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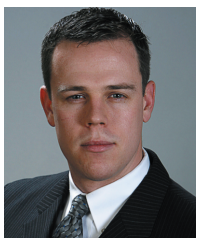
Removal

The authors take a look at the divergent case law addressing pre-service removal to federal court and the practical considerations defendants should undertake when deciding whether to use the process. In the end, they suggest that early planning, vigilant monitoring, and knowledge of the law in the relevant jurisdiction are essential ingredients in a successful pre-service removal strategy.

Pre-Service Removal in Diversity Actions Involving Forum Defendants



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I. Introduction

It is a truism that businesses often try to avoid state court, even in their home state of corporate citizenship. Where a business is sued in its home state court in a case implicating federal law, the full range of federal court removal strategies ordinarily is available. But where a business is sued in its home state court and the only possible basis for removal is diversity of citizenship, there is seemingly an insuperable bar to removal: the ''forum defendant rule,'' 28 U.S.C. § 1441(b)(2), which prohibits diversity-based removal where one of the defendants is a citizen of the state in which the suit is filed.

In fact, however, in recent years numerous district courts have held that the forum defendant rule is not insurmountable in diversity-based removal cases, at least where the removal notice is filed before a forum defendant is served with process in the state court action. This view stems from the text of Section 1441(b)(2) (formerly Section 1441(b), before amendments that took effect in early 2012), which prohibits diversity-based removal only where a forum defendant has been ''properly joined and served.'' One (if not the principal) reason Congress enacted this language was to prevent a plaintiff from negating diversity jurisdiction by improperly naming a non-diverse defendant without any ''honest intention of pursuing'' that defendant in the

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litigation.[1] But many courts have also relied on the ''properly joined and served'' clause for their conclusion that the forum defendant rule does not preclude diversity-based removal if the removal notice is filed before any forum defendant has been ''served.''

This view is not without opposition. Many district courts have concluded that construing the ''properly joined and served'' clause to permit so-called ''pre-service removal'' encourages gamesmanship by defendants who closely monitor electronic state court dockets and, in some instances, can take advantage of state procedures that delay a plaintiff's ability to serve its complaint after it has been filed. These courts also observe that pre-service diversity-based removal unnecessarily allows in-state defendants to escape their home state's courts—courts in which they presumptively would not face the local prejudices that drove Congress to create diversity jurisdiction in the first place.

A third group of district courts has staked out a middle ground, concluding that a non-forum defendant can remove so long as (1) it or another non-forum defendant has already been served and (2) no forum defendant has been served. These courts reason that this follows from the text of Section 1441(b)(2), which in their view implies that at least one defendant has already been joined and served before diversity-based removal in a forum defendant case is proper.

While district courts are sharply divided on the propriety of pre-service removal and who can invoke it and when, the federal courts of appeal have been silent on the issue, due largely to the statutory bar on appellate review of orders granting motions to remand.[2] But that may change soon. The Ninth Circuit recently accepted an interlocutory appeal in *Regal Stone Limited v. Longs Drug Stores California, LLC*,[3] where the district court endorsed pre-service removal and denied a motion to remand, and appellate briefing in that case is now complete.

This article provides an overview of the increasingly divergent case law addressing pre-service removal.[4] The article also discusses the practical considerations defendants should undertake in determining whether to employ pre-service removal. Vigilance is essential to removing a state court action to federal court before a forum defendant is served. Potential defendants and their counsel must anticipate litigation, monitor dockets, and be prepared to move quickly once litigation commences. Important, too, is knowledge of the current state of the case law in the federal district to which the expected state court suit would be removed.

In the end, although pre-service removal remains an uncertain escape route given the conflicting case law and the lack of appellate rulings on the issue, it is an option state court defendants should consider if diversity jurisdiction would exist and their case involves a forum defendant.

II. Diversity-Based Removal Statutes

The general removal statute, 28 U.S.C. § 1441(a), authorizes removal where the federal court would have subject matter jurisdiction had the state court suit been filed there originally. Federal courts, of course, have subject matter jurisdiction over diversity suits under 28 U.S.C. § 1332(a)—that is, cases where there is at least $75,000 in controversy and complete diversity of citizenship between the plaintiffs and the defendants. And this is true even where one of the defendants is a citizen of the state in which the suit is filed—a so-called ''forum defendant.''

