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WINDING THE REMOVAL CLOCK: THE SECOND CIRCUIT CLARIFIES THE DEADLINE FOR REMOVAL UNDER THE CLASS ACTION FAIRNESS ACT

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Introduction

When faced with a state court lawsuit, a critical consideration for any defendant is the forum in which to litigate – whether to remain in state court or, if possible, remove the case to federal court. In the case of a putative class action, proceeding in state court under state rules of procedure and other local influences could have significant impact on how the case proceeds. As such, a defendant must first consider whether the claims are removable, and, if removable, what deadline applies to the notice of removal. In assessing the timeliness of removal, a defendant should first look to the statutory deadlines set forth in 28 U.S.C. § 1446(b) ("Section 1446(b)").[1] However, as the United States Court of Appeals for the Second Circuit recently explained in *Cutrone v. Mortgage Electronic Registration Systems, Inc.*,[2] the provisions of Section 1446(b) do not provide all of the answers.

The removal clock does not start ticking merely upon the service of a complaint or other paper that may suggest removability. Notably, the *Cutrone* court held that neither of Section 1446(b)'s 30-day removal periods is triggered until a plaintiff, either in an initial pleading or other paper, affirmatively "provides facts explicitly establishing removability or alleges sufficient information for the defendant to ascertain removability."[3] Moreover, according to the Second Circuit, where removability is indeterminate on the face of a complaint or other paper, a defendant may remove based on facts discovered during an independent investigation, but it is under no duty to investigate or to remove prior to the triggering of the removal clocks.[4]

Importantly, the rule announced by the Second Circuit in *Cutrone* applies equally to removal under the Class Action Fairness Act ("CAFA"),[5] at issue in the case, and under traditional diversity principles.[6] As such, the Second Circuit's decision has important implications for any defendant seeking to remove a case to federal court in compliance with Section 1446(b). Indeed, the decision not only clarifies, but appears to expand, the time period for a defendant to assess removability and to file a notice of removal in the district courts within the Second Circuit.[7]

Background and the District Court's Decision

The *Cutrone* decision arose from a complaint filed against defendant Mortgage Electronic Registration Systems, Inc. ("MERS") in the Supreme Court of New York, Kings County.[8]

The complaint did not estimate the expected size of the putative class, estimating only the existence of "hundreds, and likely thousands, of persons and entities."[9] The complaint similarly failed to allege, specify, or suggest the total amount of damages at issue for the

putative class. The complaint only provided the amount of damages allegedly suffered by the plaintiffs. In response to MERS's demand for a bill of particulars, plaintiffs again merely estimated the existence of more than 100 likely putative class members and stated that they could not "reasonably state the precise amount in controversy."[10]

MERS filed a notice of removal under CAFA more than 90 days after plaintiffs filed their complaint. Plaintiffs moved to remand, and the district court granted plaintiffs' motion, finding that the complaint contained sufficient allegations for MERS "'to make an intelligent assessment as to CAFA removability'" and, thus, that the notice of removal was untimely.[11]

The Second Circuit's Decision Reversing the District Court

In granting MERS's petition for permission to appeal, the Second Circuit instructed the parties to address two issues: (1) whether the Second Circuit's prior decision, finding that "the removal clock does not start to run until the plaintiff serves the defendant with a paper that explicitly specifies the amount of monetary damages sought,"[12] applies to cases removed under CAFA; and (2) "whether a defendant may remove a case under CAFA if neither of the two 30-day periods set forth in [Section 1446(b)] is triggered because the initial pleading and other documents are indeterminate with respect to removability but the defendant later asserts removability on the basis of its own investigation."[13]

The Second Circuit answered both of these questions with a firm "yes."[14] In doing so, the Second Circuit, following the lead of other circuit courts of appeal, established a bright line rule for defendants and courts to follow in assessing the 30-day removal periods under Section 1446(b) and the timeliness of notices of removal under CAFA.[15]

Issue 1: When Do the 30-Day Removal Clocks Begin to Run in CAFA Cases?

