

DRUG, DEVICE AND BIOTECHNOLOGY

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Jason C. Rose and Sarah L. Scott highlight a Third Circuit case that delivers a bright line rule for successfully snap removing actions from state court.

The Third Circuit is Snap Happy

ABOUT THE AUTHORS



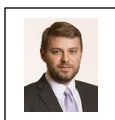
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The Drug, Device and Biotechnology Committee serves as an educational and networking resource for in-house counsel employed by pharmaceutical, medical device and biotech manufacturers and the outside counsel who serve those companies. The Committee is active in sponsoring major CLE programs at the Annual and Midyear Meetings as well as internal committee programs. The Committee also publishes a monthly newsletter that addresses recent developments and normally contributes two or more articles to the *Defense Counsel Journal* annually. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:



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It seems rare these days to find reliable, bright-line rules to live by, particularly in the courts in which we all practice. But rejoice, because the Third Circuit has given us a friendly bright-line rule in its recent decision upholding the propriety of “snap removals” in Encompass Ins. Co. v. Stone Mansion Rest. Inc., 902 F.3d 147, 151-54 (3d Cir. 2018). In one for the good guys, the Third Circuit found snap removals to be proper under their plain language reading of the forum defendant rule.

To give some quick background, actions filed in state court may be removed to federal court under 28 U.S.C. § 1332 when the action is between citizens of different states with a sufficient amount in controversy—what we all know as diversity citizenship—except when one of the defendants is both a citizen of the state where the action was filed and has been properly served. This is the so-called “forum defendant rule” under 28 U.S.C. § 1441(b)(2). Defendants who want to circumvent the forum defendant rule, however, can “snap remove” an action by removing before any forum defendant is properly served. This type of removal relies on the plain language of the forum defendant rule and the notion that a plaintiff filing a complaint against a forum defendant is not enough to defeat removal; rather, the plaintiff must also properly serve that defendant to ensure that the complaint cannot be removed.

Snap removals are messy and controversial in most circuits, subjecting any case that is “snap” removed to potential peril and a risk of remand. Compare, e.g. Little v. Wyndham Worldwide Op., Inc., 251 F. Supp. 3d 1215, at 1219-1223 (M.D. Tenn. 2017) (finding snap removal improper where the non-forum defendant removed prior to service on the forum defendant, and noting that “there is a dearth of appellate authority construing the ‘properly joined and served’ language of § 1441(b)(2)”); and Smethers v. Bell Helicopter Textron Inc., 2017 WL 1277512, at *2-3 (S.D. Tex. Apr. 3, 2017) (finding snap removal improper on a three-part factual test, where the forum defendant removed prior to being properly served, and noting that “no federal appellate court has expressly ruled on snap removal”), with D.C. by and through Cheatham v. Abbott Lab. Inc., 323 F. Supp. 3d 991, 996-97 (N.D. Ill. 2018) (finding snap removal proper where a forum defendant removed prior to being served), and Howard v. Crossland Construction Co., Inc., 2018 WL 2463099, at *2-3 (N.D. Okla. June 1, 2018) (finding snap removal proper where the non-forum defendant removed prior to the forum defendant being served). Thankfully, the Third Circuit in Encompass is now the first United States Court of Appeals to give us the bright-line rule that snap removals are proper as a matter of law.¹

¹ Hopefully others like the Sixth Circuit, which has mentioned in *dicta* that “the inclusion of an *unserved* resident defendant in the action does not

defeat removal under 28 U.S.C. § 1441(b),” will follow suit. McCall v. Scott, 239 F.3d 808, 812 n.2 (6th Cir. 2001) (emphasis in original).

The Third Circuit correctly, in our view, emphasized that an unambiguously written statute must be enforced as written, except in “the most extraordinary showing of contrary intentions in the legislative history.” Encompass Ins. Co., 902 F.3d at 152. And the unusual circumstances of this case are particularly appropriate to illustrate the Third Circuit’s point: that straightforward statutes should be read straightforwardly, no matter what the court may think about a given party’s “gamesmanship” or intent in using to its advantage the plain reading of a plain statute.

Encompass arose in Pennsylvania state court and involved a non-forum plaintiff against a forum defendant. Counsel for the Pennsylvania defendant first agreed to accept electronic service. However, when the plaintiff’s counsel emailed the filed complaint and a form to acknowledge the acceptance of service, the Pennsylvania defendant’s counsel did not return the form. Three days later, defense counsel sent an email, stating that they would not accept service until after the notice of removal was filed because to do otherwise could have affected their client’s ability to remove the case. The forum defendant then filed the notice of removal to the Western District of Pennsylvania and subsequently accepted service.

The plaintiff argued that the removal amounted to gamesmanship because defendant’s counsel delayed accepting service to gain an advantage. The Third

Circuit disagreed, finding that, though the “result may be peculiar in that it allows [the defendant] to use pre-service machinations to remove a case that it otherwise could not,” it “is not so outlandish as to constitute an absurd or bizarre result.” Id. at 153-54. The Third Circuit also denied that the defendant could be precluded from claiming defective service of process because of the prior agreement to receive electronic service. Id. at 154. Rather, the Pennsylvania defendant’s statements “did not include language regarding its position on jurisdiction and removal,” and, therefore, even if the defendant’s conduct was “unsavory,” removal was still proper. Id. Unsavoriness aside, to the extent plaintiffs want to complain about any impropriety or unfair advantage afforded to defendants, the Third Circuit referred them to the legislature. Id. at 153 n.4.

