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# *FEDERAL PRACTICE*

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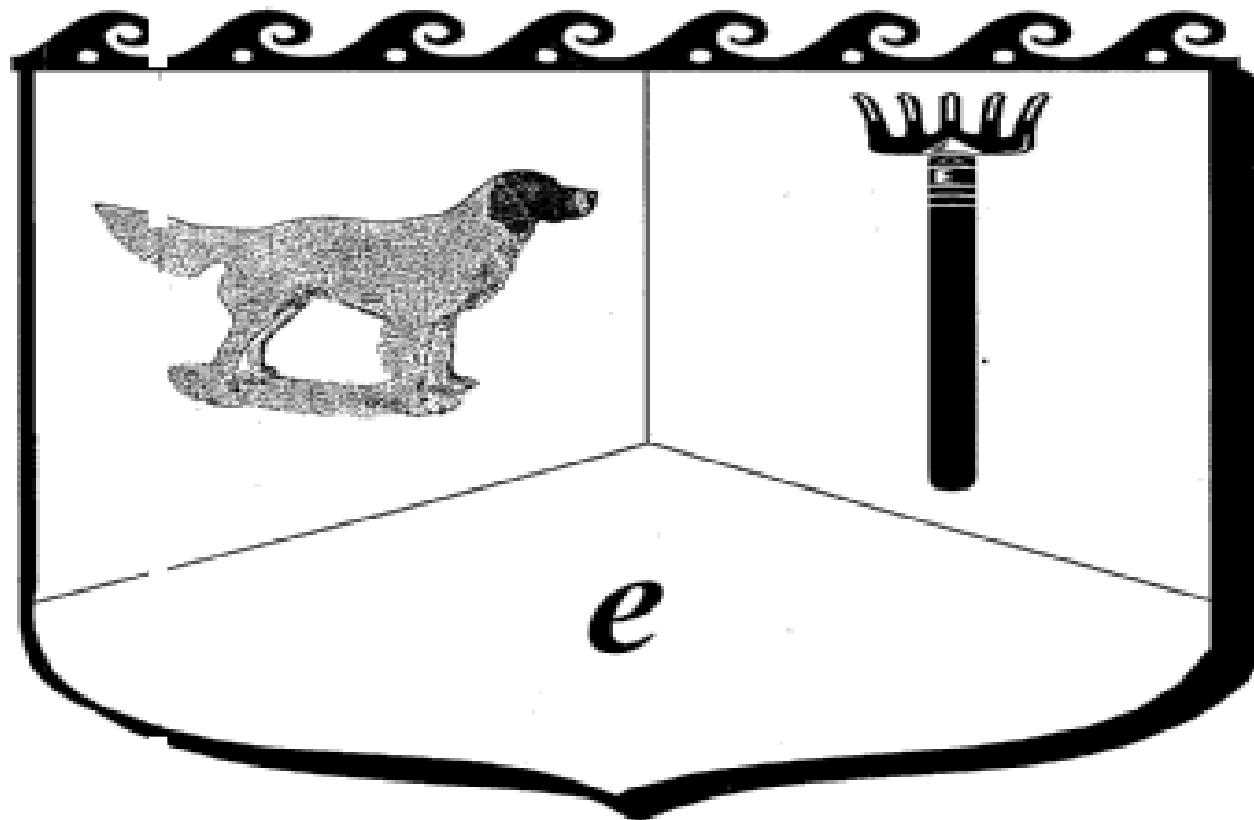
## **Hidden Nuggets**

