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## Third Circuit Resolves Tension Between Snap Removals and the Forum Defendant Rule

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Whether to file or maintain a litigation in state or federal court can be an important decision for litigants. In personal injury cases, some plaintiffs' counsel prefer to file their cases in state court, while many corporate defendants prefer to remove cases from state to federal court. Whether a case can be removed to federal court requires application of the federal removal statute, 28 U.S.C. §1441. Unless the case presents an issue of federal law, a case may only be removed to federal court if complete diversity exists and the amount in controversy exceeds \$75,000.

In cases where diversity jurisdiction is the only basis for removal, defendants seeking to remove the case must also be cognizant of the "forum defendant rule," 28 U.S.C. §1441(b)(2). Under the forum defendant rule, a diversity jurisdiction-only case may not be removed to federal court if any of the defendants "properly joined and served" is a citizen of the state in which the action was brought. The reasoning behind the forum defendant rule is that "forum defendants" do not need the protections of federal court since they are already in their home jurisdiction.

While the forum defendant rule may seem straightforward at first glance, the statutory limitation that it only applies to defendants "properly joined and served" has been a source of motion practice in recent years. Due to the recent advances in electronic court filing and docketing, and the availability of services that track and report on court filings, a company is often able to learn when it has been named as a defendant within a day or two after the lawsuit is filed, and well before it is formally served with a summons and complaint. These advances have led some defendants to employ "snap removals," i.e., the removal of a case to federal court before the defendants are formally served, even in cases involving forum defendants.

Defendants have taken the position that the forum defendant rule does not preclude snap removals, provided that removal is effectuated before any forum defendant is formally served in the case. Defendants have relied on the



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**Beth S. Rose**



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**Vincent R. Lodato**

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*Beth S. Rose is the Chair of the Product Liability Practice Group at Sills Cummis & Gross. Vincent Lodato is Of Counsel with the firm. They both defend complex product liability matters.*

*The views and opinions expressed in this article are those of the authors and do not necessarily reflect those of the firm or its clients.*

“properly joined and served” language of 28 U.S.C. §1441(b) (2) to support their position. Plaintiffs seeking to remand cases back to state court have frequently argued that snap removals are not consistent with the spirit and reasoning behind the forum defendant rule, and should be precluded as they lead to absurd results. Plaintiffs have also argued that it is arbitrary to only apply the forum defendant rule to forum defendants that have been formally served. Until recently, snap removals have only been addressed by federal district courts, resulting in varying decisions on the validity of the practice.

In August 2018, the Third Circuit became the first federal circuit court to address the validity of snap removals in *Encompass Ins. Co. v. Stone Mansion Rest.*, 902 F.3d 147 (3d Cir. 2018). *Encompass* involved a drunk driving accident. The insurance company settled the driver’s and passenger’s claims and brought a dram shop liability action against Stone Mansion, a restaurant located in Pennsylvania. *Encompass* filed the action in Pennsylvania state court and Stone Mansion removed the case to the Western District of Pennsylvania before *Encompass* had a chance to formally serve Stone Mansion. *Encompass* moved to remand the case, arguing that the forum defendant rule precluded removal, but the District Court denied the motion. The District Court ultimately dismissed the action on other grounds, and *Encompass* appealed both the dismissal and remand decisions to the Third Circuit.

The Third Circuit analyzed the language and intent of 28 U.S.C. §1441(b)(2) to determine the validity of snap removals. The court explained that where the text of a statute is unambiguous, it should be interpreted and enforced as written, unless doing so would lead to absurd or bizarre results. *Encompass*, 902 F.3d at 152. The court further explained that “[a]n absurd interpretation is one that ‘defies rationality or renders the statute nonsensical and superfluous.’” *Id.*, quoting *United States v. Moreno*, 727 F.3d 255, 259 (3d Cir. 2003).