That doesn't mean a federal court will keep a removed state court suit that names a forum defendant and meets the diversity jurisdiction requirements, however. That is because Section 1441(b)(2)—the ''forum defendant rule''—prohibits diversity-based removal ''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.''[5] Thus, if a state court suit is removed on diversity grounds but names a forum defendant, a timely motion to remand under Section 1441(b)(2) would appear to have a significant likelihood of success.[6]

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[1] *Morris v. Nuzzo*, 718 F.3d 660, 670 n. 3 (7th Cir. 2013) (''The purpose of the 'joined and served' requirement is to prevent a plaintiff from blocking removal by joining as a defendant a resident party against whom it does not intend to proceed, and whom it does not even serve.'') (quoting *Stan Winston Creatures, Inc. v. Toys ''R'' Us, Inc.*, 314 F. Supp. 2d 177, 181 (S.D.N.Y. 2003) (Lynch, J.)) (internal quotation marks omitted).

[2] 28 U.S.C. § 1447(d).

[3] No. 12-16567 (9th Cir.).

[4] There is a growing body of commentary on pre-service removal. *See* Zach Hughes, *A New Argument Supporting Removal Of Diversity Cases Prior To Service*, 79 Def. Couns. J. 205 (2012); Saurabh Vishnubhakat, *Pre-Service Removal In The Forum Defendant's Arsenal*, 47 Gonz. L. Rev. 147 (2011-12); Matthew Curry, *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); 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); John P. Lavelle, Jr. & Erin E. Kepplinger, *Removal Prior To Service: A New Wrinkle Or A Dead End?*, 75 Def. Couns. J. 177 (2008).

[5] *See also Lively v. Wild Oats Markets, Inc.*, 456 F.3d 933, 940 (9th Cir. 2006) (explaining that the forum defendant rule ''confines removal on the basis of diversity jurisdiction to instances where no defendant is a citizen of the forum state'').

[6] Motions to remand based on procedural defects in removal must be made within 30 days of the filing of the removal notice in federal court, though the lack of subject matter jurisdiction can (and must) be considered at any time before final judgment. *See* 28 U.S.C. § 1447(c). Most (but not all) courts of appeals have ruled that the presence of a forum defendant in a suit removed on diversity grounds is a procedural—not jurisdictional—defect that must, on pain of waiver, be raised within 30 days of the removal notice. *See Shapiro v. Logistec*

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But what if a defendant in a ''forum defendant'' suit removes on the basis of diversity jurisdiction before any forum defendant in that case is served? The forum defendant rule only prohibits diversity-based removal if a forum defendant has been ''properly joined and served.'' Is pre-service removal thus consistent with the forum defendant rule? This question has spawned an expansive body of case law and growing disagreement among district courts across the country.

III. Conflicting Pre-Service Removal Jurisprudence

The division among district courts over the legitimacy of pre-service removal is deeper and broader than ever. District courts within certain circuits, and even district court judges within certain districts, have reached divergent views on the issue.[7] And, there is no binding appellate authority on the issue.[8]

A. Pre-Service Removal Acceptable Where No Defendant Has Been Served.

A large number of district courts have permitted pre-service removal by both forum and non-forum defendants. These courts have relied principally on the plain language of the forum defendant rule in Section 1441(b)(2). According to these courts, adhering to settled principles of statutory construction, the language of Section 1441(b)(2) clearly provides that only when a forum defendant has already been ''properly . . . served'' with process is removal on diversity grounds forbidden.[9]

Many of these courts have followed what they view as the plain meaning of ''properly joined and served'' despite claims by plaintiffs that such a construction conflicts with Congress's intention in passing Section 1441(b) or produces an absurd result. As for the former contention, these courts emphasize that the ''plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters[,]' ''[10] and find that reading Section 1441(b)(2) to permit pre-service removal is not one of those ''rare cases'' where the construction is ''demonstrably at odds'' with the intent of Congress.[11]

