

# Maintain A Foothold

Rayna E. Kessler, Brendan A. Mcdonough



## Here are some tactics for beating snap removal to keep your cases in state court.

Imagine properly filing your state court case where the defendant resides, only to find out a few minutes later that the defendant has already removed your case to federal court. The practice of “snap removal”—removing an action to federal court before the forum defendant has been “properly . . . served” pursuant to 28 U.S.C. §1441(b)(2)—was already growing in recent years as state courts around the country gradually shifted to electronic filing.

In November 2018, the issue was propelled to new heights by the Third Circuit’s ruling in *Encompass Insurance Co. v. Stone Mansion Restaurant Inc.*<sup>1</sup> Soon after, appellate courts in the Second and Fifth Circuits followed suit and adopted the same reasoning as *Encompass* in lockstep.<sup>2</sup>

In *Encompass*, the Third Circuit permitted removal by the forum defendant despite the defendant’s consent in writing to waive service. Instead, the defendant removed the case and failed to complete the waiver. Despite that arguably unsavory conduct, the Third Circuit nevertheless viewed the plaintiff’s

failure to obtain the official waiver form as a failure to effect service in accordance with state law, and thus a failure to “properly . . . serve” within the meaning of §1441(b)(2).

In the short time since, sophisticated defendant corporations have turned snap removal into an art and perfected it—now routinely removing cases brought by out-of-state plaintiffs to federal court less than 10 minutes after the complaint is filed on the state’s electronic filing system.



**To beat snap removal, ‘snap serve’ a forum defendant’s registered agent for service before any defendant can effect a removal.**

Third-party vendors monitor electronic state court dockets, scanning for complaints that name their corporate client as a defendant. The defendant and its counsel—possibly aided by artificial intelligence technology—then instantly receive notification of the filed complaint and a copy of it to accompany a notice of removal.

Although *Encompass* led to brazen behavior by defendants, some district courts appear to have drawn a line in the sand as to what is permissible conduct by defendants. These rulings provide practical lessons for service going forward.

### Restoring Balance

In 2019 in *Dutton v. Ethicon, Inc.*, a New Jersey federal district court denied motions to remand when the defendant, Johnson & Johnson (J&J), snap removed cases that the plaintiffs attempted to serve at the company’s headquarters but were prevented from doing so because the offices were closed for the year-end holidays.<sup>3</sup> The court reasoned there was no evidence that J&J had intentionally closed its offices to stymie service until the removals were filed. In doing so, the court appeared to suggest that “deliberately delay[ing] service by, for example, purposefully making agents unavailable” could constitute behavior that is “so egregious” as to render a snap removal improper.<sup>4</sup>

Fast-forward to June 2020. In *Jackson v. Howmedica Osteonics Corp.*, a New Jersey federal judge issued a report and recommendation that may have appeared pedestrian on first glance: “New Jersey law is clear that a corporation is properly served with process via service on its appointed agent.”<sup>5</sup> In other words, the court held that service on an agent for service constitutes service. But this ruling may have provided the lynchpin for plaintiffs vying to avoid snap removal and keep their cases in state court.

In *Jackson*, the court was deciding a representative case with the same or similar procedural facts as 13 others, all involving the same defendant and the same allegedly defective product. The first seven complaints were properly served on the defendant’s registered agent several hours before snap removals were filed. Nevertheless, the defendant opposed the plaintiffs’ motions to remand in those cases on the novel basis that service on the registered agent was insufficient and that a defendant itself must physically receive the service of process before service can be deemed “properly” effected.

As a result, the *Jackson* plaintiff and six others filed their complaints simultaneously on both the agent and the defendant itself at the company’s headquarters. However, in each of those subsequent seven

cases, the defendant intentionally stalled the individuals authorized to accept service at headquarters, sometimes for hours, until after snap removals had been filed, despite service already having been effected on the agent.

The court rejected the defendant's arguments in *Jackson* as to service on the agent, finding that such service of course constitutes "proper service," and it remanded all 14 cases on that basis alone. Surprisingly, the court commented on the defendant's alleged behavior at corporate headquarters, stating that, if true, it was "unbecoming of litigants" and that "'purposefully making agents unavailable' is more egregious than the conduct found to be acceptable in the cases cited by [the] Defendant in support of its present position."<sup>6</sup>

The *Dutton* and *Jackson* rulings are an encouraging sign that courts will not permit forum defendants to take the "narrow" loophole granted in *Encompass* and convert that exception into the rule, even in circuits where snap removal is permitted in general. Moreover, those decisions taken together appear to have given diligent plaintiffs the opening they needed to bring—and keep—cases in state court.

### **Beating Snap Removal**

As evidenced by the facts in *Jackson*, to beat snap removal, you must "snap serve" a forum defendant's registered agent for service before any defendant can effect a removal under 28 U.S.C. §1446(b). Your process server must be ready and waiting outside the agent's premises before you file the complaint, which you must immediately transmit to the server after filing so that he or she can quickly print it and literally run it inside.