James Wagstaffe

San Francisco, California

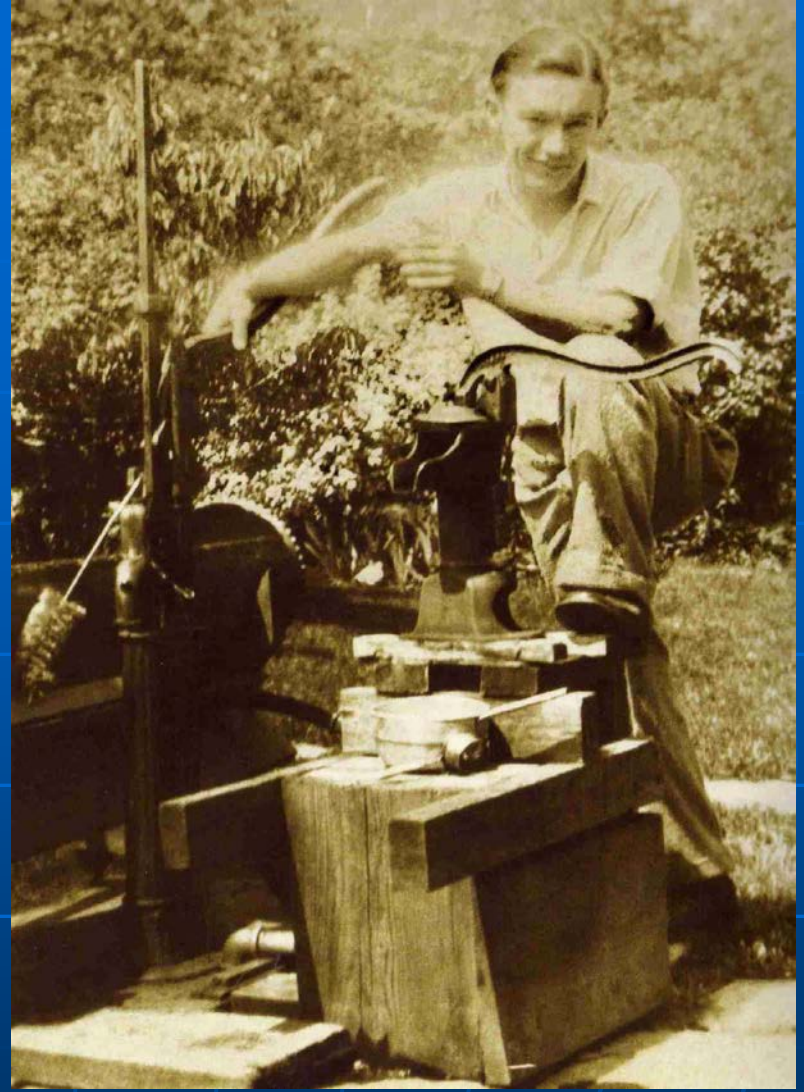
wagstaffe@kerrwagstaffe.com

# *Wagstaffe University*





SYLVESTER PENNOYER



HARRY TOMPKINS



JURISDICTION?



ELEMENT?

## *“Jurisdiction” or “Element”?*

- Bartender's wins verdict on Title VII and related state claims for sexual harassment
- Post-verdict, D moves to dismiss for *lack of jurisdiction* (< 15 employees)
- Plaintiff: Objection waived as threshold is not "jurisdictional" and supplemental claims proper

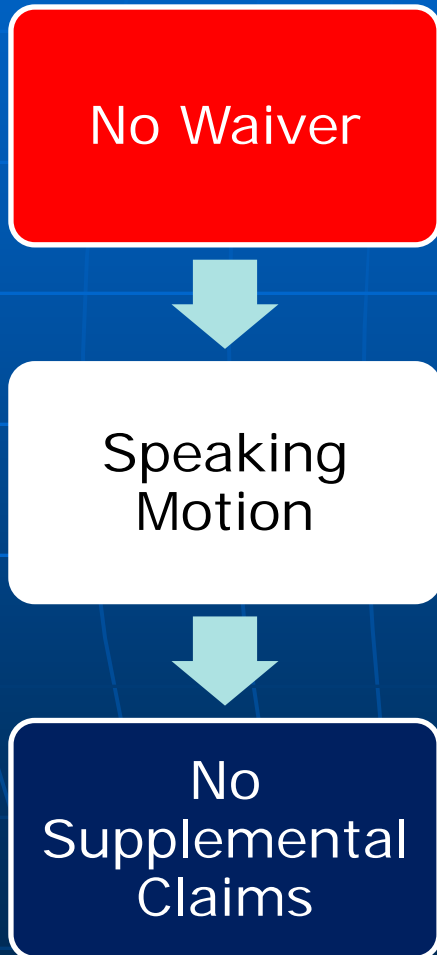
*HOW SHOULD THE COURT  
RULE?*

# *Arbaugh v. Y & H Corp.*

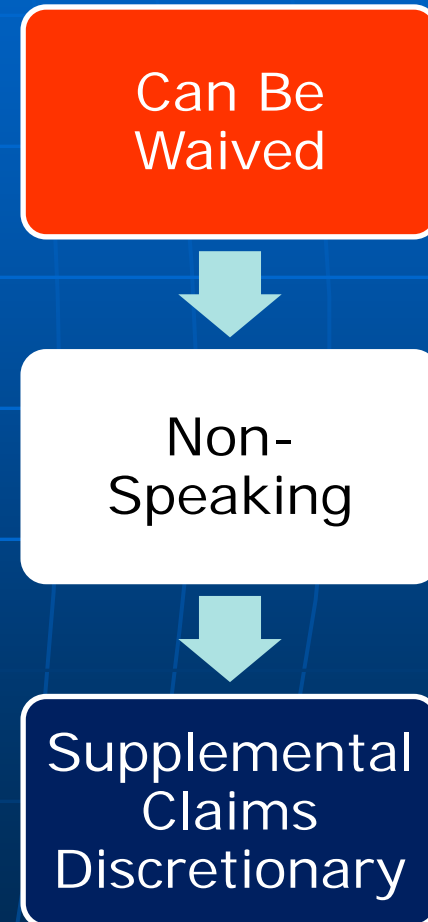
126 S.Ct. 1235 (2006)--Title VII numerical prerequisite – not jurisdictional

*See also Day v. AT&T (9<sup>th</sup> Cir. 2012) 685 F.3d 848—minimum age requirement for ADEA not jurisdictional*

# Rule 12(b)(1)



# Rule 12(b)(6)



# ***TIME LIMITS?***

*Sebelius v.  
Auburn  
Regional Med.  
Center (2013)*

- Time to file administrative appeal challenging Medicare reimbursement decision not jurisdictional