As for the related claim that permitting pre-service removal is absurd because it allows local defendants to engage in procedural gamesmanship to escape their home state's courts, many of these courts stress first that the ''absurd results'' exception to following the plain language is very strict.[12] Some of these courts note further that while ''Congress may not have anticipated the possibility that defendants could actively monitor state court dockets to quickly remove a case prior to being served . . . such a result is not so absurd as to warrant reliance on 'murky' or non-existent legislative history in the face of any otherwise perfectly clear and unambiguous statute.''[13] And, specifically in cases where pre-service removal is sought by a non-forum defendant, courts have found this in keeping with the pur-

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USA Inc., 412 F.3d 307, 313 (2d Cir. 2005) (holding that the forum defendant rule is ''procedural, . . . not jurisdictional''); *Korea Exch. Bank, N.Y. Branch v. Trackwise Sales Corp.*, 66 F.3d 46, 50 (3d Cir. 1995) (same); *but see Horton v. Conklin*, 431 F.3d 602, 605 (8th Cir. 2005) (holding that a ''violation of the forum defendant rule constitute[s] a jurisdictional defect'' that cannot be waived). The Supreme Court has not resolved this circuit split. *See Lincoln Property Co. v. Roche*, 546 U.S. 81, 90 n. 6 (2005).

[7] *See In re Intralinks Holdings, Inc. Deriv. Litig.*, 2013 BL 120540, at *2 (S.D.N.Y. Mar. 11, 2013) (recognizing contrary determinations in the Southern District of New York—*e.g.*, *In re Fosamax Prods. Liab. Litig.*, 2008 BL 167124, at *2 (S.D.N.Y. July 29, 2008); and *Stan Winston Creatures, Inc.*, 314 F. Supp. 2d at 180); *Swindell-Filiaggi v. CSX Corp.*, 2013 BL 34230, at *3 (E.D. Pa. Feb. 8, 2013) (recognizing contrary determinations in the Eastern District of Pennsylvania and other districts within the Third Circuit—*e.g.*, *Valido-Shade v. Wyeth, LLC*, 875 F. Supp. 2d 474, 478 (E.D. Pa. 2012), and *In re Avandia Mktg. Sales Pract. & Prods. Liab. Litig.*, 624 F. Supp. 2d 396, 410-11 (E.D. Pa. 2009)); *compare Munchel v. Wyeth LLC*, 2012 BL 231701, at *4 (D. Del. Sept. 11, 2012) (Stark, J.) (endorsing pre-service removal) *with Laugelle v. Bell Helicopter Textron, Inc.*, 2012 BL 31199, at *2-3 (D. Del. Feb. 2, 2012) (Sleet, C.J.) (rejecting pre-service removal); *see also Campbell v. Hampton Roads Bankshares, Inc.*, 2013 BL 46301, at *4 n. 12 (E.D. Va. Feb. 19, 2013) (noting that there are ''internal splits'' in the District of New Jersey and the Eastern District of Missouri).

[8] In dictum, the Sixth Circuit appears to have endorsed pre-service removal. *See McCall v. Scott*, 239 F.3d 808, 813 n. 2 (6th Cir. 2001) (''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).''). Similarly, and also in dictum, the Seventh Circuit recently indicated that pre-service removal can be used by non-forum defendants ''to guard against wrongful triggering of the forum defendant rule'' when a plaintiff joins a diverse forum defendant. *See Morris*, 718 F.3d at 670 n. 3 (citation omitted); *see also infra* n. 39 (citing district court cases adopting this view). And, as noted above, the Ninth Circuit has granted a petition for an interlocutory appeal in a case implicating the pre-service removal issue.

[9] *See, e.g.*, *Harvey v. Shelter Ins. Co.*, 2013 BL 217699, at *2 (E.D. La. Apr. 24, 2013); *Valido-Shade*, 875 F. Supp. 2d at 477-78; *Carrs v. AVCO Corp.*, 2012 BL 131954, at *3 (N.D. Tex. May 30, 2012); *Regal Stone Ltd. v. Longs Drug Stores Cal., L.L.C.*, 881 F. Supp. 2d 1123, 1128 (N.D. Cal. 2012); *Poznanovich v. AstraZeneca Pharms. LP*, 2011 BL 313591, at *4 (D.N.J. Dec. 12, 2011); *Wensil v. E.I. DuPont de Nemours & Co.*, 759 F. Supp. 447, 448 (D.S.C. 1992).

[10] *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989) (citation omitted).

