SNAP REMOVAL IN THE EIGHTH CIRCUIT

ABSTRACT

Diversity jurisdiction is one way civil litigants can find themselves in federal court. Under 28 U.S.C. Section 1332, the federal courts have original jurisdiction over civil actions where the amount in controversy exceeds seventy-five thousand dollars between citizens of different states. The forum defendant rule, codified in 28 U.S.C. Section 1441(b)(2), provides that a suit sitting in diversity may be removed to federal court if no defendant, properly joined and served, is a citizen of the state in which the action is brought. Snap removal is a technique used by defendants whereby removal is sought before an in-state defendant is properly joined and served.

Several federal circuits are in a quandary about whether a defendant may remove an action to federal court before an in-state defendant has been properly joined and served. The majority of circuits have relied on the plain language of Section 1441(b)(2), holding that a defendant may properly remove the action to federal court before an in-state defendant is properly joined and served while meeting the statutory requirements of federal diversity and the forum defendant rule. Some jurisdictions have held that a defendant's race to the courthouse will not cure a lack of complete diversity and the demands of the forum defendant rule. Recently, the Eighth Circuit rejected snap removal as a means to cure incomplete diversity as the court lacked original jurisdiction.

This Note addresses the considerations several federal circuit courts analyzed in coming to grips with the validity of snap removal in civil actions sitting in diversity. The impact of the Eighth Circuit's holding in *M & B Oil, Inc. v. Federated Mutual Insurance* on North Dakota litigants in their race to the courthouse will be explored. Although the Eighth Circuit does not permit snap removal to cure a lack of diversity, there are circumstances where civil actions in North Dakota may be removed via snap removal techniques. Since the federal diversity and removal statutes are interrelated, the United States Supreme Court should address the propriety of snap removal.

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I. BACKGROUND

The two primary ways civil litigants can find themselves in federal court are by federal question or diversity jurisdiction.[1] Federal district courts have original jurisdiction over civil actions that satisfy the requirements of 28 U.S.C. Sections 1331 or 1332—the statutes codifying federal question and diversity jurisdictions.[2] Removal is a procedural device allowing defendants to transfer a state court action to a federal district court with original jurisdiction over the action.[3] Defendants seeking to remove a civil action sitting in diversity must satisfy the forum defendant rule.[4] The language of the forum defendant rule, codified in Section 1441(b)(2), has created a unique phenomenon for defendants known as snap removal.[5]

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1. *See* 28 U.S.C. §§ 1331-32.
2. *Id.* State court actions typically are removed to federal court under diversity jurisdiction.
3. *See* 28 U.S.C. § 1441.
4. *See id.* § 1441(b)(2).
5. *See* M & B Oil, Inc. v. Federated Mut. Ins. Co., 66 F.4th 1106 (8th Cir. 2023); Tex. Brine Co. v. Am. Arb. Ass'n, 955 F.3d 482 (5th Cir. 2020); Gibbons v. Bristol-Myers Squibb Co., 919 F.3d 699 (2d Cir. 2019); Encompass Ins. v. Stone Mansion Rest. Inc., 902 F.3d 147 (3d Cir. 2018); Goodwin v. Reynolds, 757 F.3d 1216 (11th Cir. 2014).

Section 1332 of the United States Code sets the basis for federal courts' diversity jurisdiction.[6] In relevant parts, 28 U.S.C. Section 1332(a) states:

> The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—(1) citizens of different States; (2) citizens of a State and citizens or subjects of a foreign state . . . ; (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.[7]

The purpose of diversity jurisdiction is to avoid undue prejudice against out-of-state litigants in state courts,[8] "afford[ing] [them] the opportunity to have their cases tried in an impartial forum."[9] This protection becomes obsolete, however, if a defendant is a citizen of the forum state.[10] The forum state is the state where federal court presiding over the action is sitting.

A civil action removable solely on diversity jurisdiction is subject to 28 U.S.C. Section 1441.[11] Section 1441 establishes the rules for removing civil actions from state to federal court.[12] Subsection (a) reads:

> 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, to the district court of the United States for the district and division embracing the place where such action is pending.[13]

Colloquially known as the forum defendant rule, Section 1441(b)(2) provides: "A civil action otherwise removable solely on the basis of the jurisdiction under section 1332(a) of this title 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."[14] A person's citizenship is the state where the person is domiciled. Businesses are citizens of the states in

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6. 28 U.S.C. § 1332.
7. *Id.*
8. Leslie Paul Machado & C. Quinn Adams, *Getting to Federal Court in a "Snap,"* 68 FED. LAW. 54, 54-55 (2021) (quoting Prudential Oil Corp. v. Phillips Petroleum Co., 546 F.2d 469, 475 (2d Cir. 1976)).
9. *Id.* (quoting *Prudential*, 546 F.2d at 475).
10. *Id.*
11. *Id.*
12. 28 U.S.C. § 1441.
13. *Id.* at § 1441(a).
14. *Id.* at § 1441(b)(2) (emphasis added).

which they are incorporated or where their principal place of business is located.[15]

Ordinarily, the forum defendant rule is simple: "a defendant . . . sued in a diversity action in the state courts of its home state, is served in accordance with state law, [then] attempts to remove the case, and is [later] rebuffed by a district court applying Section 1441(b)(2)."[16] Recently, defendants have been exploiting the plain language of the forum defendant rule by "removing cases based on diversity jurisdiction even where one of the defendants is a citizen of the state in which the action was brought."[17]

