



PROGRAM MATERIALS

Program #3346

March 2, 2023

Litigating a Personal Injury Case in Federal Court

Copyright ©2023 by

- Dan M. Schiavetta Jr., Esq. - Russo & Gould LLP**

All Rights Reserved.

Licensed to Celesq®, Inc.

Celesq® AttorneysEd Center

www.celesq.com

5301 North Federal Highway, Suite 150, Boca Raton, FL 33487

Phone 561-241-1919

Dan Schiavetta, Jr.
Russo & Gould LP
33 Whitehall Street, 16th Floor
New York, NY 10004
(914) 329-7035
dschiavetta@russogould.com

Litigating a Personal Injury Case in Federal Court

How it is different from state court!

General Pluses and Minuses of Federal Court

PLUS:

- cafeterias
- judges
- more serious jurors

MINUS:

- more formality, stricter security
- higher expectations of attorneys
- “meaner”; Rule 11; sanctions are immediately appealable
- *waste of time* on jurisdictional issues

Why Plaintiffs Like Federal Court

- makes the case look bigger
- can't appeal denial of summary judgment
- large verdicts more likely left alone
- they believe it allows more permissive expert opinions

Why Defendants Like It (removal and d/j actions)

- federal court as unknown territory
- less toleration for delay
- better understanding of complex/insurance law issues

Getting into Federal Court -- I

- federal law issue: Constitution, statutes at issue
example: civil rights statutes (42 U.S.C. §1983),
state actor liability
- admiralty (Jones Act, 46 U.S.C. §30104)
- claims that must be brought in federal court: e.g.,
bankruptcy adversary proceedings, Fed. R. Bankr. Pro.
7001

Getting into Federal Court -- II

diversity jurisdiction

- complete diversity required
- realignment
- “minimal” diversity in class actions, interpleader
- state law applied on state law claims

removal

- self-executing
- 30-day deadline and all defendants must agree
- no removal if there is one in-state defendant
- motion to remand within 30 days
- discovery to test diversity, sham claim against in-state

Getting out of Federal Court

- supplemental jurisdiction over additional parties brought in but not if brought in by:
 - Rule 14 (third parties) (if brought in directly by plaintiff) can destroy diversity:
 - Rule 19 (“indispensable” parties)
 - Rule 20 (permissive joinder)
- dismissing federal claim as insubstantial
- abstention doctrines

Federal Court Pretrial Procedure

- trial by jury must be demanded in Complaint
- Rule 7.1 disclosure
- Rule 16 Conference; appointment of Magistrate Judge
- Rule 26: automatic disclosure
- conduct of depositions
- non-party subpoenas: 2013 amendment to Rule 45
- expert depositions (disclosure of reports and opinions)
- change of venue: 28 U.S.C. §1404 (convenience of parties/witnesses)

Summary Judgment

- usually have to ask permission
- Affirmations plus Memoranda of Law (problems on appeal)
- decisions from other Circuits not controlling

Interlocutory Appeals

- 28 U.S.C. §1292
injunctions, orders against non-parties, Rule 11 orders, and
orders certified by district judge
- collateral order doctrine (disclosure orders of national interest, etc.)

Trials in Federal Courts

- right to jury trial -- Seventh Amendment
- voir dire (Rule 47)
- order of argument: plaintiff - defendant, then defendant - plaintiff
- strict scheduling of witnesses
- Federal Rules of Evidence
- experts: *Daubert* standard: “reliable”; hearing even for state law issues
- can only move for JNOV/new trial if you’ve moved for directed verdict (Rule 50)
- entering judgment and costs (Rule 60)

In the Circuit Court

- **issues that can and can't be appealed: F.R.A.P. 3(c)**
- **new arguments on appeal**
- **standards of review**
 - motions to dismiss/summary judgment**
 - directed verdicts, judgment n.o.v.**
 - verdict forms, jury instructions, interrogatories**
 - excessive/inadequate verdicts**
- **supplemental appellate jurisdiction**
- **review of state law issues**
- **motions**
- **oral argument**

Res Judicata and Collateral Estoppel

- respect for state court orders = federal court orders
- non-mutual estoppel
 - defensive
 - offensive

Dan Schiavetta, Jr.
Russo & Gould LP
33 Whitehall Street, 16th Floor
New York, NY 10004
(914) 329-7035
dschiavetta@russogould.com

Litigating a Personal Injury Case in Federal Court,
or, How This Is Different from Litigating in State Court
Presentation by Dan Schiavetta, Jr. for
West/Thomson-Reuters

I. Why Federal Court?

- a. General attractions
 - i. Cafeterias
 - ii. Judges
 - iii. More serious jurors
- b. General aversions
 - i. More formality, stricter security
 - ii. Higher expectations of attorneys
 - iii. “Meaner”; Rule 11; sanctions are appealable
 - iv. Waste of time on jurisdictional issues
- c. Why plaintiffs like it
 - i. Makes the case look bigger
 - ii. Can’t appeal denial of summary judgment
 - iii. Large verdicts more likely left alone
 - iv. Plaintiffs’ attorneys believe it allows greater latitude for expert opinions
- d. Why defendants like it (removal and commencing related d/j actions)
 - i. Federal court as unknown territory
 - ii. Less toleration for delay
 - iii. Better understanding of complex/insurance issues

II. Getting Into Federal Court

- a. Federal question jurisdiction
 - i. Federal Constitution/statutes at issue
 - 1. Civil Rights statutes (e.g., 42 U.S.C. § 1983); private entities carrying out traditional state functions can be sued under the Fourteenth Amendment just as the state/municipality can be (e.g., foster care placement agency liability)

- ii. Admiralty (Jones Act, 46 U.S.C. §30104, shipboard injuries)
- iii. Claims restricted to federal court: e.g., bankruptcy (adversary proceedings, Fed. R. Bankr. Pro. 7001, core vs. non-core proceedings); 28 U.S.C. §1334 gives bankruptcy court additional jurisdiction
- b. Diversity jurisdiction: Const. art. III, §2 (federal courts have jurisdiction over suits “between citizens of different states”); 28 U.S.C. §1367 (“between citizens of different states”); \$75,000 minimum
 - i. Complete Diversity: *Strawbridge v. Curtiss*, 7 U.S. 267 (1806)
 - ii. Realignment; *City of Indianapolis v. Chase Nat’l Bank of City of New York*, 314 U.S. 63 (1941); for example, in a declaratory judgment action, the court will conceptually “realign” the parties according to their interests -- who is opposing whom?
 - iii. “Minimal” diversity (so long as any two on one side are from different states): class actions; statutory interpleader, 28 U.S.C. §1335, *CNA Ins. Cos. v. Waters*, 926 F.2d 247 (3rd Cir. 1991); minimal diversity is all that is really required by art. III: *Exxon Mobil Corp. v. Allapattah Services*, 545 U.S. 546 (2005)
 - iv. State law provides rule of decision on state law claims: *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938)
 - v. Federal judges tend not to like diversity cases
- c. Removal: 28 U.S.C. §1446
 - i. Self-executing: the notice to remove is filed in federal court
 - ii. 30 day deadline: from the date of the first-served defendant? split of authority; *McKinney v. Board of Trustees of Maryland Community College*, 955 F.2d 924 (4th Cir. 1992); all defendants must agree to remove
 - iii. No removal if there is an in-state defendant; 28 U.S.C. §1441(b)
 - iv. Motion to remand must be made with 30 days, 28 U.S.C. §1447(c); order granting remand is not appealable until final judgment
 - v. Discovery to establish diversity (true residence of parties, or to see if claim against in-state defendant is a sham)

III. Getting Out of Federal Court

- a. Federal courts have “supplemental jurisdiction” over additional claims over non-diverse parties: 28 U.S.C. §1367 (“claims so related that they form part of the same case or controversy” . . . “that involve additional parties”). Parties can be added who destroy diversity. No supplemental jurisdiction over parties added under these rules:
 - i. Rule 14: Third Parties non-diverse to plaintiff: prompting plaintiff to sue them directly
 - ii. Rule 19: “Indispensable” Parties: e.g., *Northport Health Services of Arkansas v. Rutherford*, 605 F.3d 483 (8th Cir. 2010) (nursing home administrators not indispensable parties); *Aguilar v. Los Angeles County*, 751 F.2d 1089 (9th Cir. 1985) (non-diverse malpractice son bringing post-majority state court suit was indispensable to parent’s pre-majority diversity suit). If the indispensable party is not subject to personal jurisdiction, entire suit is dismissed.
 - iii. Rule 20: Permissive Joinder of Parties: *Massaro v. Bard Access Systems*, 209 F.R.D. 363 (E.D. Pa. 2002) (allowing joinder of physicians to suit vs. manufacturer as to defect catheter and resulting remand)
- b. Dismissing federal part of the suit (Rule 12 motion): federal claim is insubstantial, *Hagans v. Levine*, 415 U.S. 528 (1974)
- c. Abstention doctrines
 - i. Domestic law abstention; abstentions due to pending agency or state court proceedings
 - ii. Other abstentions: *Mann v. Waste Mgmt. of Ohio*, 253 B.R. 211 (N.D. Ohio 2000) (transfer back to state court after bankruptcy court ordered state wrongful death action transferred to federal court) (28 U.S.C. §1334(c))

IV. Federal Court Pretrial Procedure

- a. Pleadings: Trial by Jury must be demanded with Complaint; Rule 7.1 disclosure to avoid judges with conflict of interest
- b. Rule 16 Conference and magistrate assignment
- c. Rule 26: automatic disclosure
- d. Conduct of depositions: seven-hour rule
- e. Non-party subpoenas: 2013 amendment to Rule 45: nationwide service; appearance within 100 miles of residence, or if party, within resident state

- f. Expert depositions (disclosure of reports and opinions)
- g. Change of venue: 28 U.S.C. §1404 (convenience of parties and witnesses); is nationwide

V. Summary Judgment and Interlocutory Appeal

- a. Usually must ask permission
- b. Affirmations plus Memos of law
- c. Decisions from other circuits not controlling
- d.
 - i. Can appeal from “final decisions”, 28 U.S.C. §1291, but these include “collateral orders” (e.g., denying or granting qualified immunity) *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949)
 - ii. Rule 54(b): final judgment as to certain claims or certain defendants
 - iii. 28 U.S.C. §1292: injunctions; orders against non-parties (Rule 11 sanctions); certification by district judge: “controlling question of law” with “substantial ground for difference of opinion” and “immediate appeal would materially advances the ultimate termination of the litigation” (but circuit court still has discretion to deny)

VI. Trial

- a. Right to jury trial: Seventh Amendment (law vs. equity)
- b. Voir dire (Rule 47: can be judge or attorneys)
- c. Order of argument: P-D, D-P
- d. Strict scheduling of witnesses
- e. Rules of evidence: by statute, Federal Rules of Evidence
- f. Experts: *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993) and F.R.Evid. 702 (“reliable”) (not *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) (“generally accepted”) hearings; *Daubert* even for state law issues, *Hendrix v. Evenflo Co.*, 609 F.3d 1183 (11th Cir. 2010)
- g. Motions for directed verdict, JNOV and new trial: Rule 50
- h. Entering judgment and costs; relief from judgment (Rule 60)

VII. Appeal

- a. Issues that can and can’t be appealed
 - i. F.R.A.P. 3(c): must specify what order/verdict is being appealed (but liberally construed): e.g., *Thomas & Betts Corp. v. New Albertson’s Inc.*, 915 F.3d 36 (“on any ground made manifest by the record”)

- ii. Can you make a new argument on appeal? It's discretionary; "if pure question of law" and "if no new facts would have been developed below", *Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130 (5th Cir. 1981)
Are Memos of Law part of the record? (split of authority)
- b. Standards of review:
 - i. Motions to dismiss (Rule 12) and summary judgment (Rule 56): de novo. E.g., *AIG Property & Cas. Co. v. Cosby*, 892 F.3d 25 (1st Cir. 2018)
 - ii. Directed verdicts and judgment n.o.v. (Rule 50): "especially deferential", "no reasonable jury" could find against movant, *Williams v. Monitowoc Cranes*, 898 F.3d 607 (5th Cir. 2018)
 - iii. Verdict forms and jury instructions and interrogatories: "erroneous and prejudicial", "harmless error review", *McNely v. Ocala Star-Banner Corp.*, 99 F.3d 1068 (11th Cir. 1996); *In re Asbestos Cases*, 847 F.2d 523 (9th Cir. 1988)
 - iv. Excessiveness or inadequacy of amount; remittitur and additur: state law claims: use state law standard of review for trial judge, but appellate is only for "abuse of discretion": *Gasperini v. Center for Humanities*, 518 U.S. 415 (1996); federal law claims: "abuse of discretion", *Stampf v. Long Island R.R.*, 761 F.3d 192 (2nd Cir. 2014)
 - c. Supplemental appellate jurisdiction (i.e., over non-appealable orders): *National Fire Ins. v. Bartolazo*, 27 F.3d 518 (11th Cir. 1992) (can decide order denying plaintiff's motion for summary judgment along with defendant's order granting)
 - d. Review of state law issues: no deference to District Court precedent; *Salve Regina College v. Russell*, 499 U.S. 225 (1991)
 - e. Review of damages: use state law standard in state law cases, *Gasperini v. Center for Humanities*, 518 U.S. 415 (1996)
- f. Motions in Circuit courts
- g. Oral argument

VIII. Res Judicata and Collateral Estoppel

- a. "Fully and fairly litigated" standard
Respect for state orders on par with federal orders: *Migra v. Warren City School District*, 465 U.S. 75 (1984)
- b. Non-mutual estoppel
Defensive use by non-party to previous litigation: *Blonder-Tongue Laboratories v. University of Illinois Foundation*, 402 U.S. 313 (1971)
Offensive use: *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979)