cir. Apr. 10, 2024). This bulletin discusses that opinion, as well as the current landscape of snap removals in U.S. federal courts.

The Ninth Circuit’s Decision on “Super” Snap Removals:

Last week, in *Casola v. Dexcom, Inc.*, the Ninth Circuit addressed what it called an “even snappier version of the typical snap removal.” 2024 WL 1547021, at *2. The opinion addressed three cases that were consolidated on appeal. In each, defendant Dexcom removed not only *before* it was *served*, but also *before* the underlying complaints were even *filed* in state court. *Id.* Plaintiff Casola electronically submitted her complaint to the clerk on November 23, 2022, Dexcom removed on Nov. 28, 2022, and the state court clerk officially filed the complaint on Nov. 29, 2022, endorsing the filing as “ELECTRONICALLY FILED.” *Id.* at *2-3.^[1] Under the California state court’s rules, a complaint is deemed “filed” not when a plaintiff submits it to the court, but instead when the court’s clerk processes and endorses or otherwise acknowledges the complaint as officially filed. *Id.* at *6-13. In California’s overburdened courts, lags of multiple days are common.

The Ninth Circuit thus held that Dexcom’s “super” snap removals were premature because they were attempts to remove cases that did not yet exist as civil actions pending in state court. *Id.* at *2, *6, *13. Because the removals were ineffectual, the district court had the “power to grant the plaintiffs’ eventual motions to remand” based on the forum-defendant rule even though plaintiffs waited more than 30 days after Dexcom’s so-called removal before moving to remand. *Id.* at *2, *13. The Ninth Circuit ultimately dismissed the consolidated appeals for lack of jurisdiction. *Id.* at *2, *15.

In finding that the state-court complaint was not deemed filed until processed or endorsed by the clerk of the state court, the Ninth Circuit expressed little sympathy for Dexcom's position, which posited that "filing" meant simply delivering the complaint to the clerk. The Ninth Circuit explained:

It is defendant Dexcom . . . who asks the court to deem these cases into existence before their docketing in state court. And for what purpose but to attempt to deprive Plaintiffs of their choice of forum? Whatever the benefits might be to litigating in federal court, there is no manifest injustice to a California-based company having to defend itself in a California court. . . . Often-overburdened state trial courts deserve the chance to at least register the pleadings that come to them before having cases removed by nimble parties.

Id. at *12. Further, the Ninth Circuit stated that adopting Dexcom's "delivery-as-filing rule would effectively give in-forum defendants with subscriptions to e-filing monitoring services a safe harbor in which to accomplish snap removals unhindered by speedy service of process." *Id.*

Thus, the Ninth Circuit's message to forum defendants is that when it comes to removals, be quick, but not *too* quick. Only an existing civil action can be removed; a nascent one cannot, so "super" snap removals are disallowed. The Ninth Circuit declined to address, however, whether regular snap/pre-service removals are permissible under 28 U.S.C. § 1441(b)(2). *Id.* at *14. Thus, the "final chapter on snap removals in the Ninth Circuit remains to be written." *Id.* at *15.

Current Landscape of Snap/Pre-Service Removals

Although the Ninth Circuit left for another day whether "non-super" snap removals are viable within the Ninth Circuit, we thought the Ninth Circuit's *Dexcom* ruling still provided a good opportunity to reflect on the status of pre-service removals within the U.S. federal courts.

Circuit Court Precedent Permitting Pre-Service Removals. Currently, three Circuit Courts-the Second, Third, and Fifth Circuits-have held that pre-service removals are viable:

- **Second Circuit - *Gibbons v. Bristol-Myers Squibb Co.*, 919 F.3d 699 (2d Cir. 2019):** The Second Circuit held that forum defendants were entitled to remove actions to federal court based on diversity of citizenship after the suits were filed in state court but before any defendant was served, notwithstanding the forum-defendant rule. In so deciding, the Second Circuit relied on 28 U.S.C. § 1441(b)(2)'s plain text and held that the provision cannot apply until a forum-state defendant has been served in accordance with state law. "[U]ntil then, a state court lawsuit is removable under Section 1441(a) so long as a federal district court can assume jurisdiction over the action."
- **Third Circuit - *Encompass Insurance Co. v. Stone Mansion Restaurant, Inc.*, 902 F.3d 147 (3d Cir. Aug. 22, 2018):** The Third Circuit was the first appellate court to uphold pre-service removals. "Starting with the text," the Third Circuit concluded that "the language of the forum defendant rule in section 1441(b)(2) is unambiguous. Its plain meaning precludes removal on the basis of in-state citizenship only when the defendant has been properly joined and served." Furthermore, the Third Circuit found that by including the phrase "properly joined and served," Congress addressed a specific problem - fraudulent joinder by a plaintiff - with a bright-line rule. Thus, the Third Circuit reasoned, applying the plain language does not defy rationality or render the statute nonsensical or superfluous.