Applying this standard, the Third Circuit held that the language of 28 U.S.C. §1441(b)(2) was unambiguous, in that it only applied when a forum defendant had been “properly joined and served.” The court next addressed plaintiff’s argument

that literal interpretation of the forum defendant rule to permit snap removals leads to absurd or bizarre results. Although the legislative intent behind the “properly joined and served” language was lacking, the court looked to lower court decisions and commentators, which concluded that this language was included to prevent plaintiffs from preventing removals by fraudulently naming forum defendants against which they had no intention of proceeding. *Encompass*, 902 F.3d at 153.

Because the “properly joined and served” language addresses a specific problem, the fraudulent joinder of forum defendants, the court held that snap removals were consistent with the language and purpose of the forum defendant rule, and did not defy rationality or render the statute nonsensical or superfluous. *Id.* The court held that while the “properly joined and served” language might lead to “peculiar results,” because it could allow for removals which may not otherwise be permissible had the forum defendant been served earlier, the court held that “the outcome is not so outlandish as to constitute an absurd or bizarre result.” *Id.* To the extent there were any procedural anomalies in the way the forum defendant rule was applied in practice, the court held that this was an issue for Congress to address. *Id.*

Since *Encompass* was decided, District Courts in the Third Circuit, and some in other circuits, have followed suit, ruling that snap removals are not precluded by the forum defendant rule. See, e.g., *Ferro v. Mendoza*, Civ. Act. No. 18-3807, 2019 U.S. Dist. LEXIS 11883 (E.D. Pa. Jan. 24, 2019) (following *Encompass* as precedent); *Tex. Brine Co. v. Am. Arbitration Ass’n*, Civ. Act. No. 18-6610, 2018 U.S. Dist. LEXIS 175122 (E.D. La. Oct. 11, 2018) (following *Encompass*); *Monfort v. Adomani*, Civ. Act. No. 18-5211, 2019 U.S. Dist. LEXIS 4230 (N.D. Cal. Jan. 8, 2019) (agreeing with *Encompass*). But see *Timbercreek Asset Mgmt. v. De Guardiola*, Civ. Act. No. 19-80062, 2019 U.S. Dist. LEXIS 30769 (S.D. Fla. Feb. 27, 2019) (disagreeing with *Encompass*); *Delaughder v. Colonial Pipeline Co.*, Civ. Act. No. 18-4414, 2018 U.S. Dist. LEXIS 215314 (N.D. Ga. Dec. 21, 2018) (same).

Most recently, the Second Circuit also sided with the Third Circuit on the validity of snap removals in *Gibbons v. Bristol-Myers Squibb Co.*, No. 17-2638, 2019 U.S. App. LEXIS 9010 (2d Cir. Mar. 26, 2019). *Gibbons* involves a product liability MDL regarding the drug Eliquis. Plaintiffs in 45 cases filed their complaints in Delaware state court, which BMS, a Delaware corporation, removed to federal court prior to service. The cases were transferred to the MDL in the Southern District of New York, which denied plaintiffs' motion to remand and dismissed plaintiffs' cases on substantive grounds. Plaintiffs appealed both decisions to the Second Circuit. Although several lower court decisions within the Second Circuit had ruled that snap removals were improper, the Second Circuit relied on the Third Circuit's decision in *Encompass* to hold that the plain language of 28 U.S.C. §1441(b)(2) permitted snap removals, and that the practice did not produce absurd results or contravene Congress's intent in trying to prevent plaintiffs from fraudulently joining forum defendants to prevent removals. *Id.* at \*13-14. The court went on to explain that a bright-line rule that allowed a forum defendant to remove prior to service produced a more consistent result than relying on a fact-specific inquiry into plaintiff's intent behind serving a forum defendant.

Given the courts' clear and unequivocal decisions in *Encompass* and *Gibbons*, challenges to the practice of snap removals are likely to dwindle within the Second and Third Circuits. There is some possibility that plaintiffs outside the Second and Third Circuits may obtain a favorable ruling at the circuit level precluding snap removals, which would create a split amongst the circuits and potentially require the Supreme Court to address the issue. Even more remote is the possibility that Congress looks at the issue and decides to amend 28 U.S.C. §1441(b)(2) to eliminate snap removals. For the time being, corporate defendants that reside in New Jersey may avail themselves of snap removals to remove state court matters to federal court.