[11] *Poznanovich*, 2011 BL 313591, at *5; *Robertson v. Iuliano*, 2011 BL 29698, at *3 (D. Md. Feb. 4, 2011) (allowing non-forum defendant to remove prior to service on forum defendant did not ''disrupt'' Congress's purpose in adopting the ''properly joined and served'' requirement, which was intended ''to protect non-forum defendants in diversity cases from being deprived of their right of removal by plaintiffs fraudulently joining a forum defendant whom plaintiffs had no intention of service'') (citation omitted); *Vitatoe v. Mylan Pharms., Inc.*, 2008 BL 304120, at *5-6 (N.D. W.Va. Aug. 13, 2008); *Frick v. Novartis Pharms. Corp.*, 2006 BL 26983, at *2-3 (D.N.J. Feb. 23, 2006).

[12] *Goodwin v. Reynolds*, 2012 BL 251847, at *4 (N.D. Ala. Sept. 28, 2012) (' '[T]o justify a departure from the letter of the law upon [the] ground [that absurd results be avoided], the absurdity must be so gross as to shock the general moral or common sense.' '') (quoting *Am. Bankers Ins. Grp. v. United States*, 408 F.3d 1328, 1334 (11th Cir. 2005) (quoting *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930)) (internal quotation marks omitted); *Hutchins v. Bayer Corp.*, 2009 BL 339234, at *5 (D. Del. Jan. 23, 2009) (''[I]t is rare that unambiguous statutory language will be ignored on the basis of the [absurd results] doctrine.'') (citation omitted).

[13] *North v. Precision Airmotive Corp.*, 600 F. Supp. 2d 1263, 1269-70 (M.D. Fla. 2009).

pose of diversity jurisdiction—to avoid possible prejudice to a non-forum defendant in a state court.[14]

Courts that have endorsed pre-service removal also point out that in the more than six decades since it added the ''properly joined and served'' language to Section 1441, Congress has revised Section 1441 numerous times, but never altered that key phrase. Most notable, according to these courts, is that Congress, which is presumed to be aware of existing judicial precedent when it enacts a statute,[15] overhauled the removal statutes in 2011 but made no changes to Section 1441 that could be read to eliminate pre-service removal[16]—all in the face of the proliferating use of pre-service removal over the previous decade and the numerous decisions enforcing the plain language of the statute and permitting the practice.[17]

The courts that have endorsed pre-service removal fall into several categories. Numerous courts have permitted forum defendants to remove pre-service—even if only forum defendants are named in the lawsuit.[18] A larger number of district courts have permitted non-forum defendants to remove prior to service on a forum defendant without considering whether a forum defendant could do so as well.[19]

B. Pre-Service Removal Acceptable Where a Non-Forum Defendant Has Been Served.

Another line of cases, while rejecting the plain language construction adopted by many courts that have permitted pre-service removal, have endorsed a different reading of Section 1441(b)(2) that permits pre-service removal, but only when a non-forum defendant has already been served, and no forum defendant has been served.[20] According to these decisions, the text of Section 1441(b)(2) (and its predecessor, Section 1441(b))—which refers to ''any of the parties'' (or, in the case of the former Section 1441(b), ''none of the parties'')—''assumes at least one party has been served prior to removal. . .''[21]

These courts also find support for this reading in their view that, under the U.S. Supreme Court's decision in *Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc.*,[22] service must occur before removal. There, the Supreme Court held that receipt of a complaint absent formal service does not start the 30-day time limit on removal under 28 U.S.C. § 1446(b). Some courts that require service on a non-forum defendant before pre-service removal read *Murphy Brothers* as ''implicitly assum[ing] that service of process would always occur prior to removal[,]''[23] while others find that *Murphy Brothers* is at least ''consistent'' with their narrow conception of pre-service removal.[24]

The view that removal before service on a forum defendant is only proper where at least one non-forum defendant has been served, however, has been rejected by several courts.[25] According to many of these courts, *Murphy Brothers* ''did not hold that formal service is a prerequisite for removal.''[26] Indeed, there is substantial authority outside the specific context of pre-service removal that has rejected the notion that under *Murphy Brothers*, service is a prerequisite for removal.[27]

C. Pre-Service Removal Rejected.

Many courts—though what appears to be a minority on the issue—have rejected pre-service removal. Like those that have permitted pre-service removal, the courts that have rejected it often employ similar reasoning.

