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In its recent decision in *Encompass Insurance Co. v. Stone Mansion Restaurant Inc.*, the United States Court of Appeals for the Third Circuit gave the green light to a litigation tactic ubiquitously referred to as "snap removal", a tactic often used by defendants seeking to remove cases from state courts to federal district courts. The Third Circuit is the first United States Court of Appeals to approve of the tactic that is often the bane of plaintiff's existence-figuratively and literally. Absent either a reversal by a Third Circuit *en banc* panel or the Supreme Court of the United States or Congress amending 28 U.S.C.S. § 1441(b)(2), defendants sued in state court in either New Jersey, Pennsylvania, Delaware, or the US Virgin Islands are permitted to use this tactic to remove cases to federal court pursuant to 28 U.S.C. § 1332 -provided they are aggressively monitoring dockets or engaging strong-armed litigation tactics.

## The Forum Defendant Rule

Defendants sued in state court are permitted to remove an action to the corresponding United States District Court-provided there is subject matter jurisdiction pursuant to 28 U.S.C. § 1331 or 1332. However, this rule is not without its limitations. Where subject matter jurisdiction is premised on diversity of the parties pursuant to 28 U.S.C. § 1332, defendants residing in the state where the action was commenced are prohibited from removing the action to federal court. Specifically, the Forum Defendant rule states "[a] civil action otherwise removable solely on the basis of the jurisdiction under section 1332(a) of this title [28 USCS § 1332(a)] 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.S. § 1441(b)(2). The "properly joined and served" portion of the statute was in the spotlight in *Encompass Insurance Co. v. Stone Mansion Restaurant Inc.*

## Facts of *Encompass Insurance Co. v. Stone Mansion Restaurant Inc.*

The holding in *Encompass Insurance Co. v. Stone Mansion Restaurant Inc.* originated in a related matter that was settled. Specifically, a passenger injured by a drunk driver filed an action against the driver's estate and ultimately settled their claims. Thereafter, Encompass Insurance Co., the drunk driver's insurance company and domiciled in Illinois, filed an action in Pennsylvania state court against Stone Mansion Restaurant, who was domiciled in Pennsylvania. Encompass alleged Stone Mansion was liable pursuant to Pennsylvania's dram shop law and sought contribution pursuant to the Uniform Contribution Among Tortfeasors Act of 1955 (UCATA) for the settlement funds paid to the passenger in the settled action.

Encompass's counsel notified Stone Mansion's lawyer of the complaint, and requested that Stone Mansion waive formal service. Stone Mansion's counsel agreed to accepting service, but upon receiving the complaint and service acceptance form, Stone Mansion refused to sign the form and return to Encompass's lawyer. Rather, Stone Mansion removed the action to the United States District Court for the Western District of Pennsylvania. Encompass filed a motion to remand the action to state court on the basis that removal was improper pursuant to the Forum Defendant Rule. The District Court denied Encompass's motion to remand and retained jurisdiction over the matter. The District Court held the Forum Defendant Rule was inapplicable because it only precludes removal for defendants "properly joined and *served.*" Thereafter, Stone Mansion filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), which was ultimately granted. Encompass appealed to the Third Circuit.

Third Circuit's Decision

In deciding Encompass's appeal, and whether the District Court erred in denying Encompass's motion to remand, Judges Chagares, Jordan, and Fuentes analyzed the plain language of the forum defendant rule. Although the panel of Judges found Stone Mansion's removal "unsavory", they nonetheless found the language of the statute unambiguous and "precludes removal on the basis of in-state citizenship *only* when the defendant has been properly joined and *served*." *Encompass*, 2018 WL 3999885, at *4. The Court, relying on other courts and commentators, noted that the legislature's purpose for including the "properly joined and served" language was to "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." *Id*. (citing Arthur Hellman, et al., *Neutralizing the Strategem of "Snap Removal": A Proposed Amendment to the Judicial Code*, 9 Fed. Cts. L. Rev. 103, 108 (2016) (quoting *Sullivan v. Novartis Pharms. Corp.*, 575 F.Supp.2d 640, 645 (D.N.J. 2008))); *see also Goodwin v. Reynolds*, 757 F.3d 1216, 1221 (11th Cir. 2014) (noting the same). The Court found Encompass failed to provide legislative intent to the contrary. Finally, the Court noted that although Stone Mansion used "pre-service machinations" to remove a case it could not otherwise remove, the outcome was not outlandish "as to constitute an absurd or bizarre result". *Id*.

Snap Shot Into the Future

Reversal of the *Encompass* decision by a Third Circuit *en banc* panel or the Supreme Court is unlikely in the near future. The Third Circuit reversed the District Court's decision to grant Stone Mansion's motion to dismiss. Accordingly, Encompass is unlikely to appeal the Order that reincarnated its claims and prospect for contribution from Stone Mansion. For the time being, snap removal will be an accepted practice for actions commenced in state courts in New Jersey, Pennsylvania, Delaware, and the US Virgin Islands, absent amendments by Congress to the removal statute (which is unlikely).

With mandatory efiling on the rise in state courts, companies that are often sued, such as the region's Pharmaceutical companies, would be prudent to monitor the dockets and remove cases to federal court prior to being served with a complaint. In the alternative, defense counsel can preliminarily agree to waive formal service and then remove the action to federal court. As a

precaution, Defendants sued in state courts outside of the Third Circuit should tread carefully and review the respective Circuit's and District Court's opinions discussing snap removals and the forum defendant rule. A district court in California has express disdain for defendants monitoring dockets to employ such tactics. See *Black v. Monster Bev. Corp.*, 2016 U.S. Dist. LEXIS 1881, at *7–*14 (C.D. Cal. Jan. 7, 2016) (noting split in California district courts on issue and holding that unserved forum defendant may not remove; "contrary ruling would incentivize sophisticated forum defendants to monitor court dockets and remove actions before any service could occur").