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Class Action Litigation ADVISORY ■

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CAFA Removal Just Got Easier (At Least in Some Courts)

In back-to-back rulings, the Eighth and Ninth Circuits cleared potential barriers to removal under the Class Action Fairness Act (CAFA). In *Raskas v. Johnson & Johnson*, No. 12-1996 (8th Cir. June 26, 2013), the Eighth Circuit held that a defendant seeking removal to federal court doesn't need to prove that damages *in fact* exceed the $5 million jurisdictional threshold, but must show only that the fact-finder "*might* legally conclude" that damages exceed $5 million. The next day, in *Roth v. CHA Hollywood Medical Center*, L.P., No. 13-55771 (9th Cir. June 27, 2013), the Ninth Circuit held that a defendant is not limited to removing within 30 days of service or within 30 days of receipt of an "other paper." 28 U.S.C. §§ 1146(b)(1), (b)(3). Rather, if a defendant's own investigation turns up facts supporting removal, the defendant can remove a case to federal court on its own timetable, so long as the plaintiff has not triggered a 30-day period for removal by putting the defendant on notice through the initial pleading or "other paper."

Raskas and *Roth* may signal a trend toward interpreting removal provisions more broadly in the wake of *Standard Fire.*

***Raskas:* If the fact-finder *might* award more than $5 million in damages, then CAFA's amount-in-controversy requirement is satisfied.**

In *Raskas*, three plaintiffs filed separate lawsuits against drug manufacturers Johnson & Johnson, McNeil-PPC, Pfizer, Inc., and Bayer Healthcare LLC alleging that each violated Missouri state consumer protection laws by conspiring with third parties to print premature expiration dates on medicines, so that patients would throw away perfectly safe medicines to buy more. Each defendant removed under CAFA based in part on evidence that total sales of the medications during the relevant period exceeded CAFA's $5 million jurisdictional threshold. The federal district court rejected the defendants' evidence and remanded the cases to state court because, in its view, the evidence of a manufacturer's total sales overstated the potential class-wide damages. *Raskas v. Johnson & Johnson, et al.*, 2013 WL 1283849, at *3 (E.D. Mo. Mar. 26, 2013).

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The Eighth Circuit reversed. Taking a broader view of "amount in controversy," the appellate court held that CAFA does not require a defendant to admit or prove that class-wide damages "are greater" than $5 million, only that "a fact finder *might* legally conclude that they are." And the manufacturers' evidence of total sales was proof enough of that possibility.

***Roth:* A defendant may be able to remove outside the normal 30-day windows based on facts that it gathers from its own investigation.**

The federal removal statute provides that a defendant can remove a case to federal court either within 30 days after the filing of a complaint or within 30 days after the defendant receives some other document containing facts supporting removal. 28 U.S.C. §§ 1146(b)(1), (b)(3). Other courts have held that those two 30-day periods are the only two windows for removal.

That's no longer true in the Ninth Circuit. In *Roth v. CHA Hollywood Medical Center, L.P.*, No. 13-55771 (June 27, 2013), the Ninth Circuit held that so long as a defendant has not "run afoul" of the two prescribed 30-day removal periods, the defendant can remove outside those 30-day periods if it discovers facts or information supporting removal.

The facts in *Roth* show how this could work. There, the defendants sought removal to federal court. When the plaintiffs moved to remand to state court, the defendant submitted (among other things) three declarations, one from a member of the putative class establishing the minimal diversity of citizenship needed under CAFA and two others from defendant CHA's president of human resources and general counsel attesting that the wages at issue were more than $5 million. The district court rejected the defendants' evidence, interpreting 28 U.S.C. § 1446 to permit removal only within the two prescribed 30-day periods and based only on information that a defendant receives from the *plaintiff*.

The Ninth Circuit disagreed, holding that the two 30-day periods in § 1446(b) apply only when the *plaintiff* has put a defendant on notice that a case is removable, not when a defendant seeks removal based on its own information. Under *Roth*, a defendant may remove at any time, based on its own information, so long as it has not "run afoul" of the two statutory 30-day periods by failing to remove within 30 days after being put on notice of removability through information received from the plaintiff.[1] In other words, a defendant cannot ignore the plaintiff's pleadings or other documents from the plaintiff that indicate a case may be removed within the two 30-day periods. But, by the same token, a plaintiff cannot prevent removal by not revealing information that supports removal and then objecting when the defendant discovers information through its own investigation and removes the case outside the 30-day window.

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1 The *Roth* court recognized that defendants possibly could exploit its ruling to engage in forum shopping and delay removal until it becomes strategically advantageous to do so. But the court also noted that any potential for abusive gamesmanship is diminished in non-CAFA cases because a defendant must remove within one year of the filing of the complaint, *see* 28 U.S.C. § 1446(c)(1), and that in the CAFA context, plaintiffs can head off much of the potential gamesmanship simply by providing a defendant with a document that triggers a 30-day window for removability.

A trend toward a more liberal removal policy?

In *Standard Fire*, the Supreme Court torpedoed one barrier to removal (stipulations to damages under $5 million in CAFA removal cases), and that decision may well have emboldened the *Raskas* and *Roth* courts to expand the reach of the federal removal statutes even further. We will see how other circuits react to these decisions, but here are a couple takeaways:

(1) **A defendant's burden on removal is not to prove the plaintiff's damages.** *Raskas* reinforces that the defendant's burden on removal is *not* to prove the actual amount of damages that the plaintiff would recover if successful on the merits, but merely to show that the plaintiff's claims have put into controversy an amount over the jurisdictional threshold. In *Raskas*, the court didn't require the defendants to provide a formula or methodology for establishing the plaintiffs' damages flowing from the alleged premature expiration dates; it was enough for the defendant to present gross sales figures for all of the sold medications placed "in controversy."

Raskas surely will help defendants who wish to remove consumer class actions to federal court (particularly within the Eighth Circuit), but who don't want to hamstring future arguments in opposition to plaintiffs' claims. In many consumer cases, evidence of gross sales will meet the amount-in-controversy requirement. By avoiding the need to provide a more precise damages calculation, a defendant can also avoid the common dilemma of wanting to provide enough evidence to ensure removal without presenting anything at the removal stage that a plaintiff could use as a class-wide damages model (or otherwise use against the defendant on the merits or at class certification).

Lastly, the *Raskas* court rejected the notion that a defendant's documents supporting removal must be admissible under the Federal Rules of Evidence, explaining that the burden is a pleading requirement and not a demand for proof. This further underscores that removing a case is not the same thing as a plaintiff *proving* a case.

(2) ***Roth* is a big win for defendants looking to remove outside the normal 30-day windows, but defendants should proceed with caution (at least at first).** *Roth* is unique in permitting removal outside the statutorily prescribed 30-day windows based on information that the defendant gathers through its own investigation. That is good (indeed, great) news for defendants in the Ninth Circuit who learn facts supporting removal outside the 30-day periods.

Given the sweeping nature of the ruling, we expect a petition for rehearing *en banc* in *Roth*. In the meantime (and even in the Ninth Circuit), where the removability of a case is indeterminate, a defendant remains wise to (1) conduct its own investigation immediately so that it can remove within 30 days of service of the complaint, and (2) when that is not possible, to remove within 30 days of obtaining the information from its investigation providing the basis for removal. And in all events, defendants should remain on red alert for any "other paper" from the plaintiff that could trigger a 30-day deadline for removal.

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