*Henderson v.  
Shinseki  
(2010)*

- Time limit to appeal VA ruling not jurisdictional

*John R. Sand  
& Gravel Co.  
v. U.S. (2007)*

- Court of Claims Statute of Limitation is jurisdictional



# STATUTORY ELEMENT?

*Reed Elsevier  
v. Muchnick  
(2010)*

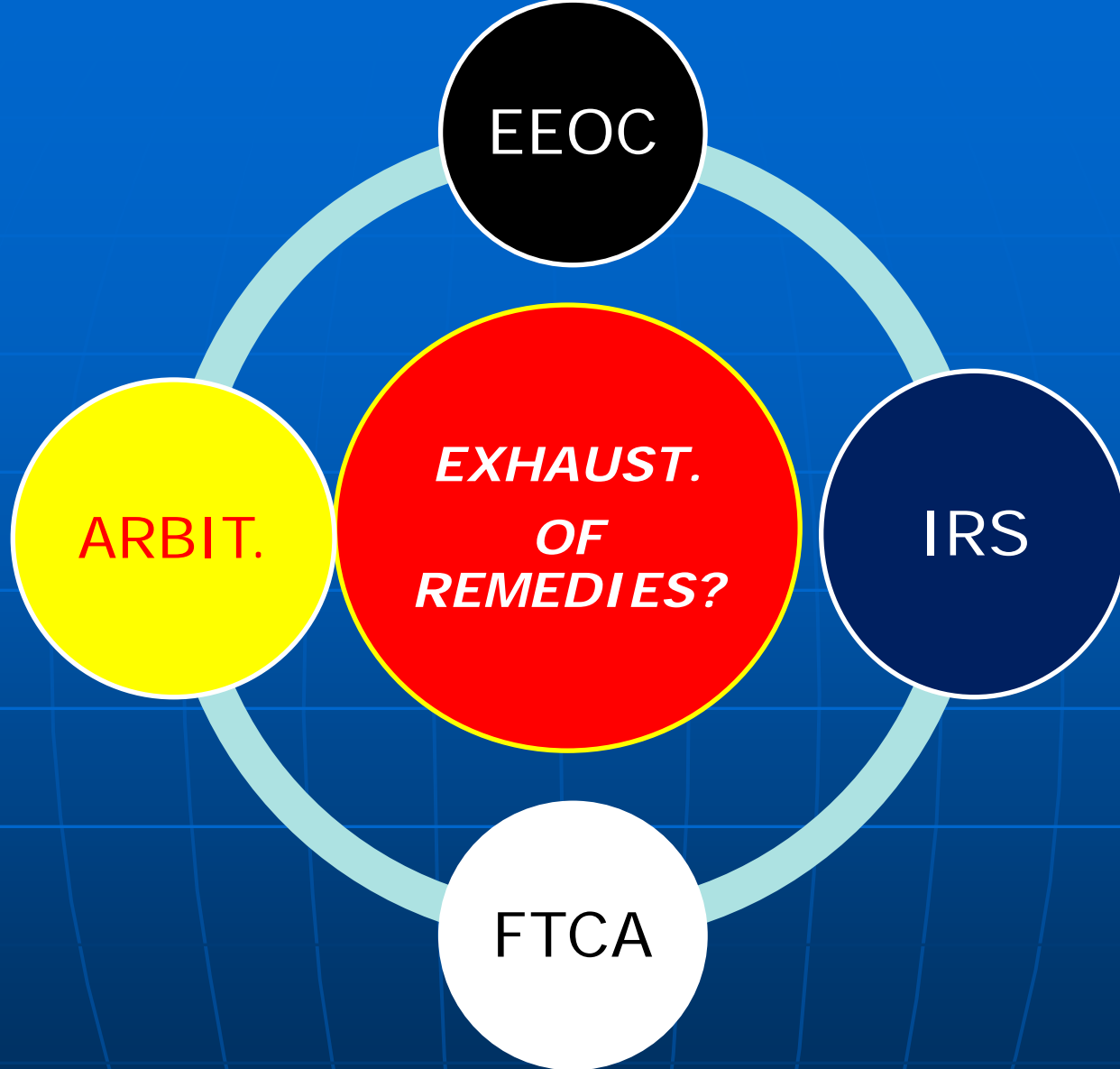
- Lack of copyright registration is not jurisdictional

*Carlsbad  
Tech. v. HIF  
Bio (2009)*

- No pattern of racketeering under RICO is not jurisdictional

*Rockwell Int'l  
v. U.S.  
(2007)*

- False Claims Act status as "original source" is jurisdictional



*See Mader v. U.S. (8<sup>th</sup> Cir. 2011) 654 F.3d 794*

ERISA



PLAN  
PARTICIPANT?



ELEMENT,  
NOT  
JURISDICTION

***Leeson v. Transamerica* (9<sup>th</sup> Cir. 2012) 671 F3d 969**

LMRA  
§301



No Claim  
for CBA  
Violation

Jurisdiction  
or  
Element?

*ABF Freight System v. Int'l Broth. Of Teamsters* (8<sup>th</sup> Cir. 2011) 645 F.3d 954; *contra Tackett v. M& G Polymers* (6<sup>th</sup> Cir. 2009) 561 F.3d 478

# *Tip # 1*

- Read Statute's Jurisdictional Label
- Distinguish Rules 12(b)(1) and 12(b)(6)



***Judges as  
Sentinels at  
the  
Jurisdictional  
Doorway***

# ***FOUR DOORWAYS TO FEDERAL COURT***



**Front  
Door**



**Visitors'  
Door**



**Back  
Door**



**Side  
Door**



# FRONT DOOR

- Arising Under
- Federal Defense  
-- Not





## *Federal Ingredients in State Law Soup?*

- Former client brings legal malpractice claim in federal court arising out of representation in prior federal patent infringement action
- Defendant moves to dismiss for lack of federal subject matter jurisdiction
- Plaintiff asserts it raises "substantial federal question"