While most of these courts concede that the plain language of Section 1441(b)(2) allows for pre-service removal,[28] many resist that conclusion on grounds that it

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[14] *Goodwin*, 2012 BL 251847, at *5 (no absurdity where non-forum defendant removes because plaintiff should not be allowed ''to thwart removal rights of diverse, non forum state defendants by not serving the forum state defendant'') (citation omitted); *Valido-Shade*, 875 F. Supp. 2d at 477 (not absurd to permit an unserved non-forum defendant to engage in pre-service removal because that party ''is in effect waiving service of process when it removes an action before being served,'' and waiver of service is ''encouraged'' by the Federal Rules of Civil Procedure); *Hutchins*, 2009 BL 339234, at *6 (even the ''arguably unseemly race between plaintiffs trying to serve defendants with state court complaints and defendants rushing to file notices of removal in federal court'' created by endorsing pre-service removal is not an ''absurd'' result, particularly given that, in court's view, ''Congress plainly anticipated that removal might occur prior to service'') (citing 28 U.S.C. § 1446(b), which provides that a removal notice ''shall be filed within 30 days after the receipt by the defendant, through service ***or otherwise***, of a copy of the initial pleading'').

[15] *Ryan v. Gonzales*, 133 S.Ct. 696, 703 (2013) (''We normally assume that, when Congress enacts statutes, it is aware of relevant judicial precedent.'') (citation and internal quotation marks omitted).

[16] H.R. Rep. No. 112–10, at 12 (''Proposed paragraph 1441(b)(2) restates the substance of the last sentence of current subsection 1441(b), which relates only to diversity.'').

[17] *Munchel*, 2012 BL 231701, at *4 (reasoning that the Clarification Act, ''by retaining the 'properly joined and served language,' . . . reinforces the conclusion that Congress intended for the plain language of the statute to be followed'') (citation omitted); *Regal Stone*, 881 F. Supp. 2d at 1129 (same).

[18] *See, e.g., Munchel*, 2012 BL 231701, at *34; *Terry v. J.D. Streett & Co.*, 2010 BL 221674, at *12 (E.D. Mo. Sept. 23, 2010); *Bivins v. Novartis Pharms. Corp.*, Civ. A. No. 09-1087 (D.N.J. Aug. 10, 2009); *Thomson v. Novartis Pharms. Corp.*, 2007 BL 21260, at *3-4 (D.N.J. May 22, 2007).

[19] *See, e.g., Visalus, Inc. v. Knox*, 2013 BL 185535, at *2 (M.D. Fla. July 9, 2013); *Carrs*, 2012 BL 131954, at *2-3; *Regal Stone*, 881 F. Supp. 2d at 1129; *Robertson*, 2011 BL 29698, at *3; *North*, 600 F. Supp. 2d at 1270; *Hutchins*, 2009 BL 339234, at **10-11; *Wensil*, 792 F. Supp. at 448-49.

[20] *See, e.g., FTS Int'l Servs., LLC v. Caldwell-Baker Co.*, 2013 BL 82673, at *23 (D. Kan. Mar. 27, 2013); *Gentile v. Biogen Idec, Inc.*, Civ. A. No. 11-11752-DPW (D. Mass. Feb. 21, 2013); *Howard v. Genentech, Inc.*, 2013 BL 47573, at *4 (D. Mass. Feb. 21, 2013); *Hawkins v. Cottrell, Inc.*, 785 F. Supp. 2d 1361 (N.D. Ga. 2011).

[21] *FTS Int'l Servs.*, 2013 BL 82673, at *2; *Hawkins*, 785 F. Supp. 2d at 1369.

[22] 526 U.S. 344 (1999).

[23] *See, e.g., Hawkins*, 785 F. Supp. 2d at 1370 (citing *Murphy Bros.*, 526 U.S. at 354).

[24] *See, e.g., Gentile*, Civ. A. No. 11-11752-DPW.

[25] *Goodwin*, 2012 BL 251847, at *6; *Poznanovich*, 2011 BL 313591, at *5.

[26] *See, e.g., Poznanovich*, 2011 BL 313591, at *5.

