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Removal: Ninth Circuit Clarifies Thirty-Day Removal Periods From Sections 1446(b)(1) And (b)(3)

In *Roth v. CHA Hollywood Med. Ctr.*, L.P., DBA Cha, No. 2:12-cv-07559 (9th Cir. 2013), the Ninth Circuit recently held that 28 U.S.C. § 1446(b)(1) and (b)(3), which require a defendant to remove a case within thirty days of receiving from the plaintiff either an initial pleading or some other document if that pleading or document shows the case is removable, operate only as limitations on the right to remove. The Court noted that it would be "odd, even perverse, to prevent removal" where the defendant may be in a better situation to determine citizenship for purposes of diversity jurisdiction. Thus, if a pleading or other document does not reveal that a case is removable, a defendant may still remove the case outside the two thirty-day periods if it discovers, based on its own investigation, that the case is removable. It is important to keep in mind, however, that a notice of removal must be filed, in any event, within one year of the commencement of a non-Class Action Fairness Act (CAFA) action. For CAFA cases, there is no such time limit and a case can conceivably be removed at any time, outside of the two thirty-day periods, under the court's holding in *Roth v. CHA Hollywood Medical Center*.

Spoliation: Wiping Cell Phone Texts Not Spoliation Where Necessary To Maintain Function Of Phone

Phone limits on the number of stored text messages may aid in a no-spoliation finding. The Pennsylvania Superior Court found in *PTSI, Inc. v. Haley*, No. 84 WDA 2012 (Pa. Sup. Ct. May 24, 2013), that the trial court did not abuse its discretion by denying PTSI's motion for sanctions for spoliation of cell phone text messages. The court noted that "[t]he doctrine of spoliation only applies to the improper intentional destruction of evidence that could be relevant to the case." Here, both defendants routinely deleted text messages, often on a daily basis, so as not to unduly encumber their iPhones. The court found that the volume of text messages and the limited amount of storage on cell phones would have made it very difficult, if not impossible, to save all text messages and to continue to use the phone for messaging. Defendants' conduct was therefore routine and not motivated by bad faith. In addition, the text messages deleted after entry of the Preservation Order were not relevant to the case because the defendants were no longer employed at the plaintiff company.

Privilege: Unlicensed Attorney Denied Privilege In Madoff Feeder Fund Suit

A New York federal magistrate judge recently ruled that communications between an unlicensed in-house lawyer at Citco Bank Nederland (a Dutch subsidiary of Citco Group Ltd.) and his employer were not privileged. In *Anwar v. Fairfield Greenwich Ltd.*, an MDL related to the Bernie Madoff investment scandal, counsel for Citco Defendants instructed the in-house lawyer not to answer certain questions during his deposition, on the basis of attorney-client privilege. Plaintiffs moved to overrule the privilege objections, asserting that Dutch law does not recognize an attorney-client privilege for communications with unlicensed in-house lawyers. The Citco Defendants countered that American law governed the privilege dispute, and that under American law, their communications with the in-house lawyer were privileged even if he was unlicensed, because they had a "reasonable belief" that he was their lawyer.

U.S. Magistrate Judge Frank Maas ruled that the communications were not privileged under Dutch or American law. Judge Maas explained that under Dutch law, "there is no recognized . . . privilege for unlicensed lawyers," and that there does not "appear to be any exception to that rule in circumstances where a client reasonably

believes that its conversations are privileged." Judge Maas recognized that under American law, there is a limited exception to the rule that attorney-client privilege applies only to licensed attorneys, where the client reasonably believes that the person with whom the communications were made was in fact an attorney. However, the exception did not apply in this instance because (1) the in-house lawyer had never been licensed in any jurisdiction, (2) there was no evidence that the in-house lawyer ever held himself out as a licensed lawyer, and (3) Dutch law requires that the employer of a licensed in-house lawyer sign a professional charter committing the employer to honor the lawyer's independence. Given these facts, Judge Maas held that "the Citco Defendants [could not] credibly argue that they were reasonably mistaken as to the [in-house] lawyer's licensure status."

Class Actions: Second Circuit Holds That Filing Class Action Does Not Toll Statutes Of Repose

In *American Pipe and Construction Co. v. Utah*, 414 U.S. 538 (1974), the Supreme Court held that the filing of a class action complaint tolls the statute of limitations for members of the proposed class. Trial courts have struggled with whether the American Pipe rule also applies to toll statutes of repose that extinguish the right to relief after a given period of time even if the plaintiff could not have been aware of its cause of action until after the time period expired. In *Police & Fire Retirement System of the City of Detroit v. IndyMac MBS, Inc.*, No. 11-2998-cv (2d Cir. June 27, 2013), the Second Circuit refused to extend the American Pipe rule to toll the three-year statute of repose in Section 13 of the Securities Act.

The court reasoned that, although statutes of limitations are generally equitable in nature and therefore subject to equitable tolling principles, statutes of repose grant defendants a substantive right to be free from liability after a legislatively determined period of time. Accordingly, a statute of repose is absolute unless subject to a legislatively created exception. Although the court's holding is limited to the three-year statute of repose in Section 13, its reasoning would likely apply to other Sections of the Securities Act as well as statutes of repose in other contexts, including the False Claims Act and state product liability statutes.

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