PRESENTS:
INTRODUCTION TO FEDERAL COURTS & NETWORKING

Table of Contents
• Program Schedule & Speakers
• Federal Jurisdiction & Venue Lecture PowerPoint
• Federal Subject Matter Jurisdiction Update – 2022
• Clerk of Court – “Top 10 Things Lawyers Should Know”
Federal Bar Association San Diego Chapter PRESENTS:

INTRODUCTION TO FEDERAL COURTS & NETWORKING

12:00 PM – 12:30 PM – Check In
12:30 PM - 1:30 PM – District Court Panel
1:30 PM - 2:00 PM – Judicial Law Clerk Panel
2:00 PM - 2:30 PM – Federal Legal Community

2:30 PM - 3:00 PM – Federal Attorney Mixer
3:00 PM - 4:00 PM – Federal Jurisdiction & Venue Lecture
4:00 PM - 4:30 PM – Federal Practitioners
4:30 PM - 5:30 PM – Closing Remarks & Hosted Reception
Federal Bar Association San Diego Chapter PRESENTS:

INTRODUCTION TO FEDERAL COURTS & NETWORKING

12:30 PM - 1:30 PM District Court & Clerk of Court Panel
Hon. Dana M. Sabraw, Chief District Judge
Hon. William V. Gallo, Presiding Magistrate Judge
Nicole Lennon-Fisher, Chief Deputy of Administration
Moderator: Kim Gregg, District Judge Law Clerk
Presents:
Introduction to Federal Courts & Networking

1:30 PM - 2:00 PM – Judicial Law Clerk Panel
Blake Currey, District Judge Law Clerk
Brittany Little, Magistrate Judge Law Clerk
Moderator: Kelly Reis, District Judge Law Clerk
PRESSENTS:

INTRODUCTION TO FEDERAL COURTS & NETWORKING

2:00 PM - 2:30 PM – Federal Legal Community

Lawyer Representatives
- Licia Vaughn, DLA Piper
- Deke Falls, Federal Defenders of San Diego, Inc.

Moderator: Janet Cabral, U.S. Attorneys’ Office

Federal Bar Association
- Sanjay Bandari, Treasurer
- Kim Gregg, VP of Legal Education
Federal Bar Association
San Diego Chapter

PRESENTS:

INTRODUCTION TO FEDERAL COURTS & NETWORKING

2:30 PM - 3:00 PM – Federal Attorney Mixer
Federal Bar Association
San Diego Chapter

PRESENTS:

INTRODUCTION TO FEDERAL COURTS & NETWORKING

3:00 PM - 4:00 PM – Federal Jurisdiction and Venue

• Professor James M. Wagstaffe, Esq.
PRESENTS:
INTRODUCTION TO FEDERAL COURTS & NETWORKING

4:00 PM - 4:30 PM – Federal Practitioners
Jami Ferrara, Law Office of Jami L. Ferrara
Aaron Arnzen, U.S. Attorneys’ Office
Brian Kramer, Morrison & Foerster LLP
Joanna Fox, Fox Law, APC
Moderator: Amy Wang, U.S. Attorneys’ Office
Federal Bar Association
San Diego Chapter

PRESENTS:

INTRODUCTION TO FEDERAL COURTS & NETWORKING

4:30 PM - 5:30 PM – Closing Remarks & Hosted Reception
Mining Federal “Golden Nuggets”

August 18, 2022
Southern District of California

@JWagstaffeLxNx
wagstaffe@wvbrlaw.com
Mining Federal “Golden Nuggets”

August 18, 2022
Southern District of California

@JWagstaffeLxNx
wagstaffe@wvbrlaw.com
Mining Tools

FRCP & Title 28


SD California

PowerPoint Slides

2022 Jurisdictional Update
See Whitaker v. Monroe Staffing Servs., LLC (4th Cir. July 22, 2022) 2022 U.S. App. LEXIS 20278—court has discretion first to address venue transfer before jurisdiction
Golden Nugget #1: What is “Jurisdictional”?

Boechler, P.C. v. Comm’r of Internal Revenue (2022) 142 S.Ct. 2354
“Jurisdictional”?  

Law firm lost challenge to IRS levy to satisfy assessed tax penalty.

