

Paper Chase: Winning The Removal Race

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On October 24, in *Romulus v. CVS Pharmacy Inc.*, a wage-and-hour putative class action, the United States Court of Appeals for the First Circuit became the latest circuit to weigh in on issues relating to the deadlines, and the documentary support necessary, for removal of actions to federal court.¹ In *Romulus*, the court held that a pleading or other paper on which the removal is based must provide the defendant with “sufficient information to easily determine that the matter is removable.” Moreover, an email from plaintiffs can provide an “other paper” basis for removal even if the email relies on information provided by the defendant itself in discovery.

Removal Rules

The general rules for the timing of a removal relevant for an understanding of the First Circuit’s decision can be summarized as follows:

- A case must be removed within 30 days of service of the complaint on that defendant.
- If the original complaint does not provide a basis for removal, the case may later be removed within 30 days of receipt of an amended complaint or “other paper” providing a basis for removal.
- Cases may ordinarily not be removed on the basis of federal diversity jurisdiction more than one year after commencement, absent a finding of bad faith by plaintiff to prevent removal.
- Cases removed based on the Class Action Fairness Act are not subject to the one year limitation on removal.
- The requirements for a CAFA removal, subject to certain exceptions not relevant here, are that: (1) there are at least 100 putative class members; (2) there is a minimal diversity (i.e., at least one named plaintiff or putative class member is a citizen of a state different from that of any defendant); and (3) the amount in controversy in the action exceeds \$5 million.

¹ *Romulus v. CVS Pharmacy, Inc.*, No. 14-1937, ____ F.3d ____ (1st Cir. Oct. 24, 2014).

With these rules in mind, in a case of first impression in the First Circuit, the court in *Romulus* answered the following important questions for removal practitioners:

***Romulus* Q&A**

1. QUESTION: When does a complaint or subsequent “other paper” provide a defendant with sufficient notice to provide a basis for removal, and specifically that the requisite amount in controversy is satisfied?

ANSWER: When plaintiffs’ complaint or subsequent paper “provides the defendant with sufficient information to easily determine that the matter is removable.”

2. QUESTION: Can an “other paper” support a removal under CAFA, or does that option only apply to non-CAFA cases?

ANSWER: The “other paper” basis applies equally to CAFA removals.

3. QUESTION: Is an email from plaintiffs considered an “other paper” based on which a case may be removed?

ANSWER: Yes.

4. QUESTION: Can the “other paper” received from plaintiffs be based on information originally provided to plaintiffs by defendants?

ANSWER: Yes.

Ascertaining the Amount in Controversy

The wage-and-hour dispute in *Romulus* arose from a pharmacy chain’s alleged corporate policy under which shift supervisors were required to remain on store premises during rest or meal breaks where there were no other managerial employees on duty or when only one other employee was on duty. In seeking unpaid wages and other damages for those supervisors’ alleged unpaid breaks, the complaint² did not provide information as to the number of breaks or the total amount of damages sought.

Based on the complaint, the defendant removed the action, estimating that the alleged lost wages from those breaks was \$10,396,944. The district court remanded the action “[b]ecause defendant’s assumptions [as to the amount in controversy] are in no way rooted in the allegations of the complaint.” Following remand, the parties conducted discovery in state court. Specifically, the pharmacy chain provided to plaintiffs certain data regarding time and attendance over an approximately two-year period. After analyzing that discovery, plaintiffs informed defendant via email of the calculation that there were approximately 116,499 meal breaks during the period when no other supervising employee was working. Based on that email, the pharmacy “was able easily to calculate a total of \$5,611,893 in damages.”

² The complaint refers to the First Amended Complaint; the original complaint was never served on defendant.

Within 30 days of receipt of that email and nearly a year and a half after the complaint was served, the pharmacy chain defendant removed the action for a second time, arguing that the email was an “other paper” from which it first ascertained that there was “a reasonable probability that the amount in controversy exceeds \$5,000,000.” Plaintiffs moved to remand on the ground that the removal was untimely because it was more than 30 days after service of the complaint. The district court granted the motion finding that even if the email was an “other paper,” it “provide[d] no ‘new’ information regarding removability that could not have been previously ascertained by defendant in light of the allegations in the amended complaint and its own knowledge and information.” Moreover, plaintiffs’ email was based on data that defendant itself had from the beginning of the litigation and had provided to plaintiffs in discovery.

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After granting defendant’s petition for review of the grant of remand under CAFA’s provisions for interlocutory review, a First Circuit panel unanimously reversed. The court held that “[t]he district court erred in imposing too great a duty of inquiry on the defendant.” A complaint or other subsequent paper must “[p]rovide the defendant with sufficient information to easily determine that the matter is removable.” The plaintiffs’ email was an “other paper” and it “was not disqualified from being an ‘other paper’ by the fact that it was based on information provided by the defendant.” Thus, the second removal was timely. The First Circuit further rejected the argument that “other paper” removals were not applicable to CAFA removals notwithstanding that the removal statute only referred to section 1332(a) (traditional diversity jurisdiction), and not 1332(d) (CAFA jurisdiction) when allowing “information relating to the amount in controversy” to serve as a basis for an “other paper” removal. Finally, the court found that the defendant had sustained its “substantive burden of demonstrating a reasonable probability that the amount in controversy exceeds \$5 million.”

Unanswered Question

The First Circuit declined to reach another important removal issue, namely whether a defendant could effectively create its own “other paper” to support removal via an affidavit or otherwise based on its own investigation where the basis for removal was not readily ascertainable from plaintiffs’ pleadings or an “other paper” generated by plaintiffs. Over the past few years, other circuits have addressed this question and held that a defendant could use its own “other paper” to support removal.³

³ See *Cutrone v. Mortg. Elec. Registration Sys., Inc.*, 749 F.3d 137, 146-48 (2d Cir. 2014); *Walker v. Trailer Transit, Inc.*, 727 F.3d 819, 825-26 (7th Cir. 2013); *Roth v. CHA Hollywood Med. Ctr., L.P.*, 720 F.3d 1121, 1125-26 (9th Cir. 2013); see also Alan E. Rothman, “9th Circ.’s Rare Gift Of Time To Remove Case,” *Law360* (July 10, 2013).

Lessons Learned

With the *Romulus* decision, defendants (at least in jurisdictions located within the First Circuit) can now breathe a little easier when a complaint provides little detail as to the amount in controversy. Unless the complaint provides information from which a defendant can “easily determine” that the amount in controversy is satisfied, a defendant can take some discovery in state court or wait for plaintiff to provide an “other paper”—which now clearly includes an email—from which the basis for removal can be ascertained. Where, as in *Romulus*, a class action is involved, defendants are not tethered to a one-year limitation generally applicable to diversity-based removals. Moreover, the “other paper” can even be derived from information originally provided by the defendant itself. Although defendants in the First Circuit cannot yet simply generate their own “other paper” on which a case can be removed, defendants need not conduct a detailed inquiry to determine a basis for removal, even if that basis could be culled from information in defendants’ possession. When in doubt, a defendant is still best served by removing based on the original complaint (even at the risk of an initial remand). Nevertheless, *Romulus* broadens the type of paper that will permit a subsequent removal and provides defendants with yet another valuable tool in winning the removal race.

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