



HOW TO DEFEAT

“PHANTOM REMOVAL”

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Some defendants are attempting to remove state cases to federal court before they are even filed. Here’s how to push back.

“Phantom removal” is a new breed of legal strategy born out of our current era of mandatory e-filing and legal tech creativity.¹ Essentially, some defendants are removing state cases to federal court before the cases have been filed. They do this by obtaining a copy of the complaint while it is still being processed by the court clerk and then immediately filing a notice to remove—before the clerk has even assigned a case number or issued a summons. Here is why phantom removal is subject to remand, how to avoid it, and what to do if it happens in one of your client’s cases.

How Is It Possible?

Many plaintiff attorneys are familiar with the strategy known as “snap removal,”² when a defendant removes a state case to federal court after it is filed but before it is served.³ Phantom removal takes this scheme one step further, with a defendant removing a case before the complaint is officially filed. How is this possible?

First, in some jurisdictions, filing a complaint is not instant. A plaintiff submits the complaint to the court clerk, who then reviews the complaint and either accepts or rejects it. A complaint

can be rejected for myriad reasons, such as failure to pay the filing fee, failure to conform to certain filing requirements, or leaving out a mandatory form.⁴ While in some jurisdictions these potential defects are presumably caught by the clerk after the fact, in others the clerk must review and verify before the complaint is actually docketed. Until the complaint is officially accepted by the clerk, it is not yet “filed.” And filing can happen relatively quickly or may take up to a couple of weeks.

Second, many courts now require plaintiffs to e-file their complaints online. This—combined with the delay between submission of the complaint for filing and acceptance of the complaint by the clerk—creates a limbo period in which the complaint is in the hands of the court but not yet publicly accessible.

Although pending complaints like these remain a secret outside of courthouse walls, some courts around the country have a loophole that provides the media with special access. For example, multiple county superior courts in California use a Media Access Portal (MAP).⁵ MAP allows news companies to see and obtain copies of pending complaints solely “for the purposes of legitimate news reporting.”⁶

As a result, some media companies are capitalizing on this free access. One such company created a legal tech product, CasePortal.⁷ If a defense firm has a CasePortal account, it is alerted when a new case involving one of its clients is submitted for filing, it gets a nonconformed copy of the complaint, and CasePortal manufactures a “temporary case number” for the matter even though the court clerk hasn’t assigned a real case number yet.

If this type of access is available in a jurisdiction, defense firms can get advanced and nonpublic notice the moment their clients are named in a lawsuit. They then can try to remove the

case to federal court as soon as possible.

Why Is This Procedurally Improper?

Phantom removal is procedurally improper and subject to remand for several reasons. First, only civil actions can be removed to federal court.⁸ For a case to become a civil action—and therefore able to be removed—it has to “commence” by being filed with the state court.⁹ A complaint is not filed until it has been accepted by the court clerk.¹⁰

For example, in *Desmond v. BankAmerica Corp.*, the defendants removed the case based solely on the fact that the plaintiff had proposed filing an amended complaint in a reply brief but had yet to do so.¹¹ The district court granted the plaintiff’s motion to remand, finding that the defendants’ removal was premature because the amended complaint had not yet been filed.¹² The court explained that “no motion to amend has been filed, much less an amended complaint. . . . Removal jurisdiction based on an amended pleading arises only after the subsequent pleading becomes operative. Similarly, removal in this case based on the addition of parties or claims, if available at all, will become available only upon the filing of an amended complaint.”¹³

Second, for a defendant to remove a case to federal court, there needs to be an “initial pleading.”¹⁴ Typically, the initial pleading is the filed complaint. For example, in *Schneehagen v. Spangle*, the plaintiff gave a copy of the unfiled complaint to the defendants, then later filed and served the complaint on the defendants.¹⁵ The defendants removed the case within 30 days of being served with the filed complaint but more than 30 days after being sent the unfiled complaint. The plaintiff moved to remand, arguing that the 30-day time limit ran from the defendants’ receipt of the unfiled complaint.¹⁶ The district

court rejected this argument, finding that the unfiled complaint did not count as an initial pleading to trigger the 30-day window for removal.¹⁷

