

## About the Author



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## 9th Circ.'s Rare Gift Of Time To Remove Case

Running on a clock is nothing unusual for litigators. We live in a world of deadlines. Fortunately, many deadlines are open to extensions by agreement of the parties or by application to the court. But other deadlines are immutable.

For those who confront the seemingly never-ending battle with plaintiffs' counsel over whether state court or federal court is the appropriate forum in which to adjudicate their disputes, there is no such luxury. One's eye is always on the removal clock. Under the federal removal statute, a defendant is racing against that clock.

Until last month, it was relatively straightforward. A defendant had two time periods in which an action could be removed to federal court: within 30 days of service of the complaint;<sup>1</sup> or within 30 days of defendant's receipt "of an amended pleading, motion, order or other paper, from which it may first be ascertained that the case is one which is or has become removable" to federal court.<sup>2</sup> Those deadlines were not subject to extensions and were regarded as the only two time periods in which a case could be removed.

Defendants in pharmaceutical, medical device, product liability or a host of other types of lawsuits may find themselves parties to a state court action that, as a result of careful pleading by the plaintiff, may not provide a facial basis for removal.

For example, the plaintiff may plead unspecified damages and allege few clues as to the extent of the injuries arising from an allegedly defective medication. Initially, the defendant may not have enough information to establish by a preponderance of evidence that the plaintiff seeks in excess of the jurisdictional minimum. Or, it may appear from the complaint that the plaintiff is domiciled in the same state as a defendant when, in fact, the plaintiff's domicile is in a different state, which would create the requisite diversity of citizenship among the parties to proceed in federal court.

Defendants could find themselves stuck in state court waiting endlessly for an "other paper" from the plaintiff that never comes to show that the case has the requisite amount in controversy or the requisite diversity of citizenship for federal diversity jurisdiction. Defendants may face a particularly steep uphill removal battle in individual actions where diversity-based removals are also subject to a one-year limitation (albeit now subject to a statutory exception where plaintiff has acted in bad faith to avoid removal).<sup>3</sup>

However, on June 27, the Ninth Circuit took a new approach. In *Roth v. CHA Hollywood Medical Center LP*, the Ninth Circuit loosened the control that the removal clock has historically had over a defendant's head. Reversing the district court, the Ninth Circuit held that where the complaint was "indeterminate" as to whether there was a basis for federal jurisdiction, a defendant could conduct its own investigation to determine whether the case was removable to federal court and remove on its own timetable.

In *Roth*, a putative wage and hour class action, the face of the first amended complaint (which added a defendant, among other amendments) was unclear whether the requisite diversity of citizenship, or the requisite amount in controversy, had been satisfied for the case to be removable under the Class Action Fairness Act (CAFA).

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Nearly a decade ago, the Ninth Circuit had held that where a complaint was "indeterminate" as to a basis for federal jurisdiction, a defendant was not obligated to inquire whether there was such a basis.<sup>4</sup> Accordingly, the defendant did not lose the right to remove if it later received an "other paper" from the plaintiff providing a basis for federal jurisdiction and removal.

However, what the Ninth Circuit had not previously addressed was what would happen if instead of waiting for an other paper from the plaintiff, a defendant conducted its own investigation to determine that there was the requisite diversity of citizenship and/or the requisite amount in controversy.

What happened in *Roth* was a good example of how such self-help could provide a basis for removal. In *Roth*, the complaint did not identify the citizenship of putative class members. Through its own investigation (because the putative class members were the defendant's employees), the defendant learned that at least one of the putative class members was a Nevada citizen and obtained a declaration to that effect.

Under CAFA, as long as at least one putative class member is a citizen of a different state than at least one defendant (minimal diversity), the requisite diversity of citizenship is satisfied. Thus, harvesting the fruits of its own investigation, the defendant ascertained that there was minimal diversity.

Furthermore, although the face of the complaint did not indicate that the requisite (\$5 million plus) amount in controversy for CAFA jurisdiction was satisfied, the defendant obtained declarations from its own vice president for human resources and general counsel, establishing that the claims at issue would exceed \$5 million.

Armed with its own due diligence, the defendant now had a basis to remove, even though it had not received any information from the plaintiff to support the removal. More than 100 days after the filing of the amended complaint and 75 days after service of that complaint was effective, the action was removed to federal court by the newly named defendant on the basis of CAFA jurisdiction.<sup>5</sup>

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The district court remanded the case because the removal papers did “not refer to which paper [defendant] received that allowed [defendant] to ‘first ascertain’ the case is one that has become removable.”<sup>6</sup> Because the action was removed under CAFA, the defendant sought an interlocutory appeal from the grant of remand.

On appeal, the Ninth Circuit reversed. The court held that “a defendant who has not lost the right to remove because of a failure to timely file a notice of removal under § 1446(b)(1) or (b)(3) may remove to federal court when it discovers, based on its own investigation, that a case is removable.”<sup>7</sup>

Significantly, the Ninth Circuit concluded that the two statutory time period for removal: within 30 days of service of the complaint; and within 30 days of receipt of an other paper, were “limitations on the right to removal rather than ... authorizations to remove.”<sup>8</sup>

Put another way, so long as the plaintiff did not serve, or provide the defendant with, a document evidencing that the case was or had become removable, the defendant’s time to remove has not been limited. Under those circumstances, there is nothing that prevents a defendant from garnering its own evidence to support removal beyond the usual 30-day window for removal.

What does this decision mean for defendants (at least within the Ninth Circuit)? The Ninth Circuit recognized that its holding could result in a defendant strategically delaying removal until an advantageous time in the proceeding, particularly in a removal under CAFA, which is not subject to the general one-year limitation on diversity-based removals. If the plaintiff wants to prevent such a result, the Ninth Circuit noted, it should provide the defendant with the basis for removal in order to trigger the 30-day window for removal.<sup>9</sup>

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So, defendants need not be shy and sit helplessly by where a case is not removable on its face. By being proactive, a defendant can convert an otherwise seemingly irremovable case into one that is removable — whether by confirming the citizenship of the parties or obtaining information to confirm that the

damages alleged seek more than the jurisdictional minimum.

This timely decision by the Ninth Circuit empowers defendants by enabling them to, in effect, create their own other paper to form a basis for removal. Perhaps even more importantly, the Roth decision enables defendants to remove on their own schedule, freeing them from the constraints of what had been seen as the fast-ticking 30-day removal clock controlled by the plaintiff.

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<sup>1</sup> 28 U.S.C. § 1446(b)(1).

<sup>2</sup> 28 U.S.C. § 1446(b)(3).

<sup>3</sup> Removals of class actions or “mass actions” or not subject to this one-year limitation.

<sup>4</sup> *Harris v. Bankers Life and Casualty Co.*, 425 F.3d 689, 693-94 (9th Cir. 2005).

<sup>5</sup> Defendant also removed on the basis of federal question jurisdiction, but the district court’s rejection of that ground was not appealed.

<sup>6</sup> *Roth v. CHA Hollywood Medical Center, L.P.*, 2012 WL 5456406 (C.D. Cal. Nov. 7, 2012).

<sup>7</sup> *Roth* at \*1.

<sup>8</sup> *Id.*

<sup>9</sup> The Ninth Circuit remanded the case to the district court for further proceedings to determine whether an exception to CAFA jurisdiction applied.