

## **Ninth Circuit Preserves Each Defendant's Right to Removal**

### ***Product Liability Advisory***

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One of the first important strategic decisions defense counsel faces upon receipt of a new state court complaint is whether to remove the case to federal court. For diversity-based cases, when the complaint contains multiple defendants, determining citizenship can be challenging. Furthermore, multiple defendant cases often present more frustrating questions that must be investigated before removal: whether other defendants have already been served and when, whether a named defendant is a "sham" defendant sued to prevent removal, and whether consent to removal is necessary from other defendants. These issues must be resolved promptly given the 30-day time limit for removal under 28 U.S.C. Section 1446(b).

The 30-day time limit rule can be equally frustrating as it not been consistently construed among the circuit Courts of Appeal, nor in district courts within the Ninth Circuit Court of Appeals. Recently, the Ninth Circuit tackled the timing question for the first time. In *Destfino v. Reiswig*, 630 F.3d 952 (9th Cir. Jan. 21, 2011), a defendant filed a removal notice within 30 days of receiving service of the summons and complaint. The problem was that it was not the first-served defendant, so the plaintiff moved to remand the case based on untimeliness given that more than 30 days had elapsed from service on the first-served defendant. The plaintiff's motion to remand was denied. The issue for the Ninth Circuit was whether each defendant receives its own 30 days from service to remove a case (the later served rule), or whether the 30 days for all defendants commences upon service on the first defendant (the first served rule). After analyzing the rationales in support of each interpretation, the Ninth Circuit adopted what it deemed the "wiser" and "more equitable" approach: the later-served rule, with each defendant receiving its own 30 days upon service to remove a case.

This rule is generally welcomed by defense counsel. While it does not obviate the need for prompt inquiries into issues such as the service status of other named defendants and consent, it will serve to discourage gamesmanship by plaintiffs in their service of defendants. More fundamentally, it will preserve each defendant's right to remove a case to federal court if it desires, and eliminate later-served defendants from being bound by the choice of other counsel. Yet, given the split among circuit courts, this is not likely the last word on the timing requirement of Section 1446(b).

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