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PERSPECTIVE

One day you're in, one day you're out

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Generally, when announcing a new rule of law, the rendering court must determine whether the rule should be applied prospectively or retroactively. A court cannot embrace what Justice David Souter defined as “selective prospectivity” (*James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 537-38 (1991)), which would allow courts to determine how to apply the rule on a case-by-case basis. This choice, however, vanishes when the newly announced rule serves to deprive the federal courts of jurisdiction. In such cases, the rule must be applied retroactively.

This principle was clearly stated by the 9th U.S. Circuit Court of Appeals in its 2010 decision *Haight v. Catholic Healthcare West*, 602 F.3d 949, which addressed the timeliness of an appeal of a qui tam action under the Federal Rules of Appellate Procedure. The appellant sought review of the trial court’s adverse ruling on summary judgment. While an appellant generally must notice an appeal within 30 days of a final decision, a separate and longer 60-day period applies to cases in which the United States is a party. As a qui tam plaintiff, the appellant relied on prior 9th Circuit precedent that interpreted the 60-day deadline to apply whether the United States was an actual or potential party to the lawsuit (that is, whether or not the United States decided to intervene in the action).

By filing his notice of appeal 51 days after the final decision was rendered, the *Haight* court recognized that the appellant timely filed his appeal under 9th Circuit precedent. But between the time the appeal was filed and the *Haight* decision was rendered, the U.S. Supreme Court overturned that 9th Circuit precedent, holding that the 60-day deadline only applies when the United States is an actual party to the action. Thus, despite appellant’s reliance on 9th Circuit precedent when he noticed the appeal, the *Haight* court concluded that it had no choice but to apply the Supreme Court’s retroactively, because “[a] timely notice of appeal is a jurisdictional prerequisite,” and the failure to file a timely notice of appeal “deprive[s] the Court of Appeals of jurisdiction.” Therefore, the Supreme Court’s decision concerned the court’s jurisdiction and had to be applied to appellant’s pending action.



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One of the most important elements of the 9th Circuit’s decision is its holding that equitable considerations, and even due process concerns, are irrelevant in the retroactive application of jurisdictional rules. In reaching its decision, the *Haight* court echoed the Supreme Court’s admonition that any equitable concerns “must give way before the rigorous rules of statutory jurisdiction.” As the Supreme Court has explained, this rule is a product of the federal court’s limited jurisdiction, which precludes the courts from expanding their jurisdiction beyond the limits proscribed by the Constitution and Congress. See *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 818 (1988); *Landgraf v. USI Film Products*, 511 U.S. 244, 274 (1994). Hence, once a jurisdictional rule is rendered, the court is powerless to extend its jurisdiction no matter how harsh the consequences may be.

Undeniably, the principle articulated in *Haight* has the potential to have profound consequences on matters that involve the court’s jurisdiction. The *Haight* decision is an example of this fact. Additionally, consider the Supreme Court’s 2013 decision in *Standard Fire Ins. Co v. Knowles*, 133 S. Ct. 1345, in which the court ruled that a plaintiff cannot defeat removal under the Class Action Fairness Act by pleading allegations that, on their face, defeat removal. While the plaintiff is usually considered the “master of his own complaint,” the court held that express allegations that defeat CAFA jurisdiction (i.e., that the class is less than 100 persons, or that the amount in controversy is less than \$5 million) do not alter a defendant’s evidentiary

burden to show that remand is proper under CAFA. In other words, the plaintiff’s allegations concerning CAFA jurisdiction are irrelevant in determining whether the defendant has met its burden to show that removal is proper.

Given that jurisdictional determinations by the Supreme Court must be given retroactive effect, without concern for the equitable results of that application, *Standard Fire* necessarily affected cases pending at the time the decision was rendered. For example, imagine that you are a defendant in the 9th Circuit considering removal under CAFA prior to the *Standard Fire* decision. In your case, the plaintiffs have expressly alleged that their class is comprised of less than 100 persons. However, during discovery, the plaintiffs produce a list showing their potential class contains far in excess of 100 individuals. Do you then seek to remove the case to federal court?

The answer is likely more difficult than it appears. In the 9th Circuit, prior to *Standard Fire*, a removing defendant was required to show CAFA jurisdiction to a clear legal certainty. See *Lowdermilk v. United States Bank National Ass’n*, 479 F.3d 994 (2007). Importantly, the 9th Circuit provided that this “legal certainty” rule was a consequence of a plaintiff’s ability to plead to avoid federal jurisdiction. So, prior to *Standard Fire*, a defendant may have reasonably withheld moving for remand — despite receiving discovery responses strongly supporting CAFA jurisdiction — and waited in reliance on 9th Circuit precedent until he or she could support remand to a legal certainty.

But based on the rule of retroactive

application, the Supreme Court’s decision in *Standard Fire* not only established that a plaintiff’s allegations to avoid jurisdiction can be disregarded going forward, but that this was always the rule. See *Rodriguez v. AT&T Mobility Services LLC*, 728 F.3d 975 (9th Cir. 2013). Thus, returning to our hypothetical defendant, *Standard Fire* effectively established that he or she should have moved for remand earlier, irrespective of the then-existing 9th Circuit precedent. Finally, such a defendant cannot claim that such an application is unfair, as equitable considerations cannot extend the jurisdiction of the federal courts and must be ignored.

What’s the lesson? Generally speaking, it is dangerous to rely on pronouncements of the Courts of Appeals on jurisdictional issues that are neither well-settled nor find their support in Supreme Court authority. On one hand, a litigant should proceed cautiously by electing the most conservative deadlines that could reasonably be applied to his case. In *Haight* for example, plaintiff could have protected himself by noticing his appeal before the 30-day deadline even though the 9th Circuit currently had a more lenient rule. On the other hand, it may be impossible to avoid the detrimental effects of a new rule concerning federal jurisdiction may have on your case. Considering the example of CAFA removal, if a defendant had removed the case earlier, the plaintiff may have successfully obtained remand under the 9th Circuit’s “legal certainty” standard prior to the *Standard Fire* decision. And at the same time, once the Supreme Court rendered the *Standard Fire* decision, it may already be too late to remove the case under the new rule, as the deadline to seek removal would have already passed.

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