While this may sound ridiculous, it is absolutely necessary if you are attempting to serve a sophisticated corporate defendant that may be monitoring your state's electronic docket. Here is a step-by-step guide.

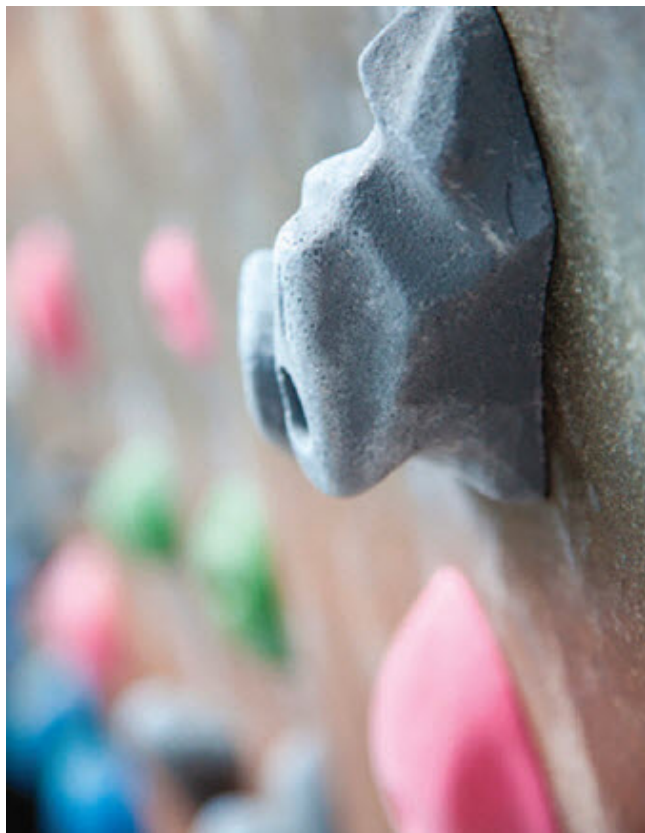
**Step 1: Look up the agent.** For most defendant corporations, the registered agent will be one of the major providers, such as the Corporation Trust Corporation (CT Corp.), the Corporation Service Company (CSC), Northwest Registered Agent, or LegalZoom, though there are many smaller providers. Some companies list the agent on their website; for those that do not, you can access registered agency information by looking up the corporation's business status report on the forum state's department of revenue website. In an abundance of caution, check the company's registered agency status before each new day of filing, in case the forum defendant has surreptitiously changed agents to avoid service.

**In mass tort actions, avoid filing your first complaints all at once—instead, file them in smaller numbers that are easier to manage and avoid snap removal.**

**Step 2: Before you file, put your server in position to serve the agent right away.** To serve the agent within a few minutes of filing, coordinate with your process server in advance. Have the server wait right outside the registered agent's building with a mobile printer and wireless hotspot in the car before you file. Then call the process server just before you file to alert him or her that the filing is imminent, even if you have previously agreed on the time of filing.

Provide servers with the summons and the entire (unfiled) complaint *beforehand*, so they can pre-print the bulk of the service packet, except for the first page of the complaint and any documents that are generated by the state court filing system at the time of filing (such as case information sheets). Time is of the essence, and having to print just a few pages after filing, instead of some 20 or more, could mean the difference.





**Step 3: File the complaint, and immediately transmit it to your process server.** Once the complaint is filed, immediately access the filed complaint with the state court’s electronic docket stamp. Save the filed complaint, and create a PDF of only the first page, which will have the docket number displayed, and any other pages the state court generates when filing. *Immediately* email this PDF to your server to print and complete the service packet, and call to inform the server that the PDF has been sent.

It is very important for your server to do a test run beforehand using a mobile printer and a previously filed complaint. Servers must ensure that they have adjusted the printer’s settings appropriately to display the docket number wherever it is rendered by the state court—typically at the very top or bottom of the page.

At worst, if printer issues arise in the moment, the server can simply handwrite the docket number on the front of the pre-printed complaint (for this

reason the server should not discard the first page before filing). However, avoid this when possible because defendants have argued that a handwritten docket number is not a faithful reproduction of the filed complaint. The process server also should take photographs just before and after service using a smartphone that can capture the precise time and GPS location metadata, in case such proof is needed.

Alternatively or in addition to service on the agent, consider snap serving the defendant at its headquarters. Jackson cites the warning in *Dutton*, suggesting that had the *Jackson* defendant’s conduct at headquarters not been mooted by the proper service already effected on the registered agent, the court could well have found the defendant’s conduct at headquarters so “egregious” as to render the snap removal improper.<sup>7</sup>

Thus, if all else fails, attempt snap service directly on the defendant—at its corporate headquarters, a principal place of business, or as otherwise permitted under the rules. If the defendant intentionally withholds the individual for service, district courts seem prepared to send the message that those tactics cross a line, even in those circuits where snap removal has been approved on the whole.

