ARNOLD & PORTER LLP

Product Liability Litigation Update

Recent Developments in the Law

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Removal: Ninth Circuit Expands Defendants' Timetable for Removing a Case to Federal Court

The removal statute provides only two time periods to remove a case -- within 30 days of service or within 30 days of receipt of an "other paper" showing removability. *See* 28 U.S.C. § 1446(b). But the Ninth Circuit held in *Roth v. CHA Hollywood Medical Center LP*, 2013 WL 3214941 (9th Cir. June 27, 2013), that a defendant can remove a case based on the fruits of its own investigation outside of the 30-day periods specified by statute.

Roth involved a putative wage and hour class action brought by a nurse against her employer. The amended complaint did not identify the citizenship of the putative class members or the amount in controversy. However, the defendant learned through its own investigation that at least one of the putative class members -- an employee of defendant's -- was a Nevada citizen and obtained a declaration to that effect. Defendant also obtained declarations from its vice president for human resources and general counsel, establishing that the claims at issue would exceed US$5 million. Having established the existence of minimal diversity and the requisite amount in controversy, the defendant removed the case under the Class Action Fairness Act.

Defendant's removal was effected more than 100 days after filing of the amended complaint and was the result of the company's own investigation, not receipt of any "other paper" by the defendant. Yet the Ninth Circuit concluded that the two statutory time periods for removal were no bar. The Court reasoned that those time limits were intended to proscribe the period for removal only when plaintiffs put defendants on notice of a case's removability, either within the four corners of the complaint or through service of an "other paper." Here, plaintiff never put defendant on notice that the case was removable -- that was something the defendant discovered through its own investigation. Hence, the defendant could remove even outside of the statutory time limits.

The Ninth Circuit's opinion in *Roth* effectively gives defendants the power and ability to create their own "other paper" and operate under their own timetable for removal. *Roth* is thus a powerful tool for defendants looking for removal opportunities. But defendants should still remain vigilant to assess whether removal rights are triggered by plaintiff's service of the complaint or other documents later in the case -- even under *Roth*, plaintiffs can argue that the 30-day limits apply in those circumstances.

An in-depth advisory on *Roth* published by Arnold & Porter attorneys is available here.

FDA Proposes Rule to Enable Generic Drug Manufacturers to Change Labels

The US Food and Drug Administration (FDA) announced its intent to issue a rule by September 2013 to allow generic drug manufacturers to change their products' labeling. The proposed rulemaking comes in the wake of the Supreme Court's decision in June in *Mutual Pharmaceutical Co. v. Bartlett*, 133 S. Ct. 2466 (2013), holding that state-law design defect claims against generic drug manufacturers that turn on the adequacy of a drug's label are preempted under *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567 (2011).

Although the precise contours of the proposed rule remain to be seen, a brief summary states that it will "clarify procedures for changes to the labeling of an approved drug to reflect certain types of newly acquired information in advance of FDA's review of such a change" and that such a rule "would create parity" between brand-name and generic manufacturers.

The proposed rule could have a number of important implications. Most obvious, the rule could limit the scope of generic manufacturers' preemption defenses. Doing so may also have implications for branded companies. With preemption of generic claims on the rise, plaintiffs have sought with limited success to hold innovator companies liable for injuries allegedly caused by taking the corresponding generic drug. If generic companies once again may generally be held liable for product liability claims, it may further dampen that effort by the plaintiffs' bar.

For questions or comments on this newsletter, please contact the Product Liability group at product@aporter.com.

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