Snap removal is a procedural loophole inherent in the language of 28 U.S.C. Section 1441(b)(2).[18] It takes advantage of the "properly joined and served" language of Section 1441(b)(2).[19] Snap removal occurs when a defendant removes an action from state court before any defendants in the forum state are properly joined and served. Additionally, the technique can be used by a forum defendant—despite being joined—before he is properly served. As early as 2001, the Sixth Circuit Court of Appeals recognized this procedural loophole.[20] In a footnote from *McCall v. Scott*, the Sixth Circuit observed, "Where there is complete diversity of citizenship . . . the inclusion of an *unserved* resident defendant in the action does not defeat removal under 28 U.S.C. § 1441(b)."[21]

In recent years, the results of this procedural twist have prompted judicial inquiry by several federal circuit courts.[22] The overwhelming majority of circuits that have considered snap removal have approved the practice.[23] However, the Eighth Circuit Court of Appeals recently rejected snap removal as a basis for curing the parties' lack of complete diversity.[24]

The Eighth Circuit took a slightly different approach in addressing snap removal.[25] The court applied the federal diversity statute before approaching the removal statute.[26] Therefore, the Eight Circuit concluded the case would

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15. *See id.* at § 1332(c).

16. Gibbons v. Bristol-Myers Squibb Co., 919 F.3d 699, 705 (2d Cir. 2019).

17. *See* Machado & Adams, *supra* note 8, at 54-55.

18. *See* McCall v. Scott, 239 F.3d 808, 813 n.2 (6th Cir. 2001).

19. *See* 28 U.S.C. § 1441(b)(2).

20. *See McCall*, 239 F.3d at 813 n.2.

21. *Id.*

22. *See* M & B Oil, Inc. v. Federated Mut. Ins. Co., 66 F.4th 1106 (8th Cir. 2023); Tex. Brine Co., v. Am. Arb. Ass'n, 955 F.3d 482 (5th Cir. 2020); Gibbons v. Bristol-Myers Squibb Co., 919 F.3d 699 (2d Cir. 2019); Encompass Ins. v. Stone Mansion Rest. Inc., 902 F.3d 147 (3d Cir. 2018); Goodwin v. Reynolds, 757 F.3d 1216 (11th Cir. 2014).

23. *See Tex. Brine*, 955 F.3d at 484; *Gibbons*, 919 F.3d at 702; *Encompass*, 902 F.3d at 149; *Goodwin*, 757 F.3d at 1218.

24. *See M & B Oil*, 66 F.4th at 1107.

25. *Id.* at 1109.

26. *Id.*

not have been "otherwise[-]removable" as there never was complete diversity of the parties, notwithstanding the "properly joined and served" language of Section 1441.[27] The court's decision seems to imply that snap removal will be permissible if the defendant seeks removal before the service of an at-home defendant, provided the plaintiff is not a citizen of the same state as any of the named defendants.[28]

II. IS SNAP REMOVAL CONSISTENT WITH FEDERAL DIVERSITY REQUIREMENTS AND THE FORUM DEFENDANT RULE?

In response to the growing number of defendants employing snap removal, five federal circuit courts have weighed in on the validity of the technique.[29] Each circuit considered whether snap removal is consistent with federal diversity requirements and the forum defendant rule.[30]

A. ELEVENTH CIRCUIT: GOODWIN V. REYNOLDS

In *Goodwin v. Reynolds*, the Eleventh Circuit was skeptical of the defendant's snap removal.[31] There, the plaintiff, a widow, alleged that a truck driver struck and killed her husband.[32] The plaintiff filed suit in Alabama state court against the truck driver, his employer, and the scrap metal facility where the truck driver was delivering his load to on "theories of negligence, vicarious liability, and premises liability."[33] All of the parties were diverse for purposes of citizenship.[34] However, the defendant truck driver, Reynolds, was a citizen of Alabama—the forum state.[35]

Immediately after filing the suit, the plaintiff requested service of process on all three defendants via the clerk of court.[36] The plaintiff also mailed courtesy copies of the complaint to each defendant.[37] After the trucking company received its courtesy copy of the complaint, and before any defendant had been served, the trucking and scrap metal companies

27. *See id*. (quoting 28 U.S.C. § 1441(b)(2)).
28. *Id*.
29. *Id*. at 1107; *Tex. Brine*, 955 F.3d at 484; *Gibbons*, 919 F.3d at 702; *Encompass*, 902 F.3d at 149; *Goodwin*, 757 F.3d at 1218.
30. *M & B Oil*, 66 F.4th at 1107; *Tex. Brine*, 955 F.3d at 484; *Gibbons*, 919 F.3d at 702; *Encompass*, 902 F.3d at 149; *Goodwin*, 757 F.3d at 1218.
31. *Goodwin*, 757 F.3d at 1220-21.
32. *Id*. at 1218.
33. *Id*.
34. *Id*.
35. *Id*.
36. *Id*.
37. *Id*.

removed the case to federal court.[38] Shortly after, the plaintiff moved for remand, arguing, inter alia, that removal violated the forum defendant rule on account of defendant Reynolds's Alabama citizenship.[39] In the alternative, the plaintiff sought dismissal under Federal Rule of Civil Procedure 41(a)(1)(A)(i), allowing her to refile the case in state court to unambiguously "trigger the forum defendant rule."[40] The federal district court denied the motion to remand and granted the Rule 41 dismissal.[41] Soon after, the trucking and scrap metal companies moved to amend the order of dismissal.[42] The court "denied this motion . . . [and a]ll three defendants jointly appealed."[43]