### **Move for Remand Whenever Possible**

If you do get snap removed, file a motion within 30 days of the removal in accordance with the federal remand statute. But not all courts have elected to follow the lead of the Second, Third, and Fifth Circuits in permitting snap removal.

The Eleventh Circuit recently let stand a district court’s decision to remand a case that was snap removed by a non-forum defendant.<sup>8</sup> The Northern District of Alabama articulated a rule that at least one defendant must be served with an action before it can be removed, essentially restricting any removal—especially snap removal—until a plaintiff has had an opportunity to effect service, which the appellate court refused to disturb.<sup>9</sup>

The District of Maryland recently remanded a snap-removed case on the same basis, holding that a plaintiff must have a “reasonable opportunity to effectuate service of process.”<sup>10</sup> And the District of Nevada has rejected snap removal, reasoning that defendants still have the argument, if valid, that the forum defendant is not a proper defendant even if removal must wait for a plaintiff to have a reasonable opportunity to serve a forum defendant.<sup>11</sup> A wave of Nevada district court decisions have followed suit.<sup>12</sup> A handful of decisions in the Southern District of Florida have also rejected snap removal on similar grounds.<sup>13</sup>

## Mass Tort Actions

It is no coincidence that the most frequent users of snap removal are multibillion dollar international corporations, including Big Pharma. These matters tend to involve many individual complaints against one corporation, so there are many opportunities to snap remove the complaints to avoid consolidated state court actions. With this in mind, avoid filing your first complaints all at once—instead, file them in smaller numbers that are easier to manage and avoid snap removal.

To maintain a foothold in state court jurisdictions where you expect to file a large number of claims, first file your non-diverse cases in which snap removal is not a concern. Typically, once a significant number of cases are filed in a jurisdiction, there is an opportunity to meet and confer with defense counsel who might be agreeable to no longer snap remove once a state court consolidated action is inevitable.

In states where snap service is possible, serve the registered agent fast. Even in jurisdictions such as Maryland, Nevada, and southern Florida, where snap removal has been rebuked, serve quickly and diligently.



Rayna E. Kessler »



**Rayna E. Kessler** is a partner at Robins Kaplan in New York City and can be reached at [rkessler@robinskaplan.com](mailto:rkessler@robinskaplan.com). **Brendan A. McDonough** is an attorney at Weitz & Luxenberg in New York City and can be reached at [bmcdonough@weitzlux.com](mailto:bmcdonough@weitzlux.com).

### NOTES

1. 902 F.3d 147 (3d Cir. 2018).
2. See *Gibbons v. Bristol-Myers Squibb Co.*, 919 F.3d 699, 705–07 (permitting snap removal by a forum defendant); see also *Texas Brine Co., LLC v. Am. Arbitration Ass’n, Inc.*, 955 F.3d 482, 486–87 (5th Cir. 2020) (permitting snap removal by a non-forum

defendant).

3. 423 F. Supp. 3d 81 (D.N.J. 2019).

4. *Id.* at n. 4.

5. 2020 WL 6049400, at \*6 (D.N.J. June 15, 2020). The time to file objections passed without objection and all affected cases were remanded.

6. *Id.* at n. 4 (quoting Dutton, 423 F. Supp. 3d 81 at n. 4).

7. *See id.* at n. 4.
8. *Bowman v. PHH Mortgage Corp.*, 423 F. Supp. 3d 1286 (N.D. Ala. 2019), *appeal dismissed*, 2020 WL 1847512 (11th Cir. Feb. 26, 2020).
9. *Id.* at 1288.
10. *Teamsters Local 677 Health Servs. & Ins. Plan v. Friedman*, 2019 WL 5423727, at \*4 (D. Md. Oct. 23, 2019).
11. *Carrington Mort. Serv., LLC v. Ticor Title of Nev., Inc.*, 2020 WL 3892786, at \*2–3 (D. Nev. July 10, 2020).
12. *See Wells Fargo Bank, N.A. v. Old Republic Title Ins. Grp., Inc.*, 2020 WL 5898779, at \*2–3 (D. Nev. Oct. 5, 2020); *Deutsche Bank Nat'l Tr. Co. v. Fid. Nat'l Title Grp., Inc.*, 2020 WL 7360680, at \*4 (D. Nev. Dec. 14, 2020); *U.S. Bank Nat'l Ass'n v. Fid. Nat'l Title Grp., Inc.*, 2020 WL 7335412, at \*1 (D. Nev. Dec. 14, 2020); *HSBC Bank USA v. Old Republic Nat'l Ins. Grp., Inc.*, 2020 WL 7360679, at \*1 (D. Nev. Dec. 15, 2020); *Wells Fargo Bank, N.A. v. Fid. Nat'l Title Grp., Inc.*, 2020 WL 7388621, at \*1 (D. Nev. Dec. 15, 2020).
13. *See, e.g., First Sw. Fin. Servs., LLC v. Dawkins Home, Inc.*, 2019 WL 7945684 (S.D. Fla. July 3, 2019); *Curtis v. Bruner*, 2019 WL 7837885 (S.D. Fla. Aug. 2, 2019).