*HOW SHOULD THE COURT RULE?*

*See Gunn v. Minton*  
133 S.Ct. 1059 (2013)—

Malpractice claim does not  
"arise under" federal law

*See Hays v. Bryan Cave LLP* (7<sup>th</sup> Cir. 2006) 446 F.3d 712—  
malpractice suit following federal criminal case; see also *Berg v.*  
*Leason* (9<sup>th</sup> Cir. 1994) 32 F.3d 422; *Palkow v. CSX Transp.* (6<sup>th</sup> Cir.  
2005); *Central Iowa Power Coop. v. Midwest Indpt. Transmission*  
*System* (8<sup>th</sup> Cir. 2009) 561 F.3d 904

# 4 Requirements – Grable “Exception”

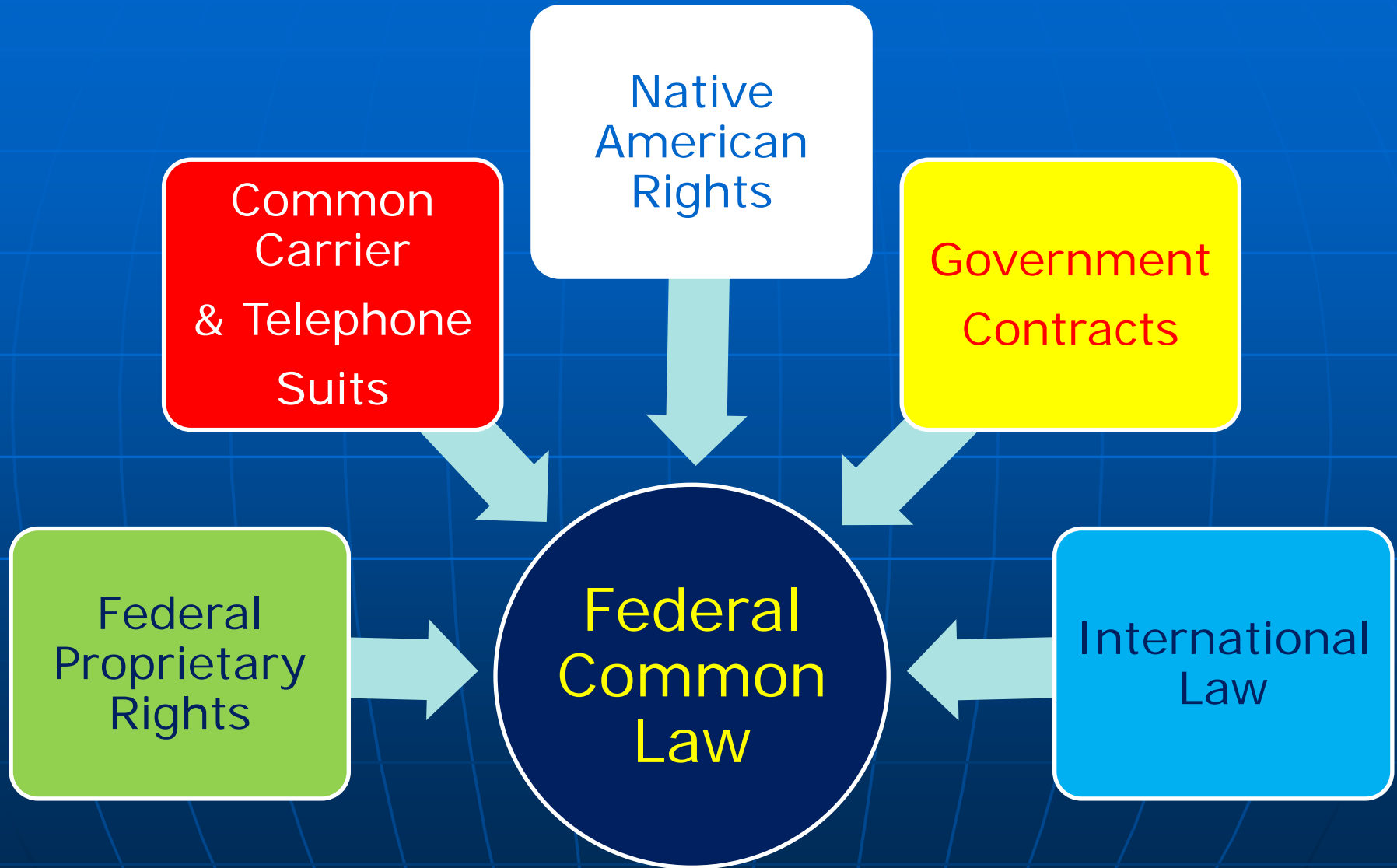
Necessarily raises a stated federal issue

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graph TD; A[Necessarily raises a stated federal issue] --> B[Federal issue is actually disputed]; B --> C[Federal issue is substantial, i.e., important to federal system as a whole]; C --> D[Federal adjudication will not disturb congressionally authorized federal-state court balance];
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Federal issue is actually disputed

Federal issue is substantial, i.e., important to federal system as a whole

Federal adjudication will not disturb congressionally authorized federal-state court balance



# *Tip # 2*

- Read Complaint
- Trust federal claims & distrust “substantial federal issue”



# VISITOR'S DOOR

- Complete Diversity
- Citizenship Rules
- Amount in Controversy

**PLAINTIFFS**

**DEFENDANTS**

**Complete Diversity**

# Corporations

All  
States  
of  
Incorp.