The Eleventh Circuit Court of Appeals noted that although the defendants' snap removal was not directly before it, the court would analyze the technique's validity.[44] In striking down the snap removal, the court did not look highly on the defendants' pre-service removal.[45] In fact, the court admonished the defendants for exploiting the courtesy copies of the complaint the plaintiff supplied.[46] The court reasoned the defendants' gamesmanship tied the district court's hands by removing the action to federal court pre-service.[47] The Eleventh Circuit concluded that the defendants' actions turned the federal removal statute's "properly joined and served" language on its head.[48]

Furthermore, the Eleventh Circuit found the legislative purpose of the forum defendant rule persuasive.[49] The court concluded that the purpose of 28 U.S.C. Section 1441(b)(2) is to prevent gamesmanship by plaintiffs.[50] Such gamesmanship may occur when a plaintiff joins an at-home defendant he does not intend to proceed against.[51] Courts typically try to obviate such unfounded claims.[52]

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38. *Id.*
39. *Id.* at 1219.
40. *Id. See also* FED. R. CIV. P. 41(a)(1)(A) ("[T]he plaintiff may dismiss an action without a court order by filing . . . a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment . . . .").
41. *Goodwin*, 757 F.3d at 1219.
42. *Id.*
43. *Id.*
44. *Id.* at 1221.
45. *See id.*
46. *See id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*

The Eleventh Circuit ultimately concluded the defendants did not suffer any clear legal prejudice from the dismissal.[53] Instead, the court viewed the defendants' right to removal under 28 U.S.C. Section 1441(b)(2) as going against the "core of what the removal statute protects."[54] Seeing the lack of merit, snap removal was nixed in the Eleventh Circuit,[55] and the case proceeded in state court.[56]

B. THIRD CIRCUIT: ENCOMPASS INSURANCE CO. V. STONE MANSION RESTAURANT, INC.

The Third Circuit Court of Appeals upheld an at-home defendant's snap removal in *Encompass Insurance Co. v. Stone Mansion Restaurant, Inc*.[57] The case arose out of a fatal collision whereby an intoxicated driver was killed, and the passenger suffered serious bodily injury.[58] Encompass Insurance Company ("Encompass"), an Illinois corporation, was the liability carrier of the vehicle.[59] Encompass settled its claim with the passenger against the deceased driver's estate and Stone Mansion, "the [Pennsylvania] restaurant that allegedly overserved the driver."[60] Encompass then brought a state action against Stone Mansion seeking contribution under Pennsylvania law.[61] Stone Mansion, a Pennsylvania business, later removed the case to federal court before being served.[62] Encompass disputed removal on grounds it was impermissible under 28 U.S.C. Section 1441(b)(2).[63] The federal district court concluded removal was proper and dismissed the case pursuant to the defendant's Rule 12(b)(6) motion.[64] Encompass appealed the court's removal and dismissal decisions.[65]

53. *Id*. at 1222.
54. *Id*.
55. *Id*.
56. *See id*.
57. 902 F.3d 147, 154 (3d Cir. 2018).
58. *Id*. at 149.
59. *Id*.
60. *Id*.
61. *Id*.; *see also Contribution*, *in* BLACK'S LAW DICTIONARY (2d ed. 1910) (defining "contribution" as an "act of any one or several of a number of co-debtors, co-sureties, etc., in reimbursing one of their number who has paid the whole debt or suffered the whole liability, each to the extent of his proportionate share").
62. *Encompass*, 902 F.3d at 149.
63. *Id.* at 150.
64. *Id*. at 150-51; *see also* FED. R. CIV. P. 12(b) ("Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion: . . . failure to state a claim upon which relief can be granted . . . .").
65. *Encompass*, 902 F.3d at 149.

On appeal, the Third Circuit addressed whether the district court erred in denying the plaintiff's motion to remand.[66] The court first turned to the language of Section 1441.[67] From there, the court determined that "[w]here federal jurisdiction is premised only on diversity of the parties, the forum defendant rule applies."[68] The Third Circuit Court of Appeals reasoned the forum defendant rule is procedural rather than jurisdictional "except where 'the case could not initially have been filed in federal court.'"[69] The court then deconstructed the language of the forum defendant rule.[70] In doing so, the court turned to the literal text of the removal statute.[71] The Third Circuit explained it will interpret the plain meaning of the text when the language of the statute is unambiguous.[72] In concluding the text of the forum defendant rule was unambiguous, the court held it would only depart from the plain meaning of the statutory text to prevent "absurd or bizarre results."[73]

The court determined "absurd" means to "def[y] rationality or [to] render[] the statute nonsensical and superfluous."[74] The Third Circuit considered whether their interpretation of the forum defendant rule produced "absurd or bizarre results."[75] In doing so, the court delved into the purpose of the forum defendant rule as described earlier in *Goodwin*.[76] The court agreed that Congress's intent in enacting the "properly joined and served" language of Section 1441(b)(2) is to prevent gamesmanship by crafty plaintiffs through "fraudulent-joinder."[77] The court concluded the forum defendant statute is a bright-line rule that "does not contravene" Congress's purpose.[78] Instead, the court found the plain interpretation of the statute "does not defy rationality or render the [forum defendant rule] nonsensical or superfluous."[79] The court reasoned that its interpretation:

