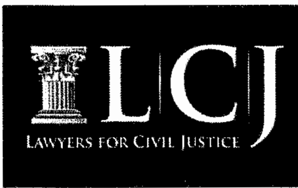

19-CV-BB

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October 15, 2019

Rebecca A. Womeldorf, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

Re: Suggestion 19-CV-W, Constructive Waiver of Service

Dear Ms. Womeldorf:

On behalf of Lawyers for Civil Justice (LCJ), I write in response to the submission of the American Association for Justice ("AAJ") suggesting an amendment to Federal Rule of Civil Procedure ("FRCP") 4 to curtail "snap removals" by deeming constructive waiver of service (the "Suggestion").

If adopted, the Suggestion would be inconsistent with the plain language of the removal statute, 28 U.S.C. § 1441(b)(2), and overturn the recent uniform holdings of two U.S. Courts of Appeals.[1] Under the removal statute and those appellate decisions, where a state court complaint meets the requirements for federal diversity jurisdiction, the presence of an in-state (in-forum) defendant only precludes removal where that defendant is "properly joined and served."[2] That is "neither absurd nor fundamentally unfair" and is "authorized by the text of Section 1441(b)(2)."[3]

In particular, the Suggestion would add a new subsection to FRCP 4(d):

(6) Constructive Waiver. When any defendant has actual notice that a lawsuit has been filed against it, all defendants to the lawsuit will be deemed to have waived service of the summons, provided that formal service takes place within thirty (30) days of any action taken by any defendant so that all defendants have formal notice of the lawsuit and it shall be deemed that such service will relate back to the date of actual notice to any defendant.

The Committee should reject this proposal for the following independent reasons:

[1] *Gibbons v. Bristol-Myers Squibb Co.*, 919 F.3d 699 (2d Cir. 2019); *Encompass Insur. Co. v. Stone Mansion Restaurant Inc.*, 902 F. 3d 147 (3d Cir. 2018).
[2] 28 U.S.C. § 1441(b)(2).
[3] *Gibbons*, 919 F.3d at 707.

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1. Using the FRCP amendment process to remedy what litigants may view as unfavorable appellate (and other) court precedent construing an Act of Congress, is improper. It is an end-run around the legislative branch and "if such change is required, it is Congress — not the Judiciary — that must act."[4]

2. The Suggestion runs afoul of the Rules Enabling Act under which the rules "shall not abridge, enlarge or modify any substantive right,"[5] and of Rule 82, which states that "[t]hese rules do not extend or limit the jurisdiction of the district courts."[6] The proposed amendment would abridge defendants' removal rights under the removal statute.

3. The Suggestion's creation of retroactive service—in state-court actions, no less—is fundamentally unfair to defendants and the due process considerations underlying the need for actual service.

4. The premise of the Suggestion—that the FRCP should be amended to enforce "the Plaintiff's choice to file in state court"[7]—is a red herring because the plaintiff has the benefit of the same substantive law whether the case proceeds in state or federal court. In addition, the cases in which "snap removals" occur often involve gamesmanship by plaintiffs in the form of adding local defendants who are not material to the case for the purpose of frustrating removal to federal court.

5. Waiver is the voluntary relinquishment of a known right. The concept of "deeming" waiver, triggered by the act of a plaintiff in ultimately serving a complaint, cannot result in a retroactive waiver by defendants.

6. Even if contrary to due process and other considerations the notion of retroactive waiver of service were palpable, it is nonsensical that one defendant could be deemed to have retroactively constructively waived service based on "actual notice" to a co-defendant. Moreover, such a retroactive waiver could have unintended consequences for named individuals and entities.[8]

In addition, the proposal suggests that there is a "divide over whether this [removal] practice should be accepted."[9] While historically there has been a difference of opinion among district courts, there is no current divide among the Courts of Appeals. The "only" Courts of Appeals to rule on the issue have uniformly applied the plain language of 28 U.S.C. § 1441(b)(2) and upheld

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[4] *Encompass*, 902 F.2d at 154.

[5] 28 U.S.C. § 2072(b).

[6] Fed. R. Civ. P. 82.

[7] Letter from Bruce Stern, President, American Association for Justice, to Rebecca A. Womeldorf, Secretary, Committee on Rules of Practice and Procedure (Aug. 30, 2019) (hereinafter, "AAJ Ltr."), at 3.

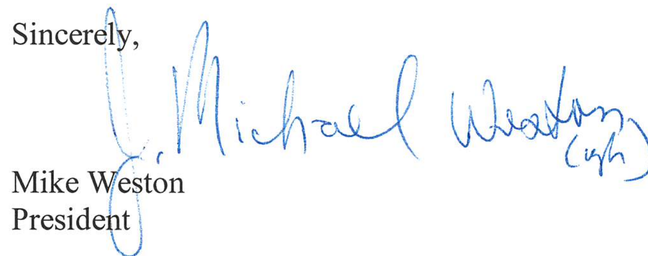
[8] For example, if one of the defendants, without knowledge of the lawsuit, enters into a transactional agreement representing that there are no lawsuits against it, that defendant could find itself subject to a misrepresentation claim. If another defendant's actual notice of the lawsuit is deemed to retroactively waive service, and place all defendants retroactively on notice, of the lawsuit, the defendant might be found to have misrepresented its knowledge of a pending lawsuit.

[9] AAJ Ltr. at 5.

removals where the in-state defendant had not been served.[10] To the extent that some district courts have questioned such removals, the pronouncements of the Courts of Appeals (and other district courts) have made clear that the result of applying what Congress said is neither "absurd [n]or bizarre."[11]

Accordingly, LCJ respectfully urges the Committee to leave any change to the removal statute to Congress and reject the Suggestion to amend the Rules of Civil Procedure to deem waiver of service. Thank you for your consideration.

Sincerely,



Mike Weston
President

[10] In addition to the Second and Third Circuits, the Sixth Circuit previously recognized the same principle in dicta. *McCall v. Scott*, 239 F.3d 808, 813 n.2 (6th Cir. 2001), *amended on denial of reh'g*, 250 F.3d 997 (6th Cir. 2001) ("[w]here 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)") (emphasis in the original).

[11] *Encompass*, 902 F.2d at 154.