The  
Principal  
Place of  
Business



Corp.'s  
Citizen-  
ship



# Hertz Corp. v. Friend 130 S.Ct. 1181 (2010)

Corporation's principal place  
of business for diversity  
purposes is corporate nerve  
center

See also *Central West Va. Energy v. Mountain State Carbon* (4<sup>th</sup> Cir. 2011) 636 F.3d 101 (not locus of day-to-day operations; where corporate officers direct, control and coordinate activities)

# *Tip # 3*

- Test corporate citizenship allegations and pleading
- Test domicile allegations and pleading

# ***Non-Corporate Entities***

Citizenship  
of  
All Members

# *Diversity Algebra*

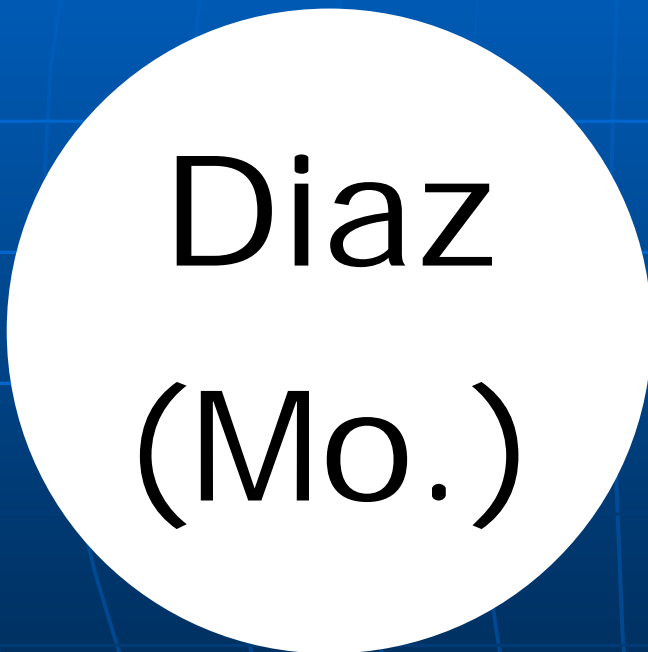
## *Other Artificial Entities*

- Jim Wagstaffe, (of California) has a hot idea: a self-lighting cigarette. As the General and Managing Partner, he forms “You Light ‘Em, LLP” as a 95% partner. His “silent partner” is “Deep Pockets” Fernando Gaitan (of Missouri with 5%) .
- Unfortunately, Diana Diaz (of Missouri) tried it and badly burned her hand. She sues in federal court in Kansas City predicated on diversity jurisdiction.
- How should the court rule on the motion to dismiss?

*Carden v. Arkoma (1990) 494 U.S. 185*

# DIVERSITY DRAWING

PLAINTIFF



DEFENDANT



# CHANGE THE FACTS

## PLAINTIFF

Diaz  
(Mo.)

## DEFENDANT

You Light 'Em LLC

Gaitan, LLP  
(Kan.)

Wagstaffe  
(Ca.)

Rhonda Enss  
(Kan.)

Fernando  
Gaitan  
(Mo.)

# *Tip # 4*

- Count citizenship of all members/partners
- Drill down

# ***VISITOR'S DOOR***

***Show Me the  
Money***

***Amount in  
Controversy***





## *Amount in Controversy?*

- Plaintiff in diversity action alleges defendant seized automobile without proper basis and alleges \$1 million in damages
- Only plausible claim based on loss of use of car for 13 months until it was returned

*HOW SHOULD THE COURT RULE ON MOTION  
TO DISMISS?*

# ***HOLDING***

- Despite good faith prayer, legal certainty test not satisfied
- Since lost value (cost of rental car in interim) + \$22,000, amount in controversy absent

*Equilon-Mendoza v. Don King Productions*  
(1<sup>st</sup> Cir. 2011) 638 F.3d 1; see also  
*Freeland v. Liberty Mutual* (6<sup>th</sup> Cir. 2011)  
632 F.3d 250

# *Tip # 5*

- Delete legally unrecoverable amounts
- Imagine JAMOL motion



# BACK DOOR

- Removal = Original Jurisdiction
- Squeaky Procedures

## ***Removal Proper?***

- Mertz sues Candy Factory (Delaware corporation) in Missouri state court for wrongful termination in violation of public policy, to wit, the policy against religious discrimination" since firing was based on her refusal to acknowledge that "Jesus was the one true Lord"
- Candy Factory removes the action to federal court alleging federal question jurisdiction, to wit, employment discrimination under Title VII

***HOW SHOULD THE COURT RULE ON MOTION TO REMAND?***

# ***HOLDING***

- Since claim is a non-completely preempted one under state law, removal was improper
- Well-pleaded complaint and plaintiff is master of her claim

*Rains v. Criterion* (9<sup>th</sup> Cir. 1996) 80 F.3d 339; see also *Johnson v. MFS Petroleum Co.* (8<sup>th</sup> Cir. 2012) 701 F.3d 243—PMRA not completely preemptive

- TRUE

- FALSE

- P brings state court action under state's "little RICO" statute. The complaint alleges the predicate acts were federal wire fraud statute. The action may be removed to federal court on federal questions grounds.

- **FALSE**

28 U.S.C. sec.  
1441(b).

- P brings state court action under state's "little RICO" statute. The complaint alleges the predicate acts were federal wire fraud statute. The action may be removed to federal court on federal questions grounds.