> (1) . . . abides by the plain meaning of the text; (2) it envisions a broader right of removal only in the narrow circumstances where a defendant is aware of an action prior to service of process with

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66. *Id.* at 151.
67. *Id.* at 151-52.
68. *Id.* at 152.
69. *Id.* (quoting Korea Exch. Bank, N.Y. Branch v. Trackwise Sales Corp., 66 F.3d 46, 50 (3d Cir. 1995)).
70. *Id.*
71. *Id.* (quoting United States v. Moreno, 727 F.3d 255, 259 (3d Cir. 2013)).
72. *Id.*
73. *Id.* (quoting *In re* Kaiser Aluminum Corp., 456 F.3d 328, 338 (3d Cir. 2006)).
74. *Id.* (quoting *Moreno*, 727 F.3d at 259).
75. *Id.*
76. *Id.* at 153.
77. *Id.*
78. *Id.*
79. *Id.*

sufficient time to initiate removal; and (3) it protects the statute's goal without rendering any of the language unnecessary.[80]

The court conceded that the result in this case was "peculiar," although the result did not rise to the level of "absurd or bizarre."[81] Thus, the court concluded the defendant had availed itself of the forum defendant rule's plain language.[82] The Third Circuit held that any procedural oddities in the result were for the legislature, not the judiciary, to correct.[83] In so holding, the Third Circuit took a strict literal interpretive approach in permitting the use of snap removal within the circuit.[84]

C. SECOND CIRCUIT: GIBBONS V. BRISTOL-MYERS SQUIBB CO.

The Second Circuit Court of Appeals upheld a defendant's use of snap removal in a products liability class action.[85] In *Gibbons v. Bristol-Myers Squibb Co.*, the two defendants, each incorporated in Delaware with their principal places of business in New York, sought removal from the Delaware state court action to federal court.[86] The motion for removal was granted, and the action was transferred and consolidated into multi-district litigation in the Southern District of New York.[87] There, the district judge denied the plaintiff's motion for remand and dismissed several of the plaintiff's claims based on the defendant's 12(b)(6) motion.[88] The class appealed.[89]

The court first addressed the plaintiff's opposition to pre-service removal.[90] The plaintiff argued "that because the only basis [here] for federal court jurisdiction is diversity of citizenship, and because [each defendant was] sued in the state courts of their home state (Delaware), removal [should be] barred by the forum defendant rule."[91] Ultimately, the court did not subscribe to the plaintiff's argument.[92] The Second Circuit articulated that the burden of proving the correctness of removal rests with the defendant.[93]

80. *Id.* (footnote omitted).
81. *Id.* at 153-54.
82. *Id*. at 154.
83. *Id.*
84. *See id.*
85. 919 F.3d 699, 702 (2d Cir. 2019).
86. *Id.*
87. *Id.* at 703.
88. *Id.* at 703-04.
89. *Id.*
90. *Id.* at 704.
91. *Id.* (footnote omitted).
92. *Id.*
93. *Id.*

According to the court, an action *can* be removed without violating the forum defendant rule when the basis for federal jurisdiction is diversity.[94]

The court stated, per Section 1441(a), civil actions in state court otherwise falling under the federal district court's original jurisdiction are removable by defendants to the federal district encompassing the state court.[95] Reasoning subject matter jurisdiction can be premised on diversity of citizenship, the court concluded the forum defendant rule applied.[96] The court held that under the forum defendant rule, suits solely removable based on diversity of citizenship cannot be removed if "any of the parties in interest properly joined and served as defendants is a citizen of the [forum] State."[97]

The court noted, here, because the defendants removed the action after the state court action was filed "but *before* any [of the defendants were] served," removal was proper based on the text of 28 U.S.C. Section 1441(b)(2).[98] Acknowledging a split amongst the district courts within the circuit in approving snap removal, the court found it incumbent to resolve the split.[99]

In resolving the split, the court interpreted the forum defendant rule in a fashion analogous to the court in *Encompass*.[100] Relying on *Encompass*, the court concluded that the language of the forum defendant rule is unambiguous.[101] The court reasoned that by its plain text, the forum defendant rule has no application to a forum defendant before being properly joined and served.[102] The plaintiff next argued that the plain meaning of the statute "produces an absurd result" and creates a "non-uniform application of the removal statute."[103] Noting the plaintiff did not contest the plain reading of the forum defendant rule, the court quickly discounted the plaintiff's policy argument.[104]

Concluding the plain reading of the forum defendant rule does not produce absurd results, the court defined the canons governing absurdity.[105]

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94. *Id.*

95. *Id.* at 704-05.

96. *Id. See also* Marcus v. AT&T Corp., 138 F.3d 46, 52 (2d Cir. 1998); Encompass Ins. v. Stone Mansion Rest. Inc., 902 F.3d 147, 152 (3d Cir. 2018)).

97. *Gibbons*, 919 F.3d at 704-05 (quoting 28 U.S.C. § 1441(b)(2)).

98. *Id.* at 705.

99. *Id.*

100. *Id. See also Encompass*, 902 F.3d at 147.

101. *Gibbons*, 919 F.3d at 705.

102. *Id.* ("The statute plainly provides that an action may not be removed to federal court on the basis of diversity of citizenship once a home-state defendant has been 'properly joined and served.'" (quoting 28 U.S.C. § 1441(b)(2) (emphasis removed))).

103. *Id.*

104. *Id.*

105. *Id.* at 705-06.

