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Presenter:

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Federal Practice:
Home Run Motions, Jurisdiction, and Twombly Celotex

Federal Practice Guide: Federal Civil Procedure Before Trial
(Rutter Group 2013)

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FEDERAL JURISDICTION UPDATE

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Jurisdiction v. Element

- Whether a plaintiff is a “plan participant” within the meaning of ERISA is a nonjurisdictional defect. [*Leeson v. Transamerica Disability Income Plan* (9th Cir. 2012) 671 F.3d 969, 979; *ABF Freight System v. Int’l Broth. Of Teamsters* (8th Cir. 2011) 645 F.3d 954—claim under CBA is jurisdictional under §301; *contra Tackett v. M& G Polymers* (6th Cir. 2009) 561 F.3d 478]
- The public disclosure provision in a state qui tam action erects a jurisdictional bar. [*Bates v. Mortgage Electronic Regulation System, Inc.* (9th Cir. 2012) 694 F.3d 1076, 1081; *see also Rockwell Int’l Corp. v. U.S.* (2007) 127 S.Ct. 1397, 1405-1406—original source requirement under Federal False Claims Act is jurisdictional]
- Minimum age requirement to qualify for age discrimination lawsuit under ADEA is nonjurisdictional. [*Day v. AT&T Disability Income Plan* (9th Cir. 2012) 685 F.3d 848, 855-856]
- Bond requirement under Miller Act (federal construction claims) is jurisdictional, but one-year statute of limitations is not jurisdictional. [*Arena v. Graybar Elec. Co., Inc.* (5th Cir. 2012) 669 F.3d 214, 221-222]
- The requirement for habeas petitioners to plead specifically a violation of their constitutional rights in order to obtain a certificate of appealability is not jurisdictional. [*Gonzalez v. Thaler* (2012) U.S. , 132 S.Ct. 641, 654]
- The Truth in Lending Act’s statute of limitations (15 USC § 1640(e)) is not jurisdictional and, thus, may be equitably tolled. [*Harris v. CitiMortgage, Inc.* (D. D.C. 2012) 2012 WL 2935594—no clear statement in Congressional record that time limit for filing was jurisdictional]
- The ministerial exception to employment discrimination claims is not a jurisdictional bar, but rather an affirmative defense to liability. [*Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* (2012) U.S. , 132 S.Ct. 694, 709 fn. 4]
- Government’s failure to file its civil forfeiture complaint within 90 days after defendant filed its administrative claim is not jurisdictional. [*U.S. v. Wilson* (4th Cir. 2013) 699 F.3d 789]
- Raising an issue first before the NLRB to be preserved for argument in the Court of Appeal is an exhaustion requirement that is a jurisdictional bar. [*Chevron Mining, Inc. v. NLRB* (D.C. Cir. 2012) 684 F.3d 1318, 1329]

Federal Question Jurisdiction

No Hypothetical Jurisdiction

- The court is acting “ultra vires” if it reaches the merits before determining it has statutory and constitutional jurisdiction over the controversy. [*Friends of the Everglades v. U.S. EPA* (11th Cir. 2012) 699 F.3d 1280]

Presumption of Concurrent Jurisdiction

- In actions arising under federal law, there is a presumption that state courts have concurrent jurisdiction, rebuttable only if Congress “affirmatively ousts” state court jurisdiction. [*Mims v. Arrow Financial Services, LLC* (2012) U.S. , 132 S.Ct. 740—concurrent state court jurisdiction exists over claim under Telephone Consumer Protection Act]

Court’s jurisdiction over extra-territorial acts

- Federal courts do not have jurisdiction over acts of foreign corporations outside the United States (i.e., allowing victims of human rights violations to sue foreign entities accused of aiding such atrocities) except where the claims “touch and concern the territory of the United States. *Kiobel v. Royal Dutch Petroleum* (2013) U.S. , 133 S.Ct. 1659.