- **Fifth Circuit - Texas Brine Co. v. American Arbitration Assoc., 955 F. 3d 482 (5th Cir. 2020):** The Fifth Circuit agreed with the Second Circuit and concluded that “[b]y its text, then, Section 1441(b)(2) is inapplicable until a home-state defendant has been served in accordance with state law; until then, a state court lawsuit is removable under Section 1441(a) so long as a federal district court can assume jurisdiction over the action.” The Fifth Circuit, like the Second and Third Circuits, rejected the plaintiff’s argument that applying the language would lead to an absurd result: “In our view of reasonableness, snap removal is at least rational.”

The Sixth Circuit has also previously hinted at the viability of pre-service removals. In **McCall v. Scott, 239 F.3d 808 (6th Cir. 2001)**, in a footnote, the Sixth Circuit noted “[w]here there is complete diversity of citizenship, as [plaintiff] concedes there was, the inclusion of an *unserved* resident defendant in the action does not defeat removal under 28 U.S.C. § 1441(b).” *Id.* at n.2 (emphasis in original). However, this footnote in *McCall* has been consistently dismissed as dicta. See *Phive Starr Properties, L.P. v. Farmers’ Ethanol LLC*, 2024 WL 488047, at *2 (S.D. Ohio Feb. 8, 2024).

Circuit Precedent Against Pre-Service Removals. By contrast, the Eleventh Circuit has, in dicta, rejected forum defendants’ attempts to use pre-service removal. In **Goodwin v. Reynolds, 757 F.3d 1216 (11th Cir. 2014)**, the plaintiff sued three defendants in state court, but only one defendant was a citizen of the forum state. The two non-forum defendants removed the case to federal court before the forum defendant had been served, but the district court granted plaintiff’s motion to dismiss the case without prejudice so the plaintiff could refile the case in state court. *Id.* at 1218. Defendants argued that the district court abused its discretion, but the Eleventh Circuit affirmed. *Id.* The appellate court reasoned that, even assuming that the case was removable, the dismissal deprived the defendants of no “substantial right.” *Id.* at 1222. In dicta, the Court briefly discussed pre-service removal and said allowing such removal would promote gamesmanship by defendants. *Id.* at 1221. Further, because the “properly joined and served” language was to address fraudulent joinder and therefore to prevent tactical maneuvers by plaintiffs, the Court also noted in dicta that the district court similarly has discretion to “undo *Defendants’* gamesmanship in the circumstances at bar” by granting the plaintiff’s motion to dismiss. *Id.* (emphasis in original).

District Court Decisions. Finally, several U.S. District Courts have addressed pre-service removal in circuits that have not directly addressed the question. The results have been inconsistent.

- For example, in **DC v. Abbott Laboratories, Inc., 323 F. Supp. 3d 991, (N.D. Ill. Aug. 29, 2018)**, the U.S. District Court for the Northern District of Illinois upheld a pre-service removal, finding that “the statutory text must control.” *Id.* at 996-97. In so deciding, the court nonetheless acknowledged that no Seventh Circuit precedent interpreted the forum-defendant rule, and that district courts within the Circuit have disagreed on the correct interpretation. *Id.* at 993-94. The Court noted, however, that “it is sufficiently common to imagine that Congress will rewrite the statute if it feels that removal where an in-forum defendant has not yet been served constitutes an abuse of the judicial system.” *Id.* at 997.
- By contrast, the U.S. District Court for the Southern District of Ohio has repeatedly held that “snap removals are inappropriate.” E.g., **Phive Starr Properties, L.P. v. Farmers’ Ethanol LLC, 2024 WL 488047, at *2 & n.2 (S.D. Ohio Feb. 8, 2024)** (collecting cases).

Conclusion:

Pre-service removals can be a powerful tool for in-state defendants to invoke federal jurisdiction and avoid litigating in state court. The new Ninth Circuit's decision in *Dexcom* does not foreclose pre-service removals in the Ninth Circuit. Instead, it establishes the second goalpost for forum defendants who seek to remove to federal court: removal must be made before service *and after* the complaint is "filed" under the state court's rules.

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[1] The other plaintiffs' cases followed the same procedural chronology, with some differences in exact dates that did not impact the Court's analysis and therefore were omitted. *Id.* at n.4