The court held statutes should be interpreted to avoid absurdity.[106] According to the court, "a statute is not 'absurd' merely because it produces results that . . . [may be] anomalous or perhaps unwise."[107] Rather, genuine absurdity occurs when it is obvious to most observers that "Congress could [not] have intended the result."[108] The court noted the plaintiff correctly contended that the purpose of the forum defendant rule is to prevent an out-of-state defendant from being "home-towned" by the plaintiff's state court.[109] However, the plaintiffs argued:

> it is absurd to allow a home-state defendant to use an exception meant to protect defendants from unfair bias (in the courts of a plaintiff's home state) and [the] language designed to shield them from gamesmanship (in the form of fraudulent joinder) to remove a lawsuit to federal court.[110]

The Second Circuit, however, did not view this result as absurd.[111] In debunking the plaintiff's argument, the court reasoned that while it may be anomalous to allow a home-state defendant to remove an action sitting in diversity, the unambiguous language of 28 U.S.C. Section 1441(b)(2) cannot be ignored.[112] In the court's opinion, the defendants' actions did not vitiate Congress's goal to stave off fraudulent joinder.[113] Instead, the court found Congress likely employed the "properly joined and served" language to preclude gamesmanship and, more importantly, "to provide a bright-line rule keyed on *service*."[114] Reasoning a bright-line rule focused on *service* can be administered with ease rather than a factual probe of "a plaintiff's intent or opportunity to actually serve a home-state defendant."[115]

Plaintiff further alleged that variances in state service requirements would contribute to a nonuniform application of Section 1441(b)(2), which the court quickly deflated.[116] Relying on prior caselaw, the court stated variations in state service requirements are common in federal cases, particularly in the context of removal.[117] Accordingly, the Second Circuit

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106. *Id.* at 705.
107. *Id.*
108. *Id.* at 706 (quoting Catskill Mountains Ch. Trout Unlimited, Inc. v. EPA, 846 F.3d 492, 517 (2d. Cir 2017)).
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.* (emphasis added).
115. *Id.*
116. *Id.*
117. *Id.* (citing Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344, 354-55 (1999)).

reasoned such variation does not require the court to look outside the plain language of the removal statute.[118] The court concluded the defendants' actions were explicitly authorized by the unambiguous verbiage of 28 U.S.C. Section 1441(b)(2).[119] Furthermore, the court found the results were not absurd or unfair.[120] On these grounds, the Second Circuit held snap removal permissible.[121]

D. FIFTH CIRCUIT: TEXAS BRINE CO. V. AMERICAN ARBITRATION ASSOCIATION, INC.

In *Texas Brine Co. v. American Arbitration Association, Inc.*, the Fifth Circuit Court of Appeals upheld the defendant's snap removal.[122] There, the plaintiff, a Texas limited liability company, sued the defendant, a New York corporation, and two of its employees, both arbitrators and citizens of Louisiana.[123] The plaintiff filed the initial action in Louisiana state court concerning a conflict of interest arising between the two arbitrators and the Texas Brine Co.'s party opponent in an independent matter.[124] The American Arbitration Association removed the action to federal court before the two arbitrators were served.[125] The question before the Fifth Circuit was "whether the forum-defendant rule prohibits a non-forum defendant from removing a case when a not-yet-served defendant is a citizen of the forum state."[126] The Fifth Circuit ultimately answered the question in the affirmative.[127]

In allowing the defendant's snap removal technique, the court relied on the holdings of *Encompass* and *Gibbons* as well as prior dicta.[128] The court observed that as early as 2001, the Sixth Circuit "interpreted Section 1441(b)(2) to allow snap removal" in an oft-quoted footnote.[129] The Fifth Circuit declared 28 U.S.C. Section 1441(b)(2) a rule of procedure and not jurisdiction.[130] In a matter-of-fact fashion, the court stated, "When the plain language of a statute is unambiguous and does not lead to an absurd result,

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118. *Id.*
119. *Id.* at 707.
120. *Id.*
121. *Id.*
122. 955 F.3d 482, 484 (5th Cir. 2020).
123. *Id.* at 484-85.
124. *Id.*
125. *Id.* at 485.
126. *Id.*
127. *Id.* at 487.
128. *Id.* at 485 (first citing Gibbons v. Bristol-Myers Squibb Co., 919 F.3d 699 (2d Cir. 2019); then citing Encompass Ins. v. Stone Mansion Rest. Inc., 902 F.3d 147 (3d Cir. 2018); and then citing McCall v. Scott, 239 F.3d 808, 813 n.2 (6th Cir. 2001)).
129. *Id.* (citing *McCall*, 239 F.3d at 813 n.2).
130. *Id.* (citing *In re* 1994 Exxon Chem. Fire, 558 F.3d 378, 392-93 (5th Cir. 2009)).

our inquiry begins and ends with the plain meaning of that language."[131] The court concluded the case was removable because the federal district court had original jurisdiction over the case since the New York defendant removed the case before the Louisiana defendants were served.[132] Thus, there was complete diversity of citizenship at the time of removal, allowing the court to have subject matter jurisdiction over the action.[133]