As to the first issue, the Second Circuit unequivocally held that "in CAFA cases, the removal clocks of [Section 1446(b)] are not triggered until the plaintiff serves the defendant with an initial pleading or other document that explicitly [1] specifies the amount of monetary damages sought or [2] sets forth facts from which an amount in controversy in excess of $5,000,000 can be ascertained."[16] Thus, according to the Second Circuit, the removal time limits begin to run "*only* in cases in which the plaintiff's initial pleading or subsequent document has explicitly demonstrated removability."[17]

Under this rule, a defendant must analyze an initial pleading or other paper with "a reasonable amount of intelligence" in assessing removability.[18] A defendant, however, has no obligation to independently investigate a plaintiff's allegations or to consider material outside of the relevant documents to comply with Section 1446(b)'s 30-day removal periods.[19] This is true even where the facts supporting removability are primarily in the defendant's possession or control, or where the case may be removable as a matter of fact based on information outside of the relevant documents.[20] Simply put, "[i]f removability is not apparent from the allegations of an initial pleading or subsequent document, the 30-day clocks of [Section 1446(b)] are not triggered."[21]

In applying this rule to the facts, the Second Circuit found that nothing in plaintiffs' complaint or other litigation document explicitly specified the amount in controversy or alleged sufficient information for MERS to ascertain removability. As such, the Second Circuit held that the 30-day removal clocks were never triggered and had not begun to run at the time MERS filed its notice of removal.[22]

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Issue 2: Is a Defendant Permitted to File a Notice of Removal Where the 30-Day Removal Periods Have Not Been Triggered?

As to the second issue, the Second Circuit held that a defendant is permitted to remove a case to federal court outside of the 30-day periods set forth in Section 1446(b).[23] In other words, if a defendant's own investigation uncovers evidence of removability, a defendant may file a notice of removal whether or not the removal clocks under Section 1446(b) have begun to run.[24]

In so holding, the Second Circuit explained that the issues of "whether a basis for removal exists and whether removal is timely" are separate questions.[25] The removability question, on the one hand, addresses whether facts exist to determine whether the plaintiff's claims satisfy the jurisdictional requirements of CAFA, a determination that often involves materials outside of a plaintiff's pleadings.[26] The timeliness inquiry, on the other hand, is concerned with whether a plaintiff's pleading or other paper, on its face or in combination with other documents, explicitly demonstrates the removability of the case.[27] "Thus, even if a defendant *could* remove immediately upon the filing of a complaint because the case satisfies the requirements of federal subject matter jurisdiction, a complaint or other document from the plaintiff that does not explicitly convey the removability of a case does not trigger the removal clocks of [Section 1446(b)]."[28]

The Second Circuit also rejected plaintiffs' argument that the Court's rule will result in "gamesmanship" and "intentional delay" by defendants.[29] This concern, plaintiffs argued, is heightened with respect to removal under CAFA, which is not subject to the one-year limitation applicable to removal under traditional diversity principles[30] and which would therefore permit a defendant to delay removal "'until the state court has shown itself ill-disposed to defendant, or until the eve of trial in state court.'"[31] The Second Circuit dismissed the argument out of hand, stating that plaintiffs can protect themselves by serving a pleading or other document that explicitly demonstrates removability and that, "in most cases, defendants will likely remove as soon as the existence of federal jurisdiction predicates becomes apparent."[32]

Conclusion

The Second Circuit's decision in *Cutrone* provides important clarification of the law regarding the deadlines to file a notice of removal under both CAFA and traditional diversity principles in the Second Circuit. Moreover, the Second Circuit's holding, its rationale, and its application to the facts suggest that courts in the Second Circuit may take a narrow view of what constitutes a sufficiently "explicit" demonstration of removability in a pleading or other litigation document, which could limit the circumstances in which Section 1446(b)'s removal clocks are triggered. Such a result should be welcome news for defendants considering removal of state court cases, particularly in putative class actions where complaints often lack specificity regarding the damages and other relief sought on behalf of the putative class.

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[1] On its face, Section 1446(b) sets forth two deadlines for filing a notice of removal: (1) 30 days from service of a summons and copy of the complaint if the case stated in the initial pleading is removable; or (2) if the initial pleading is not removable, 30 days after receipt by the defendant of "an amended complaint, motion, order, or other paper" that first demonstrates that the case is or has become removable. 28 U.S.C. §1446(b).
[2] *Cutrone v. Mortg. Elec. Registration Sys., Inc.*, --- F.3d ---, 2014 WL 1492715 (2d Cir. Apr. 17, 2014).
[3] *Id.* at *7, *10.
[4] *See id.* at *7, *9-10.
[5] *See* 28 U.S.C. §§ 1332(d), 1453.
[6] *See Cutrone*, 2014 WL 1492715, at *5-7; *see also Moltner v. Starbucks Coffee Co.*, 624 F.3d 34, 37-38 (2d Cir. 2010) (holding that, in the context of traditional diversity removal, "the removal clock does not start to run until the plaintiff serves the defendant with a paper that explicitly specifies the amount of monetary damages sought").
[7] Notably, removal under traditional diversity principles pursuant to 28 U.S.C. § 1332(a) is subject to a general one-year limitation, such that any notice of removal must be filed within one year of the commencement of the action. *See* 28 U.S.C. § 1446(c)(1). Removal under CAFA, however, is not subject to the one-year limitation. *See* 28 U.S.C. § 1453(b).
[8] *See Cutrone*, 2014 WL 1492715, at *1-2.
[9] *Id.*
[10] *Id.*
[11] *Id.* at *3 (quoting *Cutrone v. Mortg. Elec. Registration Sys., Inc.*, No. 13-CV-3075 (ENV)(VMS), 2013 WL 5960827, at *6 (E.D.N.Y. Nov. 6, 2013)).
[12] *Moltner*, 624 F.3d at 37-38.
[13] *Cutrone*, 2014 WL 1492715, at *3-4.
[14] *See id.* at *1, *10.
[15] *See Cutrone*, 2014 WL 1492715, at *5-7. In its decision, the Second Circuit cited to and relied upon several decisions from other federal circuit courts of appeals. *See Mumfrey v. CVS Pharmacy, Inc.*, 719 F.3d 392, 400 (5th Cir. 2013); *Walker v. Trailer Transit, Inc.*, 727 F.3d 819, 824 (7th Circ. 2013); *In re Willis*, 228 F.3d 896, 897 (8th Cir. 2000); *Kuxhausen v. BMW Fin. Servs. NA LLC*, 707 F.3d 1136, 1139-40 (9th Cir. 2013); *Akin v. Ashland Chem. Co.*, 156 F.3d 1030, 1036 (10th Circ. 1998).
[16] *Cutrone*, 2014 WL 1492715, at *7; *see also id.* at *10.
[17] *Id.* at *9.

[18] *Id.* at *7; *see also id.* at *5 (citing *Whitaker v. Am. Telecasting, Inc.*, 261 F.3d 196, 206 (2d Cir. 2001)).
[19] *Id.* at *7 ("While a defendant must still apply a 'reasonable amount of intelligence' to its reading of a plaintiff's complaint, we do not require a defendant to perform an independent investigation into a plaintiff's indeterminate allegations to determine removability and comply with the 30-day periods of 28 U.S.C. §§ 1446(b)(1) and (b)(3).").
[20] *See id.* at *7, *8-9 (rejecting plaintiffs' argument that the *Moltner* rule should only be applied where the plaintiffs themselves are in possession of information from which they can explicitly specify or allege damages on behalf of putative class members).
[21] *Id.* at *5 (describing the Second Circuit's *Moltner* standard).
[22] *See id.* ("The only amount provided in the compliant is that which the two named plaintiffs are seeking to recover: the $6,835.20 they paid in New York state mortgage recording taxes upon refinancing their mortgage."). The Second Circuit rejected plaintiffs' argument that MERS could have easily determined removability by multiplying the plaintiffs' stated damages by the estimated "hundreds, and likely thousands" of putative class members, noting simply that plaintiffs' argument failed because they did not allege, or even approximate, the value of the other putative class members' claims in any relevant pleading or document. *Id.*
[23] *See id.* at *8-10.
[24] *See id.* at *9; *see also Walker*, 727 F.3d at 824-25; *Mumfrey*, 719 F.3d at 398-99, 400 n.13; *Kuxhausen*, 707 F.3d at 1141 n.3.
[25] *Cutrone*, 2014 WL 1492715, at *8 ("'The moment a case becomes removable and the moment the 30-day removal clock begins to run are not two sides of the same coin.'" (quoting *Walker*, 727 F.3d at 824)).
[26] *See id.* (citing *Walker*, 727 F.3d at 824-25).
[27] *See id.* at *9 (citing *Walker*, 727 F.3d at 824-25).
[28] *Id.*
[29] *Id.*
[30] *See id.* at *9-10; *see also* Note 7, *supra*.
[31] *Cutrone*, 2014 WL 1492715, at *9 (quoting *Roth v. CHA Hollywood Med. Center, L.P.*, 720 F.3d 1121, 1126 (9th Cir. 2013)).
[32] *Id.* ("Because we already held above that the plaintiffs' filing failed to trigger the 30-day periods of [Section 1446(b)], we conclude that MERS's removal based on its own investigation was permissible. We accordingly hold that MERS's removal was timely.").