

## BUSINESS LITIGATION

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*In the year since the Third Circuit issued its decision in Encompass Ins. Co. v. Stone Mansion Rest. Inc., federal appellate and district courts across the country have been weighing in on the propriety of “snap” removals. This article examines the recent approvals and disapprovals of the procedure.*

## The Growing Consensus on the Propriety of “Snap” Removals – Looking at the Effect of Encompass Ins. Co. v. Stone Mansion Rest. Inc. After One Year

### ABOUT THE AUTHOR



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The United States Court of Appeals for the Third Circuit issued its opinion in *Encompass Ins. Co. v. Stone Mansion Rest. Inc.*, 902 F.3d 147, on August 22, 2018. The *Encompass* opinion was the first time an appellate court expressly approved of the use of “snap” removals—i.e., the pre-service removal under 28 U.S.C. § 1332 where complete diversity exists but one defendant is a resident of the forum state. Though the practice of “snap” removals long pre-dates *Encompass*, the Third Circuit’s opinion removed all doubt of its legitimacy within that circuit and bolstered the propriety of “snap” removals across the country. Now, a year after the *Encompass* decision, the Second Circuit along with numerous United States district courts from various circuits have concurred in the legitimacy of “snap” removals. Despite the general consensus that “snap” removals are allowed, some district courts—particularly those in the Eleventh Circuit—have elected not to follow *Encompass*’s lead.

### **The Forum Defendant Rule and “Snap” Removals**

“Snap” removals allow defendants to avoid the restrictions of the forum defendant rule. As we all know, federal district courts have original jurisdiction of all civil actions where the amount in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and the action is between citizens of different states. 28 U.S.C. § 1332 (2011). Section 1332—the jurisdictional statute—does not place any limitations on the district courts’ jurisdiction based on the citizenship of the defendants. “Snap” removals do

nothing to alter or expand the district courts’ subject matter jurisdiction; rather, they negate one procedural blockade to removal—the forum defendant rule.

The general rule is that “any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed ... to the district court ...” 28 U.S.C. § 1441(a). Section 1441(b)(2)—the forum defendant rule—provides a limited exception to the general rule:

A civil action otherwise removable solely on the basis of [diversity jurisdiction] 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.

28 U.S.C. § 1441(b)(2) (2011) (emphasis added).

“Snap” removals exist in the narrow set of cases where (1) there is complete diversity of citizenship, (2) one or more defendants are citizens of the forum state, but (3) none of the forum defendants have been “properly ... served” at the time of removal.

### ***Encompass* Revisited**

In August 2018, the Third Circuit became the first appellate court to expressly approve the use of “snap” removals. In *Encompass*, the Third Circuit affirmed the denial of the plaintiff’s motion to remand, finding the “properly joined and served” language of

§ 1441(b)(2) allowed the sole in-forum defendant to remove the action prior to service. There, the plaintiff was a citizen of Illinois; the defendant was a citizen of Pennsylvania. The plaintiff filed suit in the Pennsylvania state court.

Before filing the action, the defendant's counsel informed plaintiff's counsel he was authorized to accept service of process on behalf of the defendant. After receiving the filed complaint and a service acceptance form, counsel for the defendant removed the case and then accepted service. The district court denied the plaintiff's motion to remand, holding that the removal was proper under the express language of the forum defendant rule because the in-state defendant was not "joined and served" prior to removal.

In affirming the denial of the motion to remand, the Third Circuit analyzed whether § 1441(b)(2) was ambiguous and whether its literal interpretation leads to an absurd result. *Id.* First, the court found § 1441(b)(2) was unambiguous and its plain meaning "preclude[d] removal on the basis of in-state citizenship only when the defendant ha[d] been properly joined and served." *Encompass*, 902 F.3d at 152. Next, the court concluded that the literal interpretation of § 1441(b)(2) does not lead to an absurd result. Specifically, the court noted the legislative history provided no guidance regarding the purpose of the "properly joined and served" language, but courts and commentators had determined that Congress enacted the rule to prevent fraudulent joinder. The court opined that

allowing removal by an in-forum defendant prior to service does not contravene this purpose. Thus, the result did not "rise to the level of the absurd or bizarre." *Id.* at 153-54.

In sum, the Third Circuit found its interpretation (1) "abid[ed] by the plain meaning of the text;" (2) "envisio[n]ed a broader right of removal only in the narrow circumstances where a defendant is aware of an action prior to service of process with sufficient time to initiate removal;" and (3) "protect[ed] the statute's goal without rendering any of the language unnecessary." *Id.* at 153.