Like *Encompass* and *Gibbons*, the plaintiff conceded the plain language of the removal statute allowed the defendant's snap removal.[134] However, the plaintiff here argued the interpretation of the statute produced absurd results warranting remand.[135] The Fifth Circuit disagreed.[136] In evaluating plaintiff's absurdity argument, the court concluded, "absurdity is not mere oddity."[137] Rather, "[t]he absurdity bar is high, as it should be."[138] According to the court, an absurd result is preposterous and beyond reason.[139] "In our view of reasonableness, snap removal is at least rational."[140] The court reasoned that Congress's failure to appreciate the side effects of the statutory language was not an absurdity in and of itself.[141] Relying on the three indicators of rationality announced by the Third Circuit in *Encompass*, concerning questions of absurdity in statutory interpretation, the court concluded "a reasonable person could intend the result of the [statute's] plain language."[142] Thus, the court has no reason to revise the forum defendant rule.[143] Although the court concedes there may be exceptional circumstances where removal would amount to an abuse of Section 1441(b)(2), the court declined to

131. *Id.* at 486 (quoting Dunn-McCampbell Royalty Int., Inc. v. Nat'l Park Serv., 630 F.3d 431, 438 (5th Cir. 2011)).

132. *Id.*

133. *See id.* ("When the [defendant] filed its notice of removal, the case was 'otherwise removable'—as required by Section 1441(b)—because the district court has original jurisdiction of a case initially filed in Louisiana state court in which the parties are diverse.").

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* ("Congress may well have adopted the 'properly joined and served' requirement in an attempt to both limit gamesmanship and provide a bright-line rule keyed on service, which is clearly more easily administered than a fact-specific inquiry into a plaintiff's intent or opportunity to actually serve a home-state defendant." (quoting Gibbons v. Bristol-Myers Squibb Co., 919 F.3d 699, 706 (2d Cir. 2019))).

143. *Id.*

specify.[144] Instead concluding, the circumstances "do not support rewriting the statute here."[145]

Furthermore, the court declined to create an exception to the forum defendant rule "requiring a reasonable opportunity to serve a forum defendant" because the text is unambiguous.[146] Thus, there was no doubt in the propriety of removal.[147] So far as the Fifth Circuit is concerned, "[a] non-forum defendant may remove an otherwise removable case even when a named defendant who has yet to be 'properly joined and served' is a citizen of the forum state."[148] Snap removal garnered another circuit's approval.

E. EIGHTH CIRCUIT: M & B OIL, INC. V. FEDERATED MUTUAL INSURANCE CO.

Despite the long line of federal circuits approving the snap removal technique, the Eighth Circuit Court of Appeals denied the defendant's snap removal in *M & B Oil, Inc. v. Federated Mutual Insurance Co*. as a means of circumventing the federal diversity requirements.[149] There, the plaintiff, a Missouri corporation, sued the defendant, an insurer incorporated in Minnesota, in a breach of contract matter when the insurer denied coverage for a loss concerning water damage to the plaintiff's property.[150] "[The plaintiff] also sued [the City of] St. Louis under a detrimental-reliance theory for failing to 'shut off the water' as promised."[151] Before the plaintiff could serve the city, the defendant removed the action to federal court.[152] Then the plaintiff filed a motion to remand that the district court denied "because St. Louis did not officially become part of the case until after it was 'properly joined and served,' which occurred *after* [the defendant] had removed it."[153] The plaintiff then appealed the district court's order denying remand to the Eighth Circuit.[154]

On appeal, the Eighth Circuit framed the question as "whether [snap removal] eliminates the requirement of complete diversity."[155] In discussing if the case could remain in federal court, the court first analyzed original

144. *Id.* at 487.
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. 66 F.4th 1106, 1110 (8th Cir. 2023).
150. *Id.* at 1108.
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.* at 1107.

jurisdiction.[156] Relying on 28 U.S.C. Section 1332(a), the court concluded "[f]ederal district courts have original jurisdiction over civil suits 'between . . . citizens of different States' when 'the matter in controversy exceeds . . . $75,000.'"[157] The court found the diversity statute "contains an important judicial gloss: the parties must be completely diverse from one another."[158] Declaring service is irrelevant in the diversity equation, the court cited an earlier opinion, *Pecherski v. General Motors Corp.*, to support the proposition.[159] The court concluded the case was a "fish out of water" because plaintiff also sued St. Louis.[160] Because both the plaintiff and St. Louis were citizens of Missouri, there was never complete diversity of citizenship; thus, the federal courts did not otherwise have original jurisdiction.[161]

The court went on to say "[s]nap removal has nothing to do with the complete-diversity requirement."[162] Instead, the court concluded snap removal "offers a potential solution to a different problem: the forum-defendant rule."[163] "A defendant can remove the case to federal court, assuming there is 'original jurisdiction,' if the forum-state defendant has yet to be 'properly . . . served.'"[164] The Eighth Circuit seems to imply the circuits previously addressing the issue of snap removal perhaps overlooked Section 1332 diversity requirements:

> Even if we assume these courts are right, snap removal cannot cure a lack of complete diversity. Remember that the forum-defendant rule only applies when the case is, in the words of the statute, "otherwise removable," meaning there is "original jurisdiction." It then *adds* a further limitation based on the citizenship of the defendant.[165]

Despite the nuance in facts, the Eighth Circuit agreed the forum defendant rule is not jurisdictional but a rule of procedure.[166]