# Change The Facts – New Rules

- Assume there is complete diversity between Mertz and Candy Factory. The complaint does not state the amount in controversy.
- Candy Factory removes the action to federal court and in the notice states: "The amount in controversy exceeds "75,000."

How should the court rule on the motion to remand?

**New Rule: 28 USC 1446(b)(2)(A)**

# Change The Facts – New Rules

- This time in state court, Mertz also sues and first serves her local supervisor, McGillicutty, who does not remove.
- 45 days later, Mertz serves Candy Factory who promptly removes (with McGillicutty's joinder).

How should court rule on motion to remand?

**New Rule: 28 USC 1446(b)(2)(A)**

# Change The Facts –New Rules

- This time Mertz sues Candy Factory and McGillicutty and waits over one year to serve either of them.
- Mertz is attempting to prevent removal by delaying service to invoke the one-year outside time limit for removal of diversity actions.

How should court rule on motion to remand?

**New Rule: 28 USC 1446(c)(1)**

## *No Removal Diversity Jurisdiction*

- Action by LLC against Rhode Island D is removed to federal court with jurisdictional allegation: “P is a Delaware LLC with its principal place of business in New York.”
- Removal notice also states that “P has no members who are citizens of Rhode Island.”

*HOW SHOULD THE COURT RULE  
ON MOTION TO REMAND?*

# ***HOLDING***

- No diversity jurisdiction
- Diversity allegations in notice of removal inadequate

D.B. Zwirn Special Opportunities Fund v. Mehrotra (1<sup>st</sup> Cir. 2011) 661 F.3d 124

# *CAFA Removal Rules*

## *28 U.S.C. sec. 1453*

Minimal  
Diversity

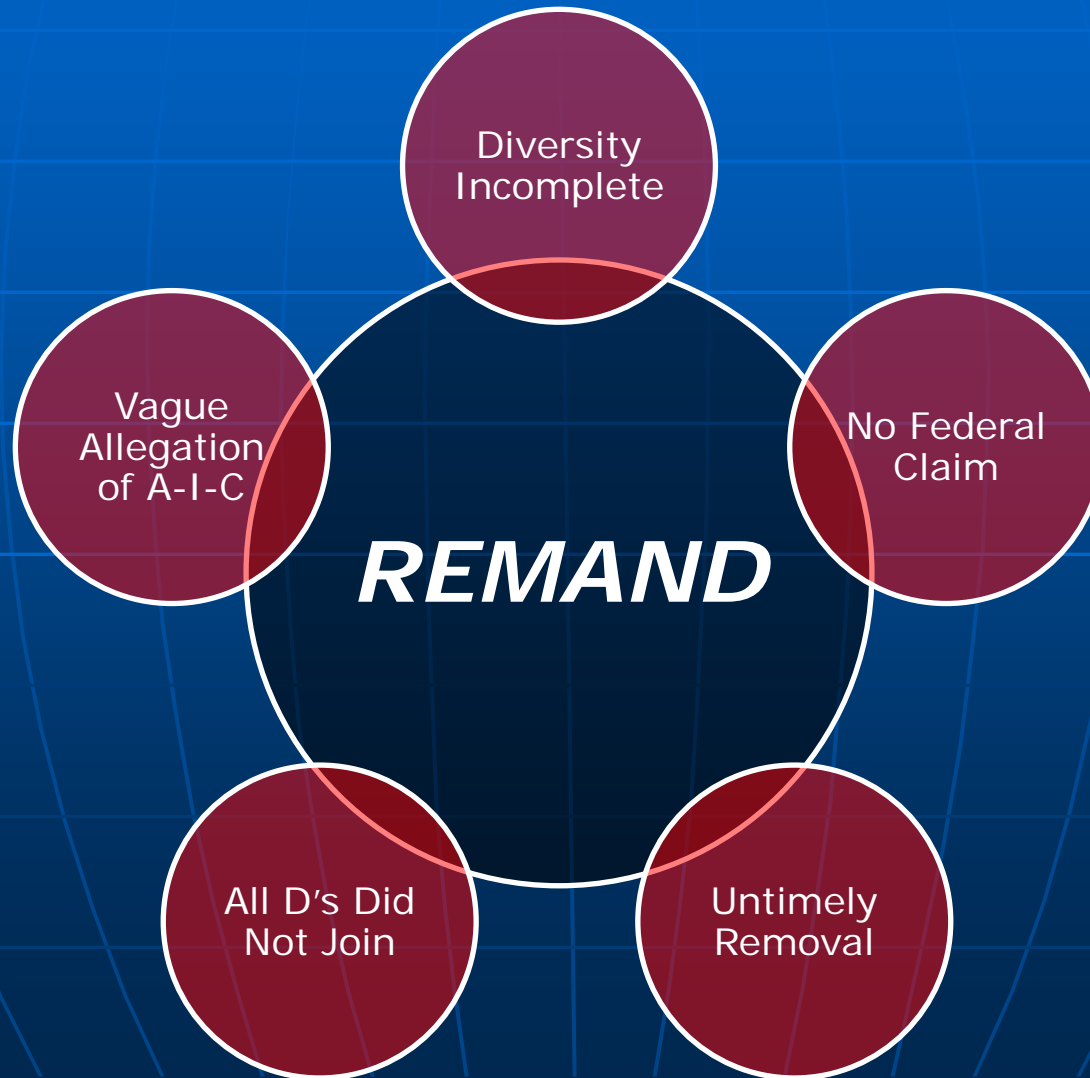
\$5 million  
Aggregate

No Joinder  
Requirement

No One-Year  
Time Limit

Abstention  
Rules

# Tip # 6



# Side Door



- Same Transaction
- Supplement. Parties



Novel or  
Complex

Other  
Compelling  
Reason

**Decline  
Supp.  
Jx.?**

Substant.  
Predomin.