### **The Holding of *Encompass* Has Expanded to the Second Circuit**

In March 2019, the Second Circuit expressly adopted the *Encompass* decision and cleared the way for "snap" removals in its jurisdiction. *See Gibbons v. Bristol-Myers Squibb Company*, 919 F.3d 699 (2d Cir. 2019). *Gibbons* arises from a multi-district litigation case that was pending in the United States District Court for the Southern District of New York. The plaintiffs were a group of individuals asserting product liability claims against the manufacturers of a certain medication. The two defendants were incorporated under Delaware law with their principal places of business in New York. The plaintiffs filed suit in Delaware state court. Prior to service, the defendants removed the cases to the United States District Court for the District of Delaware, which then transferred the cases to the MDL court in the Southern District of New York. The plaintiffs moved to have their cases remanded to

state court, arguing removal was prohibited by the forum defendant rule.

At the outset of the discussion, the Second Circuit noted that there was a split among the district courts within the Second Circuit on the propriety of “snap” removals. *Gibbons* then goes on to engage in a textualist review of the removal statute, expressly citing to and quoting from *Encompass*. The Second Circuit noted that the plaintiffs did “not even attempt to argue that the text of Section 1441(b)(2) supports their position.” *Gibbons*, 919 F.3d at 705. Instead, the *Gibbons* plaintiffs argued the “absurd results” doctrine should trump the plain meaning of the statutory text.

The first rule in statutory construction is to decide whether the “language at issue has a plain and unambiguous meaning with regard to that particular dispute.” *Shotz v. City of Plantation*, 344 F.3d 1161, 1167 (11th Cir. 2003) (quoting *United States v. Fisher*, 289 F.3d 1329, 1337-38 (11th Cir. 2002), cert. denied, 537 U.S. 1112 (2003)); see also *Encompass Ins. Co.*, 902 F.3d at 152 (“When interpreting a statute, we must begin with the statutory text. ... It is well-established that, ‘[w]here the text of a statute is unambiguous, the statute should be enforced as written and only the most extraordinary showing of contrary intentions in the legislative history will justify a departure from that language.’”) (internal citations and quotation marks omitted)). Courts are permitted to look beyond the plain meaning of a statute to extrinsic materials only if: (1) the statute’s language is ambiguous; (2) applying the statute’s plain

meaning would lead to an absurd result; or (3) there is clear evidence of contrary legislative intent. See *Consolidated Bank, N.A. v. Office of Comptroller of Currency*, 118 F.3d 1461, 1463-64 (11th Cir. 1997).

The *Gibbons* plaintiffs argued that allowing a forum defendant to remove a case from state court to federal court worked an absurd result. Specifically, the plaintiffs argued that the purpose of the removal statute was to allow out-of-state defendants from possible prejudices found in state courts, that the concern for such prejudices do not exist in the defendants’ home state, and that Congress added the words “properly joined and served” to the forum defendant rule to avoid gamesmanship on the part of plaintiffs who may name an improper forum defendant for the purposes of thwarting removal. The Second Circuit agreed that the purpose of the removal statute was to avoid the possible prejudice to out-of-state defendants but rejected the argument that removal by an unserved forum defendant works an absurd result. The *Gibbons* court held the forum defendant rule was designed to combat fraudulent joinder and that Congress may have used the “properly joined and served” language as a means to create a bright-line rule for the application of the forum defendant rule. Accordingly, the Second Circuit held “[a]bsurdity, then, cannot justify a departure from the plain text of the statute.” *Gibbons*, 919 F.3d at 706.

**District Courts in Other Circuits Are Also Following *Encompass* But Some Have Resisted**

Since the Third Circuit's August 2018 ruling, numerous district courts within the Third Circuit have followed the *Encompass* holding. Additionally, district courts from the Fourth, Fifth, and Ninth Circuits have adopted *Encompass* and approved the use of "snap" removals. See *Blankenship v. Napolitano*, Civ. A. 2:19-cv-00236, 2019 WL 3226909 (S.D.W.Va. July 17, 2019); *Loewen v. McDonnell*, Case No. 19-cv-00467-YGR, 2019 WL 2364413 (N.D. Cal. June 5, 2019); *Zirkin v. Shandy Media, Inc.*, Case No. 2:18-cv-09207-ODW (SSx), 2019 WL 626138 (C.D. Cal. Feb. 14, 2019); *Texas Brine Company, LLC v. American Arbitration Association, Inc.*, Civ. A. No. 18-6610, 2018 WL 4927640 (E.D. La. Oct. 11, 2018).

The adherence to *Encompass* has not been unanimous, however. At least two district courts from within the Eleventh Circuit have expressly rejected the use of "snap" removals. See *Timbercreek Asset Management, Inc. v. De Guardiola*, Case No. 9:19-cv-80062, 2019 WL 947279 (S.D. Fla. Feb. 27, 2019); *Delaughder v. Colonial Pipeline Company*, 360 F. Supp. 3d 1372 (N.D. Ga. Dec. 21, 2018).

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