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156. *Id.* at 1109.
157. *Id.* (quoting 28 U.S.C. § 1332(a)).
158. *Id.*
159. *Id.* (citing Pecherski v. Gen. Motors Corp., 636 F.2d 1156, 1160-61 (8th Cir. 1981)).
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.* at 1110 (quoting 28 U.S.C. § 1441 (b)(2)). *See also* Tex. Brine Co. v. Am. Arb. Ass'n, 955 F.3d 482, 485-87 (5th Cir. 2020); Gibbons v. Bristol-Myers Squibb Co., 919 F.3d 699, 704-07 (2d Cir. 2019); Encompass Ins. v. Stone Mansion Rest. Inc., 902 F.3d 147, 151-54 (3d Cir. 2018); McCall v. Scott, 239 F.3d 808, 813 n.2 (6th Cir. 2001).
165. *M&B Oil Inc.*, 66 F.4th at 1110 (citation omitted).
166. *Id.*

The court found the instant case was not removable because the district court did not have original jurisdiction via diversity of citizenship.[167] "Snap removal or not, an absence of complete diversity makes a federal forum unavailable."[168]

The court appears to have concluded snap removal is inconsistent with federal diversity requirements when the court would not otherwise have original jurisdiction.[169] The court noted that the fraudulent joinder of a non-diverse defendant is a limited circumstance when a lack of diversity may not bar an action from being removed to federal court.[170] Here, the court doubted the exception's applicability as the plaintiff sought to amend his complaint to add an inverse condemnation claim against the City of St. Louis.[171] Accordingly, the Eighth Circuit remanded the case to the federal magistrate to determine the applicability of the exception.[172]

III. ARGUMENT AND IMPACT ON NORTH DAKOTA PRACTITIONERS

When the Eighth Circuit Court of Appeals held in *M & B Oil* that snap removal cannot cure a lack of diversity, the court did not outright ban the use of snap removal.[173] Although the Eighth Circuit's holding may appear out of step with the other federal circuits, there are circumstances in which North Dakota practitioners and their clients can find themselves the victim or the benefactor of snap removal.[174] Consequently, North Dakota's plaintiff and defense bars should be cognizant of the situations permitting snap removal. Considering the interrelation between 28 U.S.C. Sections 1332 and 1441, it seems prudent that the United States Supreme Court address the propriety of snap removal, perhaps keying the practice to service.[175]

The Eighth Circuit premised its opinion in *M & B Oil* on three touchstones: (1) the federal courts did not have original jurisdiction here as there was not complete diversity between all named parties, (2) citizenship for diversity purposes concerns those named in a complaint, and (3) 28 U.S.C. Sections 1332 and 1441 are independent principles.[176] At first

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167. *Id.*
168. *Id.*
169. *See id.*
170. *Id.*
171. *Id.*
172. *Id.*
173. *See id.*
174. *See id.*
175. *See* Gibbons v. Bristol-Myers Squibb Co., 919 F.3d 699, 706 (2d Cir. 2019).
176. *See M & B Oil*, 66 F.4th at 1109-10.

glance, it may seem that the Eighth Circuit disapproves of snap removal.[177] However, the court's opinion appears to leave the door open for snap removal when the federal district court would otherwise have original jurisdiction over the action.[178]

Moreover, the Eighth Circuit's holding does not contravene the holdings in *Goodwin*, *Gibbons*, *Encompass*, or *Texas Brine* because, in each of those cases, no plaintiff was a citizen of the same state as a named defendant.[179] As the United States Supreme Court reiterated in *Lincoln Property Co. v. Roche*, "[d]efendants 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."[180] Therefore, these courts had original jurisdiction over the action in each preceding case because the diversity requirements were satisfied.[181] Thus, by the plain language of the forum defendant rule, the Second, Third, and Fifth Circuits were likely correct in concluding the "properly joined and served" language permitted defendants' snap removal.[182]

The Eighth Circuit's holding in *M & B Oil* can be reconciled with the prior cases because both the plaintiff and the non-served defendant were citizens of Missouri.[183] Thus, there never was original jurisdiction over the case to trigger the possibility of snap removal.[184] Accordingly, as the Eighth Circuit stated, diversity jurisdiction and removal are independent concepts.[185] The former is jurisdictional, while the latter is procedural.[186] Furthermore, the jurisdictional requirement must be observed.[187] Consequently, North Dakota's practitioners should be attuned to the possibility of snap removal in an action otherwise within the federal courts' original jurisdiction.[188]

Given the Eighth Circuit's reticence to fully condone snap removal, and despite several federal circuits approving the practice, it seems clarity in resolving the issue is warranted. The United States Supreme Court should

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177. *See id.*

178. *See id.* at 1110.

179. *See* Goodwin v. Reynolds, 757 F.3d 1216, 1220-21 (11th Cir. 2014); *Gibbons*, 919 F.3d at 704-07; Encompass Ins. Co. v. Stone Mansion Rest. Inc., 902 F.3d 147, 151-54 (3d Cir. 2018); Tex. Brine Co. v. Am. Arb. Ass'n, 955 F.3d 482, 485-87 (5th Cir. 2020).

180. 546 U.S. 81, 84 (2005).

181. *See* 28 U.S.C. § 1332.

182. *See Tex. Brine*, 955 F.3d at 485-87; *Gibbons*, 919 F.3d at 704-07; *Encompass*, 902 F.3d at 151-54.

183. 66 F.4th at 1108.

184. *Id.* at 1110.

185. *Id.* at 1109 ("Snap removal has nothing to do with the complete-diversity requirement.").

186. *Id.*

187. *Id.* at 1110; 28 U.S.C. §§ 1332(a), 1441(b)(2); *see also Tex. Brine*, 955 F.3d at 485; *Encompass*, 902 F.3d at 152.