“Arising Under” – General Rules

- **Federal claim incorporating state law:** When a federal claim incorporates elements of state law, the claim is still held to arise under federal law. [*Cook Inlet Region, Inc. v. Rude* (9th Cir. 2012) 690 F.3d 1127, 1131--plaintiff corporation’s claim under federal statute incorporating provisions of state corporate statutes arises under federal law]

“Arising Under” – Native American Rights

- Cases relating to Native American rights are said to “arise under” federal common law due to the need for uniform federal policies to govern Indian affairs. [*Cook Inlet Region, Inc. v. Rude* (9th Cir. 2012) 690 F.3d 1127, 1131—claims by corporation formed under Alaska Native Claims Settlement Act against its shareholders for violations of Act’ *see also Gilmore v. Weatherford* (10th Cir. 2012) 694 F.3d 1160-, 1173—discussing whether state law accounting claims asserted by tribal members constitute “substantial federal question”]
- **Compare--intratribal disputes:** Disputes between tribal members regarding tribal affairs do not arise under federal law and must be resolved by tribal, not federal, courts. [*Longie v. Spirit Lake Tribe* (8th Cir. 2005) 400 F.3d 586, 590-591]

Bivens cases and effect of alternative state tort law remedy

- Courts will not imply a *Bivens* remedy if the claim falls within the scope of traditional state tort law that provides an alternative (even if not perfectly congruent) existing procedure capable of protecting the constitutional issues at stake. [*Minneeci v. Pollard* (2012) U.S. , 132 S.Ct. 617, 623-624-- federal prisoner has no implied right of action against private employees of privately held and operated federal prison for conduct that is typically governed by state tort law]

Reserved Jurisdiction Over Dismissed Action

- A district court does not have jurisdiction over an action dismissed per Fed. R. Civ. Pro. 41(a)(1)(A)(ii) when there was no express reservation of jurisdiction at the time the action was dismissed. [*Anago Franchising, Inc. v. Shaz, LLC* (11th Cir. 2012) 677 F.3d 1272, 1281]

Diversity Jurisdiction

Status of state as real party in interest (defeating diversity)

- Where statutory fees are payable to counties and not to the state, diversity is not defeated in a false claim act case. [*Bates v. Mortgage Electronic Registration System, Inc.* (9th Cir. 2012) 694 F.3d 1076, 1080]
- State, not citizens thereof, was the real party in interest of *parens patriae* consumer protection suit against mortgage lenders, despite possibility of restitution for thousands of state citizens. [*Nevada v. Bank of Am. Corp.* (9th Cir. 2012) 672 F.3d 661, 671-672; *AU Optronics Corp. v. South Carolina* (4th Cir. 2012) 699 F.3d 385, 391-392—same; *Louisiana ex rel Caldwell v. Allstate Ins. Co.* (5th Cir. 2008) 536 F.3d 418, 431--contra]

Pleading Diversity

- There are no heightened pleading requirements for alleging a corporate party's principal place of business (e.g. pleading where the entity has its nerve center). [*Harris v. Rand* (9th Cir. 2012) 682 F.3d 846, 850-851]

Citizenship of Dissolved Corporations

- Dissolved corporation has no principal place of business such that only its place of incorporation is used for determining diversity jurisdiction. [*Holston Investments, Inc. v. LanLogistics Corp.* (11th Cir. 2012) 677 F.3d 1068, 1071]

Citizenship of Foreign Corporations

- All corporations are considered citizens of both the place of incorporation and the principal place of business. Thus, this results in denial of diversity jurisdiction for plaintiffs who are citizens of either the principal place of business or the place of incorporation of a corporation irrespective of whether it is within or outside of the U.S. [28 USC §1332(c)(1) (amended 2012); *see also Bayerische Landesbank v. Aladdin Capital Mgmt. LLC* (2nd Cir. 2012) 692 F3d 42, 49-50—rule not retroactive to cases commenced before January 6, 2012]

Citizenship of LLC's

- The citizenship of each member of an LLC is critical not only because if *any* LLC member is a citizen of the same state as an opposing party diversity is lacking, but also because if one of the LLC's members is a "stateless alien" courts also will not have diversity jurisdiction. [*D.B. Zwirn Special Opportunities Fund, L.P. v. Mehrotra* (1st Cir. 2011) 661 F.3d 124, 126-127]

Citizenship of Business Trusts

- Some states allow "*business trusts*" to operate and to sue and be sued as unincorporated associations. There is a split whether the citizenship of such trusts is determined by the citizenship of its "members", *i.e.*, the trustees as well as its beneficiaries, or solely by the citizenship of the trustee. [*Crews & Assocs. v. Nuveen High Yield Mun. Bond Fund* (D. Ark. 2011) 783 F. Supp. 2d 1066, 1069—reflecting split]

Amount in Controversy

- **Future Damages:** Most courts hold that damages through the trial date, if reasonably calculated, may be considered in determining whether the party invoking federal diversity jurisdiction has satisfied the amount in controversy requirement. [*Leslie v. Conseco Life Insurance Co.* (S.D. Fla. 2012) 2012 WL 4049965]
- **Future attorney fees?:** There is a split of authority as to whether future attorneys fees are included in calculating the amount in controversy.
 - **View not counting future fees:** Some courts hold that since future legal expenses can be avoided by defendant's prompt satisfaction of plaintiff's demand, they are not considered when assessing whether the amount "in controversy" is satisfied when the suit is filed. [*Gardynski-Leschuck v. Ford Motor Co.* (7th Cir. 1998) 142 F.3d 955, 959--"Hatfields suing McCoys" could run up \$50,000 legal fees in dispute over \$10 garden rake, but that won't confer federal jurisdiction].
 - **View counting future fees:** In contrast, other courts hold reasonably recoverable future attorneys fees are properly considered in calculating the requisite amount in controversy. Rationale: future legal fees should count just as future damages. [*Miera v. Dairyland Ins. Co.* (10th Cir. 1998) 143 F.3d 1337, 1340; *Manguno v. Prudential Prop. & Cas. Ins. Co.* (5th Cir. 2002) 276 F.3d 720, 723; *Feller v. Hartford Life and Acc. Ins. Co.* (S.D. Iowa 2010) 817 F. Supp. 2d 1097, 1107—citing cases]

- **Aggregation**

Aggregation of claims (in non-CAFA cases) is allowed to satisfy the amount in controversy requirement only when the plaintiffs have a “common and undivided interest” in the recovery such as an undivided interest in a common fund. [*Travelers Property Casualty v. Good* (7th Cir. 2012) 689 F.3d 714, 718—no aggregation in claims for insurance proceeds sought under separate policies]

Removal Jurisdiction

DIVERSITY REMOVAL:

Realignment of parties

- Remand will be denied if, after a proper realignment of the parties to their true interests, diversity jurisdiction exists. [*City of Vestavia Hills v. Gen. Fid. Ins. Co.* (11th Cir. 2012) 676 F.3d 1310, 1314; *see also Cascades Dev. v. Nat. Specialty Ins.* (8th Cir. 2012) 675 F.3d 1095, 1098-99—removal proper if assignment to nondiverse party is valid; *Scotts Co. LLC v. Seeds, Inc.* (9th Cir. 2012) 688 F.3d 1154, 1157-1158—in considering realignment, court considers primary matter in dispute]

Fraudulent Joinder

- Fraudulent joinder upheld and removal allowed when negligent misrepresentation claim against law firm barred by established immunity from suit state law protection. [*Murphy v. Aurora Loan Services, LLC* (8th Cir. 2012) 699 F.3d 1027, 1032; *see also Knudson v. Sys. Painters, Inc.* (8th Cir. 2011) 634 F.3d 968, 980—not same as motion to dismiss standard]
- Employee brought wrongful termination claim against diverse corporate employer and nondiverse manager. Because manager did not actively participate in the termination decision, he was not subject to liability under state law. He thus was not to be counted for diversity purposes. [*Casias v. Wal-Mart Stores, Inc.* (6th Cir. 2012) 695 F.3d 428, 433]

Bar on Removal by Third Party Defendants

- Third party defendants cannot remove the action to federal court even if subjected to a federal claim by the original defendant. [*Static Control Components, Inc. v. Lexmark Int'l, Inc.* (6th Cir. 2012) 697 F.3d 387, 399]

FEDERAL QUESTION REMOVAL:

No Removal Simply Due to Parallel Action

- The mere fact that there are parallel actions pending (one in state and the other in federal court) does not authorize removal of the state action that includes only state law claims. [*American Airlines, Inc. v. Sabre, Inc.* (5th Cir. 2012) 694 F.3d 539, 543]

No Complete Preemption

- Without a federal cause of action which in effect replaces a state law claim (e.g. LMRA, ERISA), there is an exceptionally strong presumption against complete preemption and removal under the artful pleading doctrine. [*Johnson v. MFS Petroleum Co.* (8th Cir. 2012) 701 F.3d 243, 249—no complete preemption under Petroleum Marketing Practices Act in class action by gas consumers for misrepresentation of grade of gasoline; *Sheehan v. Broadband Access Services, Inc.* (D. R.I. 2012) 2012 WL 3871522—no complete preemption of claims of violation of state drug testing laws under Federal Omnibus Transportation Employee Testing Act]

Labor Law Preemption

- Claims for money had and received, unjust enrichment and conversion brought by union employee essentially were ones for unpaid wages, hinging on an interpretation of the CBA. Thus, removal authorized. [*Cavallaro v. UMass Mem'l Healthcare, Inc.* (1st Cir. 2012) 678 F.3d 1, 5]
- On the other hand, if a workplace safety claim depends on an independent and non-negotiable state right, it is not completely preempted. This may be true even if CBA also speaks to safety standards, so long as the claim does not rely on a construction of the CBA for recovery. [*McKnight v. Dresser, Inc.* (5th Cir. 2012) 676 F.3d 426, 434]

ERISA Preemption

- A written agreement promising early pension plan eligibility was not a separate and independent promise from the plan itself. The agreement made clear that benefits arose from and were governed by the plan. Because the plan allowed for modification of benefits at any time, no cause of action arose from pension freeze. [*Arditi v. Lighthouse Intern.* (2nd Cir. 2012) 676 F.3d 294, 300]

Removal by Foreign Sovereigns

- Unlike U.S. states, foreign sovereigns do not waive sovereign immunity upon removal. [*Contour Spa at the Hard Rock, Inc. v. Seminole Tribe of Florida* (11th Cir. 2012) 692 F.3d 1200]

CAFA AND MASS ACTIONS REMOVAL:

- Federal jurisdiction *cannot* be exercised in “mass actions” removed from state court where all claims arise from a single event or occurrence in the state where the action was filed and that resulted in injuries in that state or contiguous states. [28 USC § 1332(d)(11)(B)(ii); *Nevada v. Bank of Am. Corp.* (9th Cir. 2012) 672 F.3d 661, 668—action did not result from a single occurrence where complaint alleged widespread fraud involving thousands of borrower interactions]
- CAFA removal in a not-yet-certified class action is not defeated by plaintiff’s counsel’s stipulation that the amount in controversy does not exceed \$5 million, if absent the stipulation, defendant establishes the amount is in excess of the jurisdictional minimum for CAFA removal. *Standard Fire Insurance Co. v. Knowles* (2013) U.S. , 133 S.Ct. 1345, 1348]
- The amount in controversy on removal of an action under CAFA must be shown by a preponderance of the evidence. [*Hartis v. Chicago Title Ins. Co.* (8th Cir. 2012) 694 F.3d 935, 944—allegation of average remedy of \$12 for approximately 1.2 million class members supported CAFA removal; *Frederick v. Hartford Underwriters Ins. Co.* (10th Cir. 2012) 683 F.3d 1242, 1247-1248—same]
- “Any defendant” language in CAFA does not allow a third party defendant to remove the case to federal court. [*In re Mortgage Electronic Registration Systems, Inc.* (6th Cir. 2012) 680 F.3d 849, 854; *Westwood Apex v. Contreras* (9th Cir. 2011) 644 F.3d 799, 806—same]
- Thirty day deadline to make motion to remand for non-jurisdictional defects does not apply to motion based on CAFA’s “local controversy” exception. [*Graphic Communications Local 1B Health & Welfare Fund “A” v. CVS Caremark Corp.* (8th Cir. 2011) 636 F.3d 971, 975]

REMOVAL PROCEDURE:

Time to Remove

- If an action is properly removable (e.g. presence of a federal claim), it does not become “more removable” because further grounds emerge supporting removability (e.g. CAFA). [*Ramos-Arrizon v. JP Morgan Chase Bank, N.A.* (S.D. Cal. 2012) 2012 WL 3762455]
- If the original complaint was jurisdictionally uncertain or unremovable, the defendant can remove within 30 days from when diversity ascertainable. However courts differ over whether §1447(c) prohibits a procedural defect from being raised after 30 days from the filing of the notice of removal, regardless of whether the remand motion itself is timely. [*N. California Dist. Council of Laborers v. Pittsburg-Des Moines Steel Co.* (9th Cir. 1995) 69 F3d 1034, 1038—yes; *BEPCO, L.P. v. Santa Fe Minerals, Inc.* (5th Cir. 2012) 675 F3d 466, 471--no]
- An in-court, off-the-record oral statement is not an “other paper” triggering the time to remove. [*Mackinnon v. IMVU, Inc.* (N.D. Cal. 2012) 2012 WL 95379]
- Time to remove action does not begin until defendant has “solid and unambiguous” information that case is removable (e.g. calculating amount in controversy based on class size from defendant’s records). [*Gascho v. Global Fitness Holdings, LLC* (S.D. Ohio 2012) 2012 WL 1048823; see also *Harris v. Bankers Life & Cas. Co.* (9th Cir. 2005) 425 F.3d 689—no duty to investigate and removal timely upon receipt of paper from plaintiff first allowing ascertainment of removal]

Unanimity Requirement

- Generally, all served defendants must unanimously agree to the notice of removal, although such joinder can be evidenced within a timely filed motion to dismiss filed in federal court by a co-defendant. [*Christiansen v. West Branch Community School Dist.* (8th Cir. 2012) 674 F.3d 927]

Remand Motions

- Error in notice of removal (misstating county from where case originated) was obvious and did not preclude amending the notice to preclude a remand to state court [*Emeldi v. Univ. of Oregon* (9th Cir. 2012) 698 F.3d 715, 731]

Supplemental Jurisdiction

Retention of supplemental jurisdiction

- Courts disagree as to whether the federal court retains original or supplemental subject matter jurisdiction after the federal corporation is no longer a party. [See *Pena v. Commonwealth of Puerto Rico* (D. P.R. 2012) __F. Supp. 2d__, 2012 WL

2103621—reflecting circuit split over type of jurisdiction that the federal courts retain after FDIC is no longer a party]

- Federal courts typically will decline continuing jurisdiction over supplemental state law claims once the federal claims are dismissed or resolved. [*RWJ Management Co. v. BP Products North America, Inc.* (7th Cir. 2012) 672 F.3d 476, 479-480]
- **Factors:** Factors that lean in favor of continuing to exercise supplemental jurisdiction are whether:
 - the statute of limitations has run on the state law claims;
 - subsequent filing in state court will result in a substantial duplication of effort and waste of judicial resources; or
 - when it is absolutely clear how the state law claims can be decided. [*RWJ Management Co., Inc. v. BP Products North America, Inc.*, *supra*, 672 F.3d at 681]

Loss of Supplemental Jurisdiction

- If the anchor federal question claim is dismissed for lack of subject matter jurisdiction, supplemental jurisdiction may not be exercised over a related state law claim as such jurisdiction is lost. [*Arena v. Graybar Electric Co.* (5th Cir. 2012) 669 F.3d 214, 222]

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JURISDICTIONAL CHECKLIST

1. JURISDICTION PROPERLY ALLEGED?

2. FEDERAL QUESTION?

- ☐ “Arising under” jurisdiction (not defensive or referential use of federal law) (2:585)
- ☐ State claims involving a “substantial” federal question (2:665)
- ☐ Private right of action (2:600)
- ☐ Wholly insubstantial federal claim (2:646)

3. DIVERSITY JURISDICTION?

- ☐ Complete diversity (2:1405)
- ☐ Dual citizenship of corporations (2:1270)
- ☐ Citizenship of all partners, association members, etc. (2:1405)
- ☐ Non-diverse or Third-party defendants joined by plaintiff disallowed (2:1967)
- ☐ Amount in controversy (in excess of \$75,000) (2:1750)
- ☐ Indispensable parties (2:1630)

4. REMOVAL JURISDICTION?

- ☐ Federal question (2:2490); diversity (2:2310) or “separate and independent” to federal question claim (2:2011)
- ☐ Non-removable claims (*e.g.*, FEOLA) (2:3110)
- ☐ Waiver by conduct or agreement (2:3168)
- ☐ Removal limited to defendants (2:2245)
- ☐ Artful pleading/complete preemption (2:2566)
- ☐ Special removal statutes (*e.g.*, federal officers) (2:2860)
- ☐ Procedural defects:
 - ☐ 1. Removal within 30 days of service on first defendant? (2:3230)
 - ☐ 2. Joinder by all served defendants (2:3445)
 - ☐ 3. Other procedural requirements (attach papers, notices, etc.) (2:3470)
 - ☐ 4. Resident defendant removal (diversity) (2:2320)
 - ☐ 5. Removal more than 1 year after commencement (diversity) (2:3335)
- ☐ Post-removal destruction of jurisdiction (2:3615)

5. SUPPLEMENTAL JURISDICTION

- ☐ Do state claims derive from “common nucleus of operative fact” (2:862)
- ☐ Does joinder of supplemental party destroy complete diversity (*i.e.*, added by plaintiff, intervenor as plaintiff, indispensable party) (2:1949)
- ☐ Are there reasons to decline supplemental jurisdiction (*i.e.*, novel/complex state claims, federal claims dismissed, or other compelling reasons for dismissal/remand) (2:905)

6. OTHER LIMITATIONS

- ☐ Venue (Ch. 4)
- ☐ Timely and proper service – FRCP 4(j) (Ch. 5)
- ☐ Personal Jurisdiction (Ch. 3)
- ☐ Jurisprudential limitations (standing, abstention, mootness, ripeness, etc.) (Ch. 2E)
- ☐ Eleventh Amendment (2:47550)
- ☐ Failure to exhaust administrative remedies (*e.g.*, EEOC), notice requirements, etc. (1:202.1)
- ☐ Iqbal, Twombly, Getotex and other Home Run Motions (Ch. 8, Ch. 9 and Ch. 14)

Removal Checklist

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Removal Jurisdiction

A. Diversity

- ☐ Is there complete diversity? (2:2341)
- ☐ Does removal notice show *citizenship* (not mere residence) of each party? (2:3432)
- ☐ Does notice allege citizenship both at time of commencement of action and at time of removal? (2:2356)
- ☐ If there is a *corporate* party, does notice of removal show *both* its principal place of business and state of incorporation? (2:2312)
- ☐ Does notice of removal allege citizenship of all members/partners of artificial entity parties (partners, LLC's) (2:1382, 2314)
- ☐ Are there any resident defendants (who have been served), thus preventing removal? (2:2320)
- ☐ Does the notice of removal allege specific facts demonstrating that the amount in controversy exceeds \$75,000? (2:2375)

B. Federal Question

- ☐ Does state court complaint plead a claim "arising under" federal law? (2:2501)
- ☐ If not, does "artful pleading" doctrine apply (claim under state law *completely preempted by* a federal claim)? (2:2561)
- ☐ Is there any express prohibition against removal of the federal claim? (2:3110)

C. Waiver

- ☐ Did defendant contractually waive the right to remove? (2:3205)
- ☐ Did defendant waive the right to remove by conduct in state court? (2:3170)

Removal Procedure

A. Removal Notice

- ☐ Did all defendants (who were served) join in the removal notice? (2:3445)
- ☐ Were copies of all state court pleadings attached? (2:3470)
- ☐ Was notice of removal given to state court and adverse parties? (2:3475)

B. Timeliness of Removal

- ☐ Did *initial pleadings* reveal removal jurisdiction? If so, was removal effected within 30 days after defendant was properly served with such pleadings? (2:3255)
- ☐ If initial pleadings did not show removability, when was defendant put on notice that removal jurisdiction existed (e.g., through dismissal of nondiverse party, or addition of federal claim)? Was removal effected within 30 days thereafter? (2:3315)
- ☐ In diversity case, has more than one year passed since commencement of actions? (2:3335)