Federal  
Claim  
Dismissed

# *Tip # 7*

- Test same transaction conclusions
- Wear state court judge hat when it fits

***Framing Complex Cases  
at the Pleadings Stage***

***TWOMBLY & IQBAL***

# TWOMBLY - IQBAL TWO STEP

Ignore  
Conclusory  
Allegations

Consider  
allegations  
showing  
plausible  
entitlement to  
relief

# ***LIGHTNING***

*Bivens* action alleges plaintiff victim of discriminatory arrest and treatment based on government policy targeting Arab-Americans post 9-11. Complaint alleges Attorney General was "principal architect" of discriminatory policy and FBI Director was "instrumental" in its implementation.

*Aschcroft v. Iqbal* (2009) 556 U.S. 662; *Bell Atlantic Corp. v. Twombly* (2007) 550 U.S. 544

# LIGHTNING

Complaint alleges defendant violated ADA "due to presence of architectural barriers at public accommodations."

*Oliver v. Ralphs Grocery Co.* (9<sup>th</sup> Cir. 2011) 654 F.3d 903, 908; see also *Benton v. Merrill Lynch* (8<sup>th</sup> Cir. 2008) 524 F.3d 866, 870

# LIGHTNING

Title VII gender bias claim by female law professor based on failure to extend probationary period. Allegations that bases given for adverse action were gender based are implausible.

*Morales-Cruz v. University of Puerto Rico* (1<sup>st</sup> Cir. 2012) 676 F.3d 220;  
*Braden v. Wal-Mart Stores, Inc.* (8<sup>th</sup> Cir. 2009) 588 F.3d 585, 594

