

DNJ Judge Recommends Remand of Hip Implant Cases After Rejecting Snap Removal to Federal Court

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In a Report and Recommendation, U.S. Magistrate Judge James B. Clark recommended the remand of artificial hip replacement implant cases after their snap removal to federal court. Judge Clark's report in a representative case applies to more than a dozen other cases pending before U.S. District Judge John M. Vazquez.

What is snap removal? "Snap removal" or "wrinkle removal" involves the removal of cases filed in state court to federal court *before* a forum defendant is served. Under the forum defendant rule, an "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). Thus, the loophole created by snap removal circumvents the prohibition against removal under the forum defendant rule. The U.S. Court of Appeals for the Third Circuit has upheld the practice.

In the case before Judge Clark, plaintiff, a citizen of Ohio, filed suit in New Jersey state court against Howmedica, which is incorporated and has its principal place of business in New Jersey, alleging injuries from Howmedica's artificial hip replacement system. Plaintiff commenced her action on October 3, 2019 at 9:15 A.M. by filing a Complaint against Howmedica in the Superior Court of New Jersey, Bergen County, where Howmedica maintains its corporate headquarters. *Jackson v. Howmedica Osteonics Corp.*, 19-18667, Op. at 3. Process was served on Howmedica's registered agent, CT Corp., at 9:53 A.M. *Id.* Another process server arrived at 9:39 A.M. at Howmedica's headquarters and was informed that a person authorized to accept service "was on their way down." *Id.* at 4. While the process server was waiting to effectuate service, Howmedica filed a Notice of Removal at 10:29 A.M. At 11:03 A.M., after waiting for nearly an hour and a half, the process server was finally able to serve a person authorized to accept service at Howmedica's headquarters.

In her motion for remand, plaintiff argued that the forum defendant rule prohibited removal because Howmedica's registered agent, CT Corp., was properly served before the Notice of Removal was filed. In response, Howmedica argued that service on CT Corp. did not bar removal because Howmedica did not actually receive a copy of the summons and complaint from CT Corp. until later that evening of October 3. Howmedica relied on a combination of two cases: *Encompass Ins. Co. v. Stone Mansion Rest. Inc.*, 902 F.3d 147, 152 (3d Cir. 2018), *reh'g denied* (Sept. 17, 2018); and *Tucci v. Hartford Fin. Servs. Grp., Inc.*, 600 F. Supp. 2d 630, 631 (D.N.J. 2009).

In *Encompass*, the U.S. Court of Appeals for the Third Circuit found that the forum defendant rule unambiguously requires that an in-state defendant be “properly joined and served” to preclude removal, regardless of whether such an interpretation would “allow [a defendant] to use pre-service machinations,” such as delaying formal service of process, “to remove a case that it otherwise could not.” *Encompass*, 902 F.3d at 153-54. Meanwhile, in *Tucci*, a decision by former Chief Judge Jerome B. Simandle, U.S.D.J., the court determined that “where service is made on a statutory agent, *rather than on an agent appointed by the defendant*, the time to remove the action to federal court does not start to run until the defendant actually has received a copy of the initial pleading.” *Tucci*, 600 F. Supp. 2d at 633, 636 (emphasis added).

Although Judge Clark acknowledged that *Encompass* does not bar removal under the forum defendant rule unless a defendant has been “properly joined and served,” regardless of whether that defendant acted to delay service, he rejected Howmedica’s argument that service was not complete for the purposes of the forum defendant rule until Howmedica actually received notice of such service from its registered agent, CT Corp. First, Judge Clark found that the limited exception in *Tucci* to the thirty-day removal period applies only “where service is made on a statutory agent, rather than an agent appointed by the defendant.” *Id.* at 636. Judge Clark found that CT Corp. was indisputably Howmedica’s registered agent and not a statutory agent. *Op.* at 7, n.3. Second, *Tucci* involved an interpretation of Section 1446(b), which provides “[t]he notice of removal of a civil action or proceeding shall be filed within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading” 28 U.S.C. §1446(b). “[U]nlike Section 1446(b), which requires ‘receipt by the defendant’ of a copy of the complaint to trigger its application, Section 1441(b)(2), which is at issue in the present case, is triggered when the forum defendant is ‘properly joined and served’ in accordance with state law.” *Op.* at 9. Because Howmedica was properly served through its appointed agent prior to the filing of the Notice of Removal, Judge Clark found that the forum defendant rule barred removal and therefore recommended remand.

In a footnote at the conclusion of his report, Judge Clark cautioned that although “pre-service machinations” designed to delay service may be permitted under *Encompass*, plaintiff’s allegations regarding Defendant’s conduct, if true, demonstrate behavior “unbecoming of litigants” in the District of New Jersey, and Howmedica’s alleged conduct in “purposefully making agents unavailable” is more egregious than the conduct found to be acceptable in the cases cited by Howmedica in support of its opposition to remand. *Op.* at 11, n.4.

A fully copy of Judge Clark’s June 15, 2020 Report and Recommendation is attached.