188. *See* 28 U.S.C. §§ 1332(a), 1441(b)(2).

consider ruling on the propriety of snap removal and its consistency with the diversity jurisdiction and removal statutes to resolve the issue. The interrelation between the statutes requires clarity. It seems that if diversity is to be determined based on the named parties, as opposed to those properly joined and served, plaintiffs may have greater leeway to craft a subterfuge for fraudulent joinder. Although plaintiffs get the first crack at selecting the venue, a bright-line rule keyed to service may be a better indicator of the proper venue. If such a bright-lined rule were to be embraced by the United States Supreme Court, plaintiffs would still have the ability to motion the court for remand. As the earlier cases suggested, a bright-lined rule keyed to service seems to effectively balance the procedural rights of plaintiffs and defendants.[189]

North Dakota plaintiffs wishing to prevent a defendant from removing a civil action to federal court on diversity grounds must consider two requirements. First, plaintiff's attorneys need to ensure there is a named forum defendant in the complaint.[190] Naming a forum defendant in the complaint will subject defendants seeking removal to 28 U.S.C. Section 1441(b)(2): the forum defendant rule. Second, plaintiff's attorneys must make sure any forum defendant is not fraudulently joined to avoid the prospect of triggering the fraudulent joinder exception permitting removal.[191] The fraudulent joinder exception may force the court to grant defendant's motion for removal. Thus, North Dakota's plaintiff's attorneys wishing to prevent a defendant from removing the action to federal court need to ensure there is a proper basis for joining any defendants.

North Dakota's defense bar can learn a thing or two from the court's holding in *M & B Oil*. Defense attorneys seeking removal to the federal courts can still employ the snap removal technique so long as the federal courts have original jurisdiction over the action by using the plain language of 28 U.S.C. Section 1441(b)(2).[192] To avail oneself of the statute's plain language, the North Dakota defense attorneys must move for removal before service of a forum defendant while ensuring plaintiff is not a citizen of the same state as any defendant (served or not).[193]

189. *See* Gibbons v. Bristol-Myers Squibb Co., 919 F.3d 699, 706 (2d Cir. 2019).

190. *See M & B Oil*, 66 F.4th at 1109-10.

191. *Id.* at 1110; *see also* 28 U.S.C. § 1441; Gottlieb v. Westin Hotel Co., 990 F.2d 323, 327 (7th Cir. 1993) ("Fraudulent joinder occurs either when there is no possibility that a plaintiff can state a cause of action against nondiverse defendants in state court, or where there has been outright fraud in plaintiff's pleading of jurisdictional facts.").

192. *See* 28 U.S.C. §§ 1332, 1441(b)(2).

193. *Id.*; *see also M & B Oil*, 66 F.4th at 1110 ("A defendant can remove the case to federal court, assuming there is 'original jurisdiction,' if the forum-state defendant has yet to be 'properly . . . served.'" (quoting 28 U.S.C. § 1441(b)(2))).

IV. CONCLUSION

Diversity jurisdiction is one avenue civil litigants can use to avail themselves of the federal courts.[194] It is on this basis federal courts can have original jurisdiction over civil actions.[195] A defendant wishing to remove a state court action otherwise falling within the federal court's original jurisdiction must comply with the forum defendant rule.[196] The forum defendant rule has led to division amongst federal courts surrounding the legality of snap removal.[197] A technique used by defendants, snap removal is sought before an in-state defendant is properly joined and served.[198]

Although the Eighth Circuit has prevented North Dakota's defense bar from using this technique to cure a lack of complete diversity, circumstances still exist allowing for the defendants' snap removal.[199] Such circumstances occur when a defendant seeks removal prior to the service of the at-home defendant provided plaintiff is not a citizen of the same state as any named defendant.[200] The outcome here is permissible as the statutory requirements of federal diversity and the forum defendant rule are served.[201] It is with this spirit that snap removal lives to see another day in the Eighth Circuit.[202] Considering the approbation of snap removal among other federal circuits and the interrelation between the diversity and removal statutes, the Supreme Court of the United States should put the propriety of snap removal to rest. Perhaps, as the earlier caselaw suggests, a bright-line rule keyed to service best balances the procedural rights of plaintiffs and defendants while honoring the spirit of the diversity and removal statutes.[203]

Benjamin Lorentz ∗

194. 28 U.S.C. § 1332.

195. *Id.*

196. *Id.* § 1441(b)(2).

197. *See M & B Oil*, 66 F.4th at 1106; Tex. Brine Co., L.L.C. v. Am. Arb. Ass'n, Inc., 955 F.3d 482 (5th Cir. 2020); Gibbons v. Bristol-Myers Squibb Co., 919 F.3d 699 (2d Cir. 2019); Encompass Ins. v. Stone Mansion Rest. Inc., 902 F.3d 147 (3d Cir. 2018); Goodwin v. Reynolds, 757 F.3d 1216 (11th Cir. 2014).

198. *See, e.g.*, *M & B Oil*, 66 F.4th at 1106.

199. *Id.* at 1110.

200. *See* 28 U.S.C. §§ 1332(a), 1441(b)(2); *see also* Lincoln Prop. Co. v. Roche, 546 U.S. 81, 84 (2005).

201. 28 U.S.C. §§ 1332(a), 1441(b)(2).

202. *See M & B Oil*, 66 F.4th at 1110.

203. *See* Gibbons v. Bristol-Myers Squibb Co., 919 F.3d 699, 702 (2d Cir. 2019).

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