# ***Twombly/Iqbal Hits - Conclusory***

**Conspiracy**

**Bad Faith**

**Color of  
Law**

**Malice**

**Retaliation**



# ***Twombly/Iqbal Hits - Plausible***

**Alter Ego**

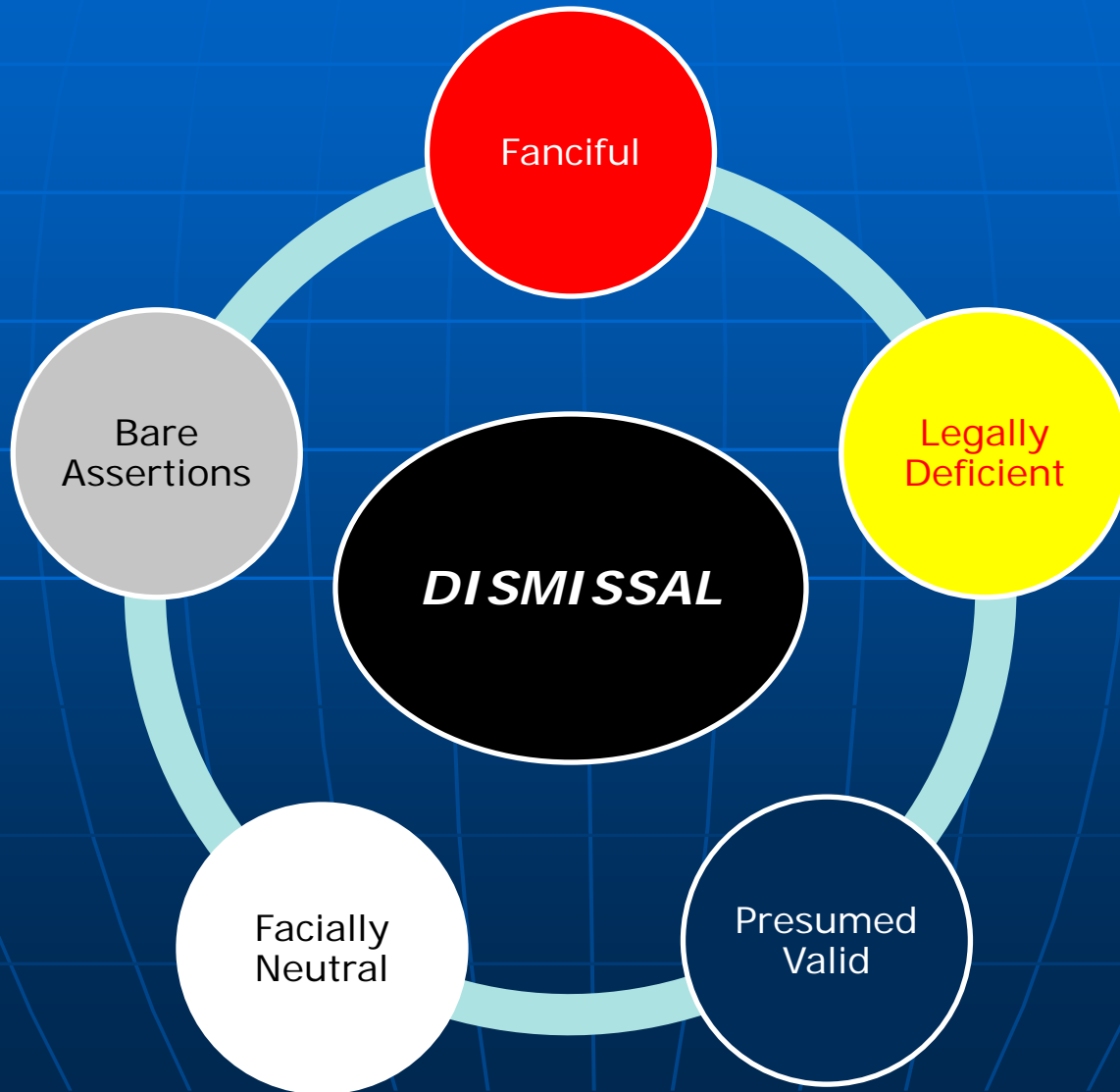
**Ratification**

***Monell  
Policy***

**Multiple  
Defendants**

**Complex  
Claims**

# Tip # 8



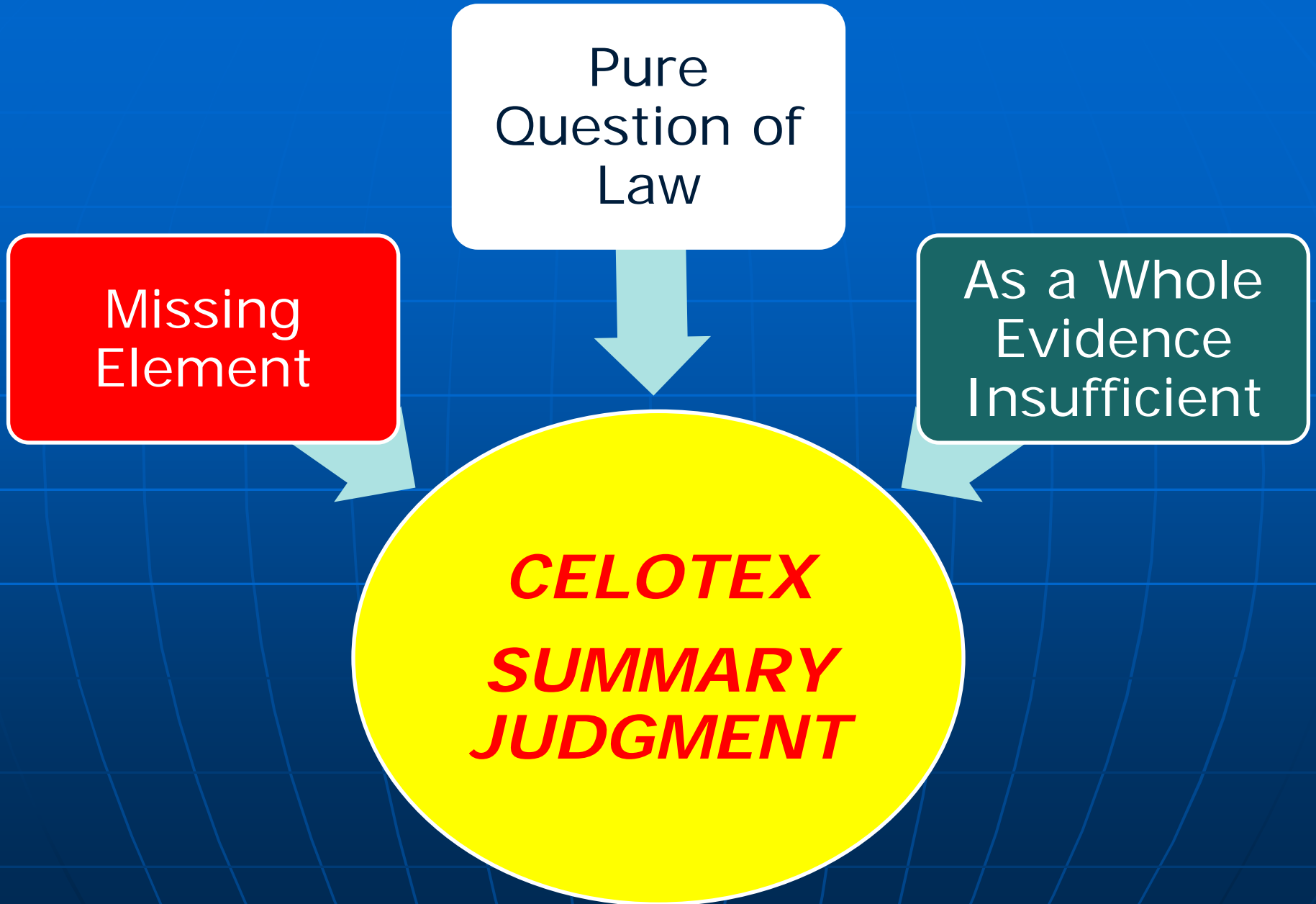
# ***Summary Judgment***

Pure  
Question of  
Law

Missing  
Element

As a Whole  
Evidence  
Insufficient

***CELOTEX  
SUMMARY  
JUDGMENT***



# Rule 12(b)

# Rule 56

- Tests **Legal Sufficiency**
- Presumes all **well-pleaded facts**
- Leave to amend freely granted to clarify or add claims

- Tests **Factual Sufficiency**
- Examines non-moving party's **admissible proof**
- Motion directed to actual claims

# *Summary Judgment Standards* (FRCP 56)

- No genuine dispute as to any material fact
- Moving Party Entitled to JAMOL
- All reasonable inferences for nonmovant
- No weighing of evidence
- No credibility determinations