Ninth Circuit Adopts "Unequivocally Clear and Certain" Standard to Determine When 30-Day Removal Clock is Triggered

By Brian D. Gross

October 19, 2021

On October 1, 2021, the Ninth Circuit Court of Appeals ruled in favor of MG+M client The Boeing Company (“Boeing”) in an appeal of an order that remanded the case to state court. The Ninth Circuit reversed the district court's remand order and adopted Boeing's argument that the thirty day removal clock is not triggered until “an amended pleading, motion, order, or other paper” makes the grounds for removal “unequivocally clear and certain.”[1]

The federal officer removal statute is codified at 28 U.S.C. § 1442 and permits removal if: (1) the removing party is a “person”; (2) a causal nexus exists between the plaintiff's claims and defendant's actions taken at the direction of a federal officer; and (3) the removing party has a colorable federal defense.[2] 28 U.S.C. § 1446 governs the corresponding procedure for such removal and allows two pathways for perfecting removal: (1) if the basis for removal is clear from the initial pleading, the case must be removed within thirty days from receipt of that pleading; or (2) if the case stated by the initial pleading is not removable, the case must be removed within thirty days of receipt 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.”[3]

In the underlying case, Plaintiff sued Boeing and other defendants in Los Angeles Superior Court, alleging that she developed mesothelioma as a result of exposure to asbestos. Plaintiff's Complaint failed to state any basis for removal, but Plaintiff later alleged that she was exposed to asbestos through the work her husband allegedly performed on Boeing aircraft while serving in the U.S. Marine Corps, thus triggering federal officer jurisdiction. Boeing removed the case, pursuant to 28 U.S.C. § 1446(b)(3), within thirty days of ascertaining that the case was removable.[4] Nevertheless, the district court, relying on its interpretation of *Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1253 (9th Cir. 2006), rejected the “unequivocally clear and certain” standard for triggering removal argued by Boeing, and concluded that Boeing's removal was untimely because it was in possession of “sufficient facts” to justify removal prior to receiving Plaintiff's amended discovery responses. Accordingly, the district court granted Plaintiff's motion to remand and awarded attorneys' fees to Plaintiff, finding that Boeing's removal was objectively unreasonable. Boeing appealed.

The Ninth Circuit reversed the district court, finding that Boeing removed the case within thirty days of ascertaining that the case was removable. *Dietrich v. The Boeing Company*, et al., No. 19-56409 (Ninth Circuit 2021) at 14. The Court explained that the district court's reliance on *Durham's* statement that the removal clock begins to run when “sufficient facts” are disclosed was misplaced because it “does not tell us *when* the facts disclosed” are sufficient. *Id*. at 13 (emphasis in original). Its reliance equated “facts sufficient to *allow* removal with facts sufficient to *require* removal.” *Id*. (emphasis in original). To avoid such confusion in the future, and in furtherance of the “bright line” approach announced in *Harris v Bankers Life & Cas. Co*., 425 .3d 689, 694 (9th Cir. 2005), the Court adopted the “unequivocally clear and certain” standard, thus requiring the basis for removal contained in “an amended pleading, motion, order, or other paper” be unequivocally clear and certain before the removal clock is triggered.[5]

Based on the fact that complaints require only a short and plain statement of the grounds for each claim, a defendant may not have reasonable grounds to remove a case from state to federal court based on a plaintiff's initial

pleading. As a result, 28 U.S.C. § 1446(b)(3) provides a second pathway for removal where a defendant receives "an amended pleading, motion, order or other paper from which it may first be ascertained that the case is . . . removable." The Ninth Circuit's adoption of the "unequivocally clear and certain standard" provides clarity to all litigants moving forward with respect to this second pathway for removal by addressing *when* facts are sufficient to trigger removal, and will "'bring[] certainty and predictability' . . . 'avoid[] gamesmanship in pleading,'" and avoid litigation over whether facts were sufficient or the defendant's investigation was sufficient to trigger removal. Id. at 12, quoting *Harris*, 425 .3d 689 at 697.

[1] 28 U.S.C. § 1446(b)(3) states, in pertinent part, that "if 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."

[2] 28 U.S.C. § 1442; *see Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1251 (9th Cir. 2006) (citing *Jefferson County v. Acker*, 527 U.S. 423, 431 (1999)); *Mesa v. California*, 489 U.S. 121, 124–25, 131–35 (1989).

[3] 28 U.S.C. § 1446(b)(3).

[4] It was not until Plaintiff provided amended responses to discovery, and for the first time confirmed that she alleged asbestos exposure from military aircraft manufactured by Boeing pursuant to government contracts, that Boeing could ascertain that the case was removable.

[5] The Fifth and Tenth Circuits previously adopted the "unequivocally clear and certain" standard. *Bosky v. Kroger Tex., LP*, 288 F.3d 208, 211 (5th Cir. 2002); *Paros Props. LLC v. Colo. Cas. Ins. Co.*, 835 F.3d 1264, 1269 (10th Cir. 2016). The Ninth Circuit found that other circuit courts have also used this same standard, if not by the same name. *Id*. at 11-12; s*ee Romulus v. CVS Pharmacy, Inc.*, 770 F.3d 67, 75 (1st Cir. 2014) (requiring "a clear statement of the damages sought or . . . [a] paper set[ting] forth sufficient facts from which the amount in controversy can easily be ascertained by the defendant by simple calculation" for removal based on diversity jurisdiction); *Moltner v. Starbucks Coffee Co.*, 624 F.3d 34, 38 (2d Cir. 2010) (per curiam) (requiring "a paper that explicitly specifies the amount of monetary damages sought" for removal based on diversity jurisdiction); *Berera v. Mesa Med. Grp., PLLC*, 779 F.3d 352, 364 (6th Cir. 2015) (requiring "solid and unambiguous information that the case is removable," which "is akin to actual notice"); *Walker v. Trailer Transit, Inc.*, 727 F.3d 819, 825 (7th Cir. 2013) (requiring "specific and unambiguous notice that the case satisfies federal jurisdictional requirements and therefore is removable").

Attorney Advertising. This material is for general informational purposes only and does not represent our advice as to any particular set of facts; nor does it represent any undertaking to keep recipients advised of all legal developments. Prior results do not guarantee a similar outcome. © 2026 MG+M The Law Firm