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Returning removal control to defendants

By Erin L. Burke and Jason C. Wright

When considering removal of a case from state court, it is well known that a defendant need not rush to federal court when the complaint does not, on its face, demonstrate that federal jurisdiction applies. This is predominantly an issue in diversity jurisdiction cases, where plaintiffs can be purposefully vague to avoid removal. For instance, in class actions plaintiffs can name a nondiverse class representative and/or intentionally omit the amount of damages at issue, leaving a defendant to show how damages should be calculated and that they exceed the \$5,000,000 threshold of the Class Action Fairness Act.

Gathering evidence to demonstrate federal jurisdiction exists may take more than 30 days. Perhaps recognizing this conundrum, Congress did not require defendants to remove within 30 days of receiving a complaint that did not facially establish federal jurisdiction (known as an indeterminate complaint). Instead, Congress included exceptions for subsequent removal when, for example, evidence supporting federal jurisdiction was later discovered. 28 U.S.C. Section 1446(b)(1) and (3). In particular, Section 1446(b)(3) provides: “[I]f the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy 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.”

But district courts, including the Central District of California, had substantially limited defendants’ ability to remove at a later date. Those courts ruled there were only two windows for removal: (1) within 30 days after service of the complaint; or (2) if the complaint was indeterminate, then 30 days after the plaintiff provided a document containing evidence of jurisdiction. In creating a requirement that the “paper” come from plaintiff, the courts left defendants who did not remove during the first period at the mercy of the plaintiff to trigger the second removal window. Evidence independently found by the defendant could not be used to trigger the second 30-day period. *Roth v. CHA Hollywood Medical Center, LP*, No. 12-07559 (C.D. Cal. Nov. 7, 2012) (holding the defendant did not prove they received a “paper” allowing removal when they obtained an affidavit from a putative class member establishing diversity); *B.C. v. Blue Cross of Cal.*, 2012 WL 12782 (C.D. Cal. Jan. 3, 2012) (holding that the defendant’s

own records, which established federal jurisdiction, did not constitute an other “paper” triggering the second window for removal).

The practical effect of this interpretation was to force defendants to remove within the first 30-day period. Though some cases imply otherwise, when a complaint does not establish federal jurisdiction, a defendant may nonetheless remove within the first 30-day period and rely on its own evidence to demonstrate jurisdiction. See, e.g., *Abrego v. Dow Chemical Co.*, 443 F.3d 676 (9th Cir. 2006). But the district court’s interpretation created a narrow opportunity for defendants to later remove an indeterminate complaint — and gave control of that opportunity to plaintiffs.

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More recently, in *Roth v. CHA Hollywood Medical Center*, 2013 DJDAR 8494 (June 27, 2013), the 9th U.S. Circuit Court of Appeals rejected the district courts’ narrow interpretation of the removal statutes. There, the plaintiff filed a first amended complaint on May 24, 2012, adding defendant CHA Hollywood Medical Center. In August 2012, CHA discovered through its own efforts a putative class member who was diverse, and so removed on Sept. 4, 2012. Consistent with other prior decisions, the district court remanded, holding CHA had not received a “paper” from plaintiff and thus the second 30-day period under Section 1446(b)(3) had not begun.

The district courts’ reasoning

The district courts’ opinions relied on the 9th Circuit decision in *Harris v. Banker’s Life and Casualty*, 425 F.3d 689 (2005). There, the 9th Circuit addressed whether the defendant must investigate the basis for federal jurisdiction within 30 days after receipt of the complaint. The plaintiff argued the defendant should have investigated the citizenship of all parties and determined that diversity jurisdiction applied; having not done so, the defendant failed to timely remove. The 9th Circuit rejected this argument and held that “notice of removability under Section 1446(b) is determined through examination of the four corners of the applicable pleadings, not through the subjective knowledge or a duty to make further inquiry.” Thus, *Harris*’s central tenet is that a de-

fendant has no obligation to investigate the basis for jurisdiction when the complaint is indeterminate.

In examining the defendant’s duty to investigate jurisdiction, the 9th Circuit also stated: “[T]he first thirty-day requirement is triggered by defendant’s receipt of an ‘initial pleading’ that reveals a basis for removal. If no ground for removal is evident in that pleading, the case is ‘not removable’ at that stage. In such case, the notice of removal may be filed within thirty days after the defendant receives ‘an amended pleading, motion, order or other paper’ from which it can be ascertained from the face of the document that removal is proper.”

Though the statement itself was dictum, the district courts relied on it to hold that defendants who did not remove within the first 30-day period cannot later remove based on their own investigation. Instead, in that instance, defendants must wait until the plaintiff provides a “paper” that evidences federal jurisdiction.

For instance, in *Roth* the district court, citing *Harris*, held that “[r]eferring to Section 1446, the Ninth Circuit has stated that a defendant cannot remove based on its own investigation.” The *Roth* court then stated that “[i]f the case is not removable from the complaint, then the defendants must wait until a second 30-day window is triggered by a change in the parties or other circumstances revealed in a newly filed ‘paper.’” Similarly, in *Adelpour v. Panda Express, Inc.*, No. 10-02367 (C.D. Cal. June 8, 2010), the court held the defendant had prematurely removed because it filed the removal before the plaintiff had provided evidence of CAFA jurisdiction.

The 9th Circuit’s ruling

In *Roth*, the 9th Circuit reversed and held Section 1446(b) only imposes time limits within which the defendant must remove when the plaintiff provides a complaint or other document evidencing federal jurisdiction. But the defendant may conduct its own research and, upon finding sufficient evidence to prove federal jurisdiction, file a notice of removal.

The 9th Circuit noted the holding in *Harris*, highlighting that even if a defendant could have discovered the basis for jurisdiction within 30 days of receiving the complaint, he has no obligation to do so. With this principal in mind, the court found that a defendant can later conduct an investigation and remove without waiting for a “paper” from the plaintiff.

The 9th Circuit further reasoned that Sections 1441 and 1446 must be read together. Section 1441 provides that a defendant may

remove if the case could have been filed in federal court, and thus it provides the power to remove. Section 1446 provides the procedure for removal. According to the 9th Circuit, reading the statutes together, they “permit a defendant to remove outside the two thirty-day periods on the basis of its own information, provided that it has not run afoul of either of the thirty-day deadlines.”

The 9th Circuit did not provide much of an explanation as to why Section 1441 — and the fact that it creates the power to remove — affected the interpretation of Section 1446’s procedural requirement. Arguably, the 9th Circuit found it inconsistent to provide defendants the power to remove but then strip defendants of a procedural mechanism to do so by giving plaintiffs the power to withhold a “paper” that triggers the second 30-day window.

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The 9th Circuit has returned to defendants some level of control in establishing that removal is appropriate. Now, when a complaint does not establish federal jurisdiction applies, rather than be at the mercy of the plaintiff subsequently producing evidence, the defendant can conduct its own search for facts establishing jurisdiction and remove once it has built its case.

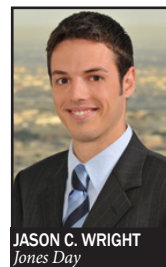
Finally, implicit in the 9th Circuit’s holding — and explicit in the district court’s holding — is that the putative class member’s affidavit which established diversity was not an “other paper” triggering the second 30-day window. Arguably, therefore, CHA faced no deadline or 30-day window in which to remove. But one might expect district court’s to find wiggle room with this issue, and defendants are well advised to remove within 30 days of getting evidence, from any source, of federal jurisdiction.

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