Third, in some jurisdictions, a case is not officially considered “commenced” until the summons is issued.¹⁸ Additionally, 28 U.S.C. §1446(a) requires the notice of removal to include “a copy of all process . . . served upon such defendant”—which is impossible in a phantom removal scenario. Moreover, since the summons will not have been issued at the time of the phantom removal, a plaintiff will not have had a “meaningful opportunity” to serve the defendant before removal.¹⁹

In sum, phantom removal is ineffective and subject to remand because it occurs when the status of the complaint is still pending, the case has yet to commence, there is no initial pleading, and no summons has been issued—therefore, there is no civil action.²⁰ Like someone attempting to grab a handful of fog out of the air, the defendant is trying to remove a phantom of a case and nothing more.

What Can Plaintiff Attorneys Do About It?

There are several proactive steps plaintiff attorneys can take to strengthen their position or possibly avoid phantom removal altogether.

First, research the defendant before filing your complaint to see if it has engaged in phantom removal previously. Search federal dockets (using PACER, Westlaw, LexisNexis, or other databases) for cases involving the defendant that were removed to federal court. You can confirm that phantom removal occurred if the copy of the complaint attached to the notice of removal does not have a “filed” stamp from the state court clerk. You can also check whether the defendant references a temporary case number in the notice. A very short time

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frame between when the state case was filed versus when the federal removal case was opened is another clue. Finally, a motion to remand in the federal docket could make phantom removal obvious.

Next, if it is still an option at the court, you can paper file your case instead of e-filing. Doing so may avoid giving the defendant the instant notice of your filing, even before it is officially filed by the clerk, as happens with e-filing. This could buy you more time to serve the defendant before it discovers the case.

Finally, if paper filing is not available, you can attempt to block phantom removal by fighting fire with fire. After you submit your complaint for filing with the state court clerk, immediately serve a nonconformed copy of it on the defendant, along with any accompanying forms and some proof that it has been submitted for filing (such as a receipt).

This is technically not proper service because the clerk has yet to issue a summons. But, if you end up in front of a federal judge who believes phantom removal is procedurally proper, you at least have an argument that you served the defendant before they removed the case to federal court. It would defy logic for a judge to deny a motion to remand because removal of an unfiled case is proper but service without a summons is not. And a defendant who is served like

this before they can phantom remove a case may decide not to remove at all. In other words, if you can beat defendants at their own game of phantom removal by staying one step ahead of them and mirroring their strategy with your own phantom service, you undermine their arguments against remand.

When implementing this strategy, it is important that after you serve the defendant without a summons, you immediately serve the defendant again as you normally would once you receive the summons. This will be key in cases in which the defendant decides not to phantom remove the case and instead chooses to use snap removal after the complaint is processed for filing by the state court clerk. Under these circumstances, effective service before the defendant can remove will be an important part of winning your motion to remand.

To effectively counter the deceptive strategy of phantom removal, plaintiff attorneys should adopt a proactive stance, combining meticulous pre-filing research with swift, strategic action. This approach not only preserves the integrity of the legal process but also ensures that clients’ cases are heard in their proper forum, upholding the principles of justice and fairness in the face of evolving legal tactics. ■



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NOTES

1. A phantom is defined as “something apparent to sense but with no substantial existence.” Merriam-Webster, *Phantom*, <https://www.merriam-webster.com/dictionary/phantom>.
2. Danielle Gold & Rayna E. Kessler, *How to Avoid “Snap Removals,”* Trial, July 2019, at 54; Rayna E. Kessler & Brendan A. McDonough, *Maintain a Foothold*, Trial, May 2021, at 18.
3. Arthur Hellman et al., *Neutralizing the Stratagem of “Snap Removal”: A Proposed Amendment to the Judicial Code*, 9 Fed. Cts. L. Rev. 103, 104 (2016).
4. *Duran v. St. Luke’s Hosp.*, 114 Cal. App. 4th 457, 459–60 (Cal. Ct. App. 2003).
5. See, e.g., *Civil Unlimited Media Access Portal*, Cal. Super. Ct., Orange Cnty., <https://map.occourts.org/>; *LASC Media Access Portal*, Cal. Super. Ct., L.A. Cnty., <https://media.lacourt.org/#/home>; *Media Access Portal*, Cal. Super. Ct., S.F. Cnty., <https://map.sftc.org/>. It is difficult to assess exactly how many courts across the country have similar media access to complaints, but news organizations have been pushing for access and have previously won the right to access

complaints through injunctions. See Maria Dinzeo & Bill Girdner, *Biggest Court in Nation Opens On-Receipt Media Portal*, Courthouse News Serv., Dec. 4, 2018, <https://www.courthousenews.com/biggest-court-in-nation-opens-on-receipt-media-portal/>.

6. *Agreement for Access to San Francisco Superior Court’s Media Access Portal*, Cal. Super. Ct., S.F. Cnty., https://sf.courts.ca.gov/system/files/general/mou-map-m2109-generic-aug2022-fillable-form-final-version_0.pdf.
7. *CasePortal by Courthouse News Service*, Courthouse News Serv., <https://www.cncaseportal.com/>; *About Us*, Courthouse News Serv., <https://www.courthousenews.com/about-us/>.
8. 28 U.S.C. §§1332(a), 1441(a), 1441(b)(1), 1446 (2011); see also 4 Hon. Karen L. Stevenson & James E. Fitzgerald, *Rutter Group Practice Guide—Federal Civil Procedure Before Trial (Cal. and 9th Cir. Ed.)* ¶ 2:2296 (2023).
9. See, e.g., Cal. Civ. Proc. Code §411.10 (“A

civil action is commenced by filing a complaint with the court.”); Cal. Civ. Proc. Code §350 (“An action is commenced, within the meaning of this Title, when the complaint is filed.”); see also Fed. R. Civ. P. 3 (same). Always check the local rules of your jurisdiction for any variations.

10. See *Artuz v. Bennett*, 531 U.S. 4, 8–9 (2000).
11. *Desmond v. BankAmerica Corp.*, 120 F. Supp. 2d 1201, 1203 (N.D. Cal. 2000).
12. *Id.* at 1203–04.
13. *Id.* at 1204; see also *Jones v. G2 Secure Staff, LLC*, 2017 WL 877293, at *3 (C.D. Cal. Mar. 6, 2017).
14. 28 U.S.C. §1446(b).
15. *Schneehagen v. Spangle*, 975 F. Supp. 973, 973 (S.D. Tex. 1997).
16. *Id.*
17. *Id.* at 473–74.; see also *Burr v. Choice Hotels, Int’l, Inc.*, 848 F. Supp. 93, 95 n. 2 (S.D. Tex. 1994) (“Until the state court action is filed, there is no action or proceeding, and the Plaintiff’s ‘pleading’ is nothing of the kind; it is only a draft of something which the Plaintiff contemplates will become a

pleading upon filing.”).

18. See, e.g., *L.G. Defelice & Son, Inc. v. Globe Indem. Co.*, 23 F.R.D. 275, 278 (S.D.N.Y. 1959) (“It is required that F. R. Civ. P. 3 and 4 must be read together. They contemplate filing of the complaint and service of process with a copy of the plaintiff’s pleading in order to commence an action, i.e., to make a named defendant a party.”); see also *Harris v. Stone*, 115 F. Supp. 531, 531 (D.D.C. 1953) (“An action is commenced with the filing of the complaint and the timely placing in the hands of the marshal process directed to the defendants for service upon such defendants.”).
19. See, e.g., *Morris v. Alza Corp.*, 2010 WL 2652473, at *2 (E.D. Cal. July 1, 2010); *Hoskinson v. Alza Corp.*, 2010 WL 2652467, at *2 (E.D. Cal. July 1, 2010); *Llanos v. Delta Air Lines, Inc.*, 2020 WL 635477, at *4 (C.D. Cal. Feb. 11, 2020).
20. For more, see a recent order to remand following phantom removal in *Martinez v. Airbnb, Inc.*, 2023 WL 5942273 (N.D. Cal. Sept. 11, 2023).

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