Part of the beauty of the Third Circuit’s decision is its simplicity. Other District Court decisions on snap removal, even the favorable ones, have depended on a fact-intensive inquiry into issues like, whether the forum defendant had waited a sufficient amount of time to be served after the complaint was filed before attempting to snap remove the complaint, or whether any perceived “gamesmanship” had occurred. Others attempted to delve into the mind and intent of the removing defendant. See, e.g., Howard, 2018 WL 2463099, at *2; Little, 251 F. Supp. 3d at 1222. In the Third Circuit, at least, neither courts nor forum defendants will need to slog through those murky considerations after Encompass.

This decision has already impacted litigation in the Third Circuit, as well as elsewhere. In Anderson v. Merck & Co., Inc., hot off the presses, the New Jersey District Court found snap removal proper on the basis of Encompass, an outcome which affected 102 other related cases. 2019 WL 161512, at *1-3 (D. N.J. Jan. 10, 2019). The court specifically noted that “the Third Circuit clearly held that forum defendants may seek removal prior to service.” Id. at *2. The New Jersey District Court then applied similar reasoning in four other, multi-plaintiff cases within the same litigation that had also been snap removed.

In addition, the Eastern District of Pennsylvania had previously found removal improper in Mendoza v. Ferro because the non-forum defendant had removed only a few days after service and before the forum defendant had been served. 2019 WL 316727, at *1-2 (E.D. Pa. Jan. 24, 2019). After Encompass, the court upheld removal by the non-served, forum defendant, citing Encompass for the proposition that “[a]ny defendant, forum or non-forum, may remove an action as long as the forum state defendant has not yet been properly served. Id. at *2. See also Monfort v. Adomani, Inc., 2019 WL 131842, at *4 (N.D. Ca. Jan. 8, 2019) (finding snap removal proper, the court cited Encompass for the proposition that “[i]nterpreting ‘joined and served’ to permit pre-service removal by an in-state defendant does not impair the provision’s anti-fraudulent joinder purpose”); Texas Brine Co., LLC v. American Arbit. Assoc., Inc., 2018 WL

4927640, at *2-3 (E.D. La. Oct. 11, 2018) (finding snap removal proper and Encompass persuasive).

Not all post-Encompass decisions have been so willing to follow suit and institute a favorable bright-line rule. For example, the Northern District of Georgia considered, and rejected, the Third Circuit’s reasoning in Encompass. Delaughder v. Colonial Pipeline Co., 2018 WL 6716047, at *3-7 (N.D. Ga. Dec. 21, 2018). The court found that the defendant engaged in “gamesmanship” by changing its registered agent shortly after plaintiffs filed their complaint, which allowed it time to remove prior to being properly served. Id. at *5-6. The court found remand necessary to “close an absurd loophole in the forum-defendant rule and to uphold the purpose and integrity of the rule.” Id. at *6. We certainly would characterize “absurd loophole” differently than the court in Georgia, but the point is that not all courts may be as willing to ignore gamesmanship as the Third Circuit. The Northern District of Ohio recently made no mention of Encompass in finding snap removal improper—whether because it is non-precedential or because it is such a new decision. See, e.g., El Hassan v. URS Midwest, Inc., 2018 WL 6064869, at *3 (N.D. Ohio, Nov. 20, 2018) (finding the forum defendant both joined and served prior to removal, the court concluded that, even if that defendant had not been served, precedent would entail that snap removal is improper). So, not everyone is on-board with the Third Circuit at this juncture.

Nevertheless, Encompass is an especially valuable opinion for the defense bar because there are, of necessity, very few appellate rulings related to removals. 28 U.S.C. § 1447(d) prohibits appeal of remand orders based on “a defect in removal procedure or lack of subject matter jurisdiction.” See, e.g., Kircher v. Putnam Funds Trust, 547 U.S. 633, 640-41 (2008) (“[W]e have relentlessly repeated that any remand order issued on the grounds specified in § 1447(c) is immunized from all forms of appellate review, whether or not that order might be deemed erroneous by an appellate court.”). And many courts have hewed to the view that snap removals are improper, leading to many, unreviewable, remands. See, e.g., Ethington v. General Elec. Co., 575 F. Supp. 2d 855, 863 (N.D. Ohio 2008) (“The Court further notes that the growing trend among district courts wrestling with this latest litigation fad is to grant a timely motion to remand.”); In re Testosterone Replacement Therapy Products Liab. Lit., 67 F. Supp. 3d 952, 958 (N.D. Ill. 2014) (noting that there is a “split in authority on the issue, with a number of courts looking to the statute’s underlying purpose and precluding removal.”). With the wind at our backs thanks to Encompass, more courts hopefully will deem snap removals proper and, by consequence, more Courts of Appeals may have opportunity to weigh in on this issue in the upcoming year. Until then, we’re snap happy about the Third Circuit’s outlook on this issue.

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