Firm filed its petition to review in Tax Court one day late arguing it was timely due to equitable tolling (26 USC § 6630(d)(1)).

Is statutory deadline “jurisdictional” such that it is not subject to tolling?
Not Jurisdictional

Boechler, P.C. v. Comm’r of Internal Revenue (2022) 142 S.Ct. 2354

Not all procedural requirements are jurisdictional; only if Congress clearly states they are; here IRC § 6630(d)(1) simply sets 30-day limit, and Tax Court has jurisdiction “with respect to such matter”

Tijerino v. Stetson Desert Project, LLC (9th Cir. 2019) 934 F.3d 968—plaintiff’s status as employee or independent contractor under FLSA is “ingredient of the claim” not jurisdictional requirement; Day v. AT&T Disability Income Plan (9th Cir. 2012) 685 F3d 848--minimum age requirement to qualify for age discrimination lawsuit under ADEA not jurisdictional; Ryder v. Hyles (7th Cir. 2022) 27 F.4th 1253—RICO injury not jurisdictional; Operating Eng’s Local 324 Fringe Benefit Funds v. Rieth-Riley Constr. Co. (6th Cir. Aug. 8, 2022) 2022 U.S. App. LEXIS 21843—ERISA plan not jurisdictional; Wickfire, L.L.C. v. Woodruff (5th Cir. 2021) 989 F.3d 343– absence of protectable mark in Lanham Act case not jurisdictional; cf. SNJ Limited v. Comm’r of Internal Revenue (9th Cir. 2022) 28 F.4th 936—time limit to petition tax court for adjustment (IRC § 6234(c)) is jurisdictional; see see TWG § 5-IV
Fort Bend County, Texas v. Davis (2019) 139 S.Ct. 1843—exhaustion with EEOC is claims processing rule, not jurisdictional; Donnelly v. Controlled Applic. Review (2d Cir. 2022) 37 F.4th 44—exhaustion for naturalization not jurisdictional; Martz v. Horazdovský (9th Cir. 2022) – statute of limitations for shipowner’s notice not jurisdictional; cf.; Global Rescue Jets, LLC v. Kaiser Found. Health Plan, Inc. (9th Cir. 2022) 30 F.4th 905—no jurisdiction if Medicare Act exhaustion not satisfied
Golden Nugget #2: Spokeo Standing?

_Calcano v. Swarovski N. Am. Ltd._ (2d Cir. 2022) 36 F.4th 68
Is there Spokeo Standing?

Visually impaired Ps sued D retailers under ADA for failing to carry braille gift cards

Conclusory allegation Ps live near Ds’ stores and intend “immediately” to purchase braille gift cards once available

Nb. “Cut & Paste” “Fill-in-the-blanks” allegations part of some 200 “carbon copy” complaints with identical language (and same typos and even referred to a closed store)

MTD for lack of standing?
Plaintiffs lack standing as they failed plausibly to allege intent to return to retail stores to purchase braille cards (“Mad-Libs” style complaint)

Harty v. West Point Realty, Inc. (2d Cir. 2022) 28 F.4th 435—ADA plaintiff lacks standing when visiting travel website since no intention of visiting defendant’s hotel; Moreno v. Vi-Jon, LLC (S.D. Cal. 2021) (Miller, J.)—no standing in class action challenging label on hand sanitizer without economic or other injury; Gomez v. Como (N.D. Cal. 2022) 2022 U.S. Dist. LEXIS 66674—no standing in ADA case by visually impaired P suing real estate agent for absence of screen-reader software on website when no real intention to visit physical locations; see also Spokeo, Inc. v. Robins (2016) 136 S.Ct. 1540; TWG § 24-III[A][1], 24.11
Standing

Nexus: Injury & Causal Conduct

Injury in Fact

Likelihood Injury Redressed by Favorable Decision

McGee v. S-L Snacks National (9th Cir. 2020) 982 F.3d 700—no standing when plaintiff suffered no economic or physical injuries by consuming trans fat from defendant’s popcorn; Stewart v. Kodiak Cakes, LLC (S.D. Cal. 2021) (Anello, J.)—no standing in class action for plaintiffs to represent others not from their state; Pulse Electron., Inc. v. UD Electron. Corp. (S.D. Cal. 2021) (Benitez, J.)—no standing to assert claims as to new patent claims not yet certified by USPTO; cf. Macinas v. Hobbs (9th Cir. 2022) 30 F.4th 890—DNC has standing to challenge state ballot
Rule 12(b)(1)