[27] *Delgado v. Shell Oil*, 231 F.3d 165, 177 (5th Cir. 2000) (''service of process is not an absolute prerequisite to removal''); *Middlebrooks v. Godwin Corp.*, 279 F.R.D. 8, 11 (D.D.C. 2011); *Mehrtens v. Am.'s Thrift Stores, Inc.*, 2011 BL 383852, at *1 n. 1 (S.D. Miss. May 26, 2011); *Abraham v. Cracker Barrel Old Country Store, Inc.*, 2011 BL 121801, at *3 (E.D. Va. May 9, 2011).

[28] *See, e.g., Campbell*, 2013 BL 46301, at *67 & n. 17; *Sullivan v. Novartis Pharms. Corp.*, 575 F. Supp. 2d 640, 643 (D.N.J. 2008) (stating that ''literal application of § 1441(b)'' would allow removal by unserved forum defendant); *Fields v.*

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produces a result that conflicts with Congress's intent or is absurd.[29] These courts reason that: (1) pre-service removal should only be used where the forum defendant has been fraudulently joined;[30] (2) the forum defendant rule was designed to prevent gamesmanship and forum shopping, and thus should not be interpreted to encourage gamesmanship and forum shopping;[31] and (3) it would be absurd to permit a forum defendant to appear and remove ''whilst simultaneously asserting that it cannot be barred from removing because it has not been properly made party to the action—through delivery of summons and a copy of the complaint. . . .''[32]

Some courts that have rejected pre-service removal have found that the statutory text has an alternative—and more reasonable—interpretation than the one endorsed by the pro-pre-service removal authorities. In *In re Intralinks Holdings. Inc. Derivative Litigation*, the court reasoned that Section 1441(b)(2) can ''be read as assuming that a defendant who moves to remove a case to federal court would have been joined and served, and that the essence of the rule related to the propriety of this service and joinder.''[33] On this reading, only ''defendants whose joinder or service would be improper'' can avoid the forum defendant rule.[34] In *Campbell*, the district court took a different tack, concluding that the term ''served'' in Section 1441(b)(2) ''mean[s] 'actual notice and involvement in the case,' which is the effect that service has on a party.''[35] Thus, on this reading, a forum defendant can never remove because, by definition, it will be on notice of, and involved in, the state court case prior to any attempt to remove it.

Since Congress's passage of the Clarification Act in 2011, several courts rejecting pre-service removal dispute the notion that the Act reflects Congress's acceptance of the tactic. According to these courts, the presumption that Congress accepts a reading of a statute that it re-enacts does not apply to the Clarification Act because there was no majority interpretation of Section 1441(b) for Congress to endorse and because the legislative history does not suggest that Congress thought about pre-service removal at all when it passed the Act.[36]

Like those courts that have permitted pre-service removal, those that have rejected the practice fall into several categories. One line of cases has specifically rejected the use of pre-service removal by forum defendants.[37] A subset of these courts, while forbidding pre-service removal by a forum defendant, seemingly would allow it if made by a non-forum defendant.[38] Other district courts have refused to allow pre-service removal no matter what type of defendant attempts it.[39]

IV. Taking Advantage of Pre-Service Removal

Given the unsettled state of the case law on pre-service removal, it is important to determine the current position of the relevant district court—and, in many instances, of district judges within a particular district—before executing a pre-service removal strategy. In some districts such as the District of New Jersey, numerous judges have weighed in on pre-service removal and reached varying conclusions. Having a sense of the likelihood of drawing a favorable or unfavorable judge

Organon USA Inc., 2007 BL 170299, at *4 (D.N.J. Dec. 12, 2007) (''This Court acknowledges that the plain language of § 1441(b) does appear to imply that a forum defendant may remove an action as long as it does so before being served.''); *Holmstrom v. Harad*, 2005 BL 26360, at *2 (N.D. Ill. Aug. 11, 2005) (''[W]e recognize the tension between this result and the literal language of § 1441(b).'')

[29] *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) (''It is true that interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.'').

[30] *See, e.g.*, *Ethington v. General Elec. Co.*, 575 F. Supp. 2d 855, 861–63 (N.D. Ohio 2008); *Vivas v. Boeing Co.*, 486 F. Supp. 2d 726, 734 (N.D. Ill. 2007).

[31] *See, e.g., Swindell-Filiaggi*, 2013 BL 34230, at *5 (''[I]t is especially absurd to interpret the 'joined and served' rule as allowing naked gamesmanship by defendants since Congress intended for the rule to prevent gamesmanship.'') (quoting *Allen v. GlaxoSmithKline PLC*, 2008 BL 126241, at *4 (E.D. Pa. May 30, 2008)); *In re Darvocet, Darvon & Propoxyphene Prods. Liab. Litig.*, MDL Dkt. No. 2226, Civ. A. No. 2: 12-97-DCR (E.D. Ky. July 27, 2012) (same); *Ethington*, 575 F. Supp. 2d at 862 (same); *Sullivan*, 575 F. Supp. 2d at 646 (''As a matter of common sense, the court is confident, beyond any doubt, that Congress did not add the 'properly joined and served' language in order to reward defendants for conducting and winning a race, which serves no conceivable public policy goal, to file a notice of removal before the plaintiffs can serve process.'').

[32] *See, e.g., Campbell*, 2013 BL 46301, at *6.

[33] *In re Intralinks Holdings, Inc. Deriv. Litig.*, 2013 BL 120540, at *3.

[34] *Id.*

[35] *Campbell*, 2013 BL 46301, at *6.

[36] *Id.* at *4 n. 15 (rejecting argument that Clarification Act supports pre-service removal because ''[i]t is not so clear that there is a majority in favor of the literal meaning'' of Section 1441(b)(2) and ''[e]ven if there was such a clear majority, this Court declines to make such an inference from Congressional inaction''); *Perez v. Forest Labs., Inc.*, 902 F. Supp. 2d 1238, 1245 n. 8 (E.D. Mo. 2012) (giving no weight to argument that the Clarification Act reinforces the propriety of pre-service removal because, ''[w]hile it is possible Congress is aware of the split in jurisdictions, it is not entirely clear what the majority interpretation is in light of the recent advent of electronic docketing[, and t]he emerging trend . . . seems to be in favor of disallowing pre-service removal'').

[37] *See, e.g., Campbell*, 2013 BL 46301, at *6 & n. 17; *In re Darvocet, Darvon & Propoxyphene Prods. Liab. Litig.*, MDL Dkt. No. 2226, Civ. A. No. 2: 12-97-DCR; *Allen*, 2008 BL 126241, at *5.

[38] *See Campbell*, 2013 BL 46301, at *6 & n. 17 (indicating that although the issue was not before it because all defendants were forum defendants, the ''reading of the statute'' court adopted ''presumably will also allow a non-forum defendant to remove a case, even though there are forum defendants, so long as the forum defendants have not become served or otherwise involved in the case''); *Allen*, 2008 BL 126241, at *5 (same).

[39] *Torchlight Loan Servs., LLC v. Column Fin., Inc.*, No. 12 Civ. 8579(RWS) (S.D.N.Y. July 24, 2013) (forum defendant rule bars pre-service removal by any defendant unless a defendant was improperly joined or served); *In re Intralinks Holdings, Inc. Deriv. Litig.*, 2013 BL 120540, at *3 (same); *Perez*, 902 F. Supp. 2d at 1245 (pre-service removal improper no matter what type of defendant removes); *Perfect Output of Kansas City, LLC v. Ricoh Americas Corp.*, 2012 BL 179135, at *2 (W.D. Mo. July 17, 2012) (same); *Traslavina v. MDS Pharma Servs. Inc.*, 2011 BL 141127, at *1 (D. Ariz. May 27, 2011) (rejecting attempt to remove by non-forum defendant where ''plaintiffs did not have a meaningful opportunity to effectuate service before defendants filed their notice of removal'' and the forum defendant ''was not joined solely for the purpose of defeating removal'').

on the issue of pre-service removal will aid the decision-making process.

It should be noted, however, that unless and until a federal court of appeals issues a decision on pre-service removal, adverse district court case law on the issue should not necessarily dissuade one from attempting pre-service removal. For one thing, district court decisions are not binding precedent.[40] Additionally, even in districts where multiple judges have rejected pre-service removal, there still may be a reasonably good chance that the removed action will not be assigned to one of those judges. And, given the fluid and rapidly changing landscape of pre-service removal case law, it is not out of the question that judges who previously rejected pre-service removal might change their mind in a future case—particularly if the facts in the case at hand differ from those the judge faced previously (*e.g.*, removal sought by non-forum defendant as opposed to forum defendant, plaintiff failed to serve complaint on forum defendant for many months after filing the complaint).

Timing, of course is crucial. The putative removing defendant should ensure that removal is executed soon after the complaint is filed and before any one forum defendant has been properly joined and served.[41] The advent of electronic filing and docket monitoring have been a boon for pre-service removal. Beneficial, too, is that many states have procedures that ensure a delay between the time a complaint is filed and when it can be served, giving defendants time to learn about lawsuits and implement the pre-service removal process.[42] By monitoring dockets and internet publications, today's companies that frequently encounter litigation (or any defendant who anticipates litigation) can be prepared to remove an action before service.

These mechanisms, though highly advantageous to those desiring to remove prior to service, are not essential. For example, in 2012, Pfizer successfully removed a Philadelphia state court case before service after it read the plaintiffs' press release announcing the filing of the lawsuit.[43] The best technology also will not be available in all instances, as many state courts do not yet have electronic filing systems in place.[44]

In order to ensure timely pre-service removal, an expectant defendant should consider outlining a protocol that covers the following tasks:

1. Identify the state court in which the anticipated suit is likely to be filed.
2. Determine the methods available for monitoring that state court's docket.
3. Assign responsibility for monitoring the state court's docket.
4. Prepare draft removal papers that can quickly be revised to incorporate the particulars of the state court complaint.
5. Establish a process for expeditiously communicating the filing of the anticipated state court suit to the team, revising and reviewing the draft removal papers, and filing the necessary removal papers.

Following these steps will enhance the likelihood of success of a pre-service removal strategy.

V. Conclusion

Given the shifting sands of pre-service removal case law, early planning, vigilant monitoring, and education about the current state of the law in the relevant jurisdiction are essential ingredients in a successful pre-service removal strategy. Without any controlling appellate decisions on the issue, defendants have wide latitude to pursue pre-service removal—even in districts where judges have rejected it. And, there are reasonably strong interpretive arguments, based on the text of Section 1441(b)(2), that support pre-service removal. Accordingly, defense counsel would be well-advised to advise their clients of the tactic and pursue it if federal court is a desired forum.

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[40] *See Garcia v. Tyson Foods, Inc.*, 534 F.3d 1320, 1329 (10th Cir. 2008) (" '[D]istrict court decisions cannot be treated as authoritative on issues of law. The reasoning of district judges is of course entitled to respect, but the decision of a district judge cannot be a controlling precedent.' ") (quoting *Bank of Am., N.A. v. Moglia*, 330 F.3d 942, 949 (7th Cir. 2003)).

[41] As noted above, some judges still may only permit pre-service removal if at least one non-forum defendant has already been served. *See, e.g., FTS Int's Servs.*, 2013 WL 1305330, at *23.

[42] *See, e.g., Gentile*, Civ. A. No. 11-11752-DPW (noting that "[i]t is, as a practical matter, essentially impossible for the filing of a case and service of process to occur simultaneously because of the realities of case management and service in the state courts" and specifically observing that "perfect[ing] service in Massachusetts" will "inevitabl[y]" result in "some delay between the filing and service" of the complaint); *Ethington*, 575 F. Supp. 2d at 857 (pointing out that New Jersey's rules of civil procedure "mandate[] a delay between filing and service" because they "require[] that a plaintiff obtain a 'Track Assignment Notice' number from the clerk's office before serving process on a defendant[,]" and that can take up to 10 days from the date of the request) (citing N.J. R. Civ. P. 4:5A–2).

[43] *Boyer v. Wyeth Pharms., Inc.*, No. 12-739 (E.D. Pa.) (Defendant Pfizer, Inc.'s Opposition To Plaintiff's Motion To Remand, Doc. No. 11, at 2 and Ex. A (Press Release)).

[44] California, for example, currently does not have a statewide, searchable e-filing system. Not all of North Carolina's counties have converted to e-filing systems. And some larger states, like Florida (102 So.3d 451 (Fla. 2012) (Admin. Order)) and Texas (Misc. Dkt. No. 12-9206) (Tex. 2012) (Admin. Order)), only recently began to implement mandatory, centralized electronic filing systems.

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