- No Waiver
  - No Supplemental Claims
    - Dismissed w/o Prejudice

Rule 12(b)(6)

- Can be Waived (Aff. Defense)
- Supplemental Claims Discretionary
  - Dismissed with Prejudice
When Dorothy reacted to the earthshaking storm by telling Toto they weren’t in Kansas anymore, she was expressing what litigators may feel when examining the tectonic changes underway in the U.S. Supreme Court as to what is meant by “subject matter jurisdiction” and Article III standing. And make no mistake about it, surviving these tremors means more than a quick reading of the hot-off-the-press June 2019 decision in Fort Bend County as the latest word on jurisdiction and other recent cases addressing the Spokeo juggernaut.

“Jurisdiction” – the Word With Limited Meaning under Fort Bend County

reaffirmed that “the word ‘jurisdictional’ generally is reserved for prescriptions delineating the classes of cases a court may entertain (subject-matter jurisdiction) and the persons over whom the court may exercise adjudicatory authority (personal jurisdiction).” In contrast, reasoned the Court, an exhaustion requirement—even if mandated by statute—is a claims-processing rule that will be enforced if properly raised, but one that may be forfeited if the party waits too long to raise the point.

Thus, the High Court continued its attack on what it calls the “profligate use” of the term “jurisdiction” in situations where Congress did not expressly and clearly describe the
Standing & Class Actions

TransUnion LLC v. Ramirez (2021) 141 S.Ct. 2190--even if FCRA violation in credit report that falsely classified individuals as on terrorist watch list, class members whose credit records not accessed lack standing; certification can be reexamined on remand

Johannessohn v. Polaris Industries, Inc. (8th Cir. 2021) 9 F.4th 981—no class certification of ATV owners as to class members who lack standing; see also Thomley v. Clearview AI, Inc. (7th Cir. 2021) 984 F.3d 1241—no certification if plaintiffs define class with members who lack standing
Class can be certified even if a non de minimis number of class members did not suffer injury and even if there must be individualized damage assessments—*Olean Wholesale Grocery Coop., Inc. v. Bumble Food LLC* (9th Cir. 2022, En Banc) 31 F.4th 651

If cognizable (non-de minimis) number of class members suffer no injury, no predominance of common issues—*In re Rail Freight Fuel Surcharge Antitrust Lit.* (D.C. Cir. 2019) 934 F.4th 619 (12.7%); see also *In re Asacol Antitrust Litig.* (1st Cir. 2018) 907 F.3d 42 (no class certification if cannot separate injured from non-injured)
Miner’s Tips

- Subject Matter Jurisdiction First
- Read Statute’s Jurisdictional Label
- Remember *Spokeo* standing is jurisdictional, so apply “no harm, no foul” rule in statutory violation cases (original and removal)
Four Doorways to Federal Court

Front Door
Arising Under

Visitors’ Door
Complete Diversity

Back Door

Side Door
Same Trans.
Golden Nugget #3: The Missing Federal Claim

*Mitchell v. Advanced HCS, L.L.C. (5th Cir. 2022) 28 F.4th 580*
Nursing home resident passes away and son sues in state court for medical negligence.

D removed as “substantial federal question” under PREP Act (granting immunity from suit for losses resulting from certain Covid-19 counter-measures and providing compensation funds).

Motion to remand for lack of jurisdiction?
Federal immunity not completely preemptive (only a federal defense), and no federal officer removal since rest home not acting under federal officer or agency

See Saldana v. Glenhaven Healthcare LLC (9th Cir. 2022) 27 F.4th 679--same; Rae v. Anza Healthcare, Inc. (S.D. Cal. 2021) (Sabraw, J.)—state claims arising out of nursing home’s alleged failure to follow COVID-19 protocols does not arise under federal law due to purported immunity in federal Public Readiness and Emergency Preparedness Act; Riggs v. Country Manor La Mesa Healthcare Center (S.D. Cal. 2021) (Bencivengo, J.)—same; TWG § 6-VI[A][1], § 8-V[E]
And Bivens Ain’t What It Used to Be

_Egbert v. Boule_ (2022) 142 S.Ct. 1793-
-no _Bivens_ claim exists for First Amendment retaliation claim against Border Patrol agents since there is no reason not to think that Congress might be better equipped to create a damages remedy; TWG § VI[C][4], 6.234
In *Badgerow v. Walters* (2022) 142 S.Ct. 1310, the Court held that removal jurisdiction does not exist on petition to vacate arbitration even if underlying claim was federal question (no “pass through” analysis); TWG § 8- V[B], 8.52
Miner’s Tips

- Read Complaint
- Trust federal claims & distrust “substantial” federal issue
- Careful about implying private rights of action
Golden Nugget #4:
Diversity: Go to Kindergarten

Case Off the Docket By Monday
Diversity Algebra

- Plaintiffs
- Defendants
Complete Diversity

28 U.S.C. Sec. 1332
No Complete Diversity

28 U.S.C. Sec. 1332; see, e.g. *Wagstaff & Cartwell, LLP v. Lewis* (8th Cir. July 15, 2022) 2022 U.S. App. LEXIS 19597—objective facts (e.g. voter registration, property tax records, etc.)
If Same state on Both Sides

Louisiana Municipal Police Employees Retirement System v. Wynn (9th Cir. 2016) 829 3d 1048—diversity defeated if party is citizen domiciled abroad; TWG § 7-III[A][2][a]
Citizenship Rules

- If Same state on Both Sides
  - Individuals
  - Corporations
All Non-Corporate Entities

- Partnerships
- LLC’s
- Unincorporated Associations
- LLP’s

See *Akno 1010 Mkt. St. St. Louis Mo. LLC v. Nahid Pourtaghi*, 2022 U.S. App. LEXIS 21842 (6th Cir. Aug. 8, 2022) -- no diversity if LLC of LLC includes foreign citizen with foreign citizen on other side; *Ingrande v. Autozoners, LLC* (S.D. Cal. 2021) (Lorenz, J.) – plaintiff must allege domicile and citizenship of all members of LLC.
Diversity Drilling

Plaintiff

Lambert (VA)

Defendants

You Light Em LLC

Huff (CA)

Wagstaffe (CA)
Diversity Drilling

Plaintiff

Lambert (VA)

Defendants

You Light ‘Em LLC

Huff LLP (CA)

Wagstaffe (CA)

George Huff (VA)

Mary Huff (CA)
Cf. Corporation’s PPB

- Corporation’s principal place of business is where it controls, coordinates and directs corporate activities ("nerve center")

See Hertz Corp. v. Friend (2010) 559 U.S. 77 – PPB not where majority of business done; 3123 SMB LLC v. Horn (9th Cir. 2018) 880 F.3d 461--newly formed holding company’s nerve center is location where board meetings to be held
Cf. Trust’s Citizenship

**Business Trust**
- “Trust” entities created by statute
  - Citizenship of All Members – SH’s

**Traditional Trust**
- Traditional fiduciary established by private trust document
  - Citizenship of Trustee
    - *Demarest v. HSBC Bank* (9th Cir. 2019) 920 F.3d 1223
WAGSTAFFE ALERT:


All parties in diversity cases must on first appearance file disclosure statement with names and citizenship of every individual or entity whose citizenship attributed to that party.

See *Akno 1010 Mkt. St. St. Louis Mo. LLC v. Nahid Pourtaghi* (6th Cir. August 8, 2022) 2022 U.S. App. LEXIS 21842 (6th Cir. Aug. 8, 2022)—must allege citizenship of all LLC members; *Qi Qin v. Deslongchomps* (7th Cir. 2022) 31 F.4th 576—no “preservation” deposition to determine LLC’s citizenship.
Miner’s Tips

- Assess citizenship of all parties
- Drill down down “factor tree”
- “Show me the money”
Golden Nugget #5: Removal to Federal Court?

*City of Oakland v. BP PLC (9th Cir. 2020)*
960 F.3d 570
Removal Jurisdiction?

Oakland sues producers and promoters of fossil fuels as a public nuisance as part of global warming.

D removed as “substantial federal question” under federal common law addressing pollution affecting interstate commerce.

Motion to remand for lack of jurisdiction?
City of Oakland v. BP PLC (9th Cir. 2020) 960 F.3d 570

- Climate change liability not removable as state claims do not arise under federal law

See also City & Cnty. of Honolulu v. Sunoco LP (9th Cir. July 7, 2022) 2022 U.S.App. LEXIS 18640 (state claim arising out of climate change liability not removable); Cty. of San Mateo v. Chevron (9th Cir. 2020) 960 F.3d 586—no federal officer removal in climate change lawsuit; WNT, Inc. v. Awojuola (S.D. Cal. August 7, 2019) (Houston, J.)—no removal of unlawful detainer action removed under Fed. Protecting Tenants At Foreclosure Act (12 U.S.C. § 5201) since no private right of action and not substantial federal question under Grable; Mack v. USAA Cas. Ins. Co. (11th Cir. 2021) 994 F.3d1353— if plaintiff lacks standing in removed action, remand required
In *Badgerow v. Walters* (2022) 142 S.Ct. 1310, the Court held that removal jurisdiction does not exist on petition to vacate arbitration even if underlying claim was federal question (no “pass through” analysis); TWG § 8- V[B], 8.52
Plaintiff is Jedi Master of Claims Alleged

*Miller v. Yellow Pages* (S.D. Cal.) (Hayes, J.)--no removal of California unfair debt collections claim simply because complaint references FDCPA and could have been brought under federal law
Removal – Citizenship Proof?

Rhode Island D sued by LLC removes action to federal Court

Removal Notice says: “P is Delaware LLC with PPB in New York” & “P has no members who are citizens of Rhode Island”

How should court rule on the motion to remand?
D.B. Zwirn Special Opportunities Fund v. Mehrota (1st Cir. 2011) 661 F.3d 124

- If, in fact, no diversity jurisdiction; burden on defendant to allege and prove complete diversity

See also West v. Louisville Gas & Elec. Co. (7th Cir. 2020) 951 F.3d 827—identities and citizenship of all partners or LLC members must be revealed; Durbois v. Deutsche Bank Nat'l Trust Co. (5th Cir. 2022) 37 F.4th 1053—diversity removal defeated if plaintiff expressly seeks less than $75,000; Turner v. GoAuto Ins. Co. (5th Cir. 2022) 33 F.4th 214—no CAFA minimal diversity if P defines class to include only non-diverse Ds; McClaren v. The UPS Store Inc. (3d Cir. 2022) 32 F.4th 232—if complaint uncertain, removal timely after clarification
State court wrongful death suit against care facility and its local admin. on elder abuse claim inadeq. care plan

Facility removes asserting individual non-diverse defendant was fraudulently joined

P moves to remand for lack of complete diversity

Sham Joinder Rule: Remand?
Grancare, LLC v. Thrower, By and Through Mills (9th Cir. 2018) 889 F.3d 543

• Defendant not “sham” if there is a possible basis for recovery (not a Rule 12(b)(6) test)

• Administrator could be personally liable (i.e., colorable claim for failure to provide due care)

See Waste Mgt., Inc. v. AIG Specialty Ins. Co. (5th Cir. 2020) 974 F.3d 528—court finds claims adjuster sham party due to conclusory allegations and failure to allege plausible claim; Ramirez v. Home Depot (SD CA 2018) (Bencivengo, J.); see also Avenatti v. Fox News Network LLC (3d Cir. July 21, 2022) 2022 U.S. App. LEXIS 20101—on removal court has discretion to deny amendment defeating diversity
Nb. Local Defendant – Removal Bar

28 U.S.C. Sec. 1441(b)(2)
Why Issue an OSC?
Miner’s Tips

- Test Diversity Allegations
- Make Sure Shams are Sham
- Distrust “Substantial Federal Q”
- All D’s Did Not Join
- Untimely Removal
- Served Local Defendant
- Waiver

REMAND FRIDAY OSC’s
Golden Nugget #6:
Decline Supplemental Jx

Robinson v. Town of Marshfield (1st Cir. 2020)
950 F.3d 21
Supplemental Jurisdiction

Fire Chief sues town under ADEA and state law claims for defamation and retaliation based on retaliation for reporting gender discrimination.

Court granted summary judgment for town based on unrebutted evidence termination was for morale and performance reasons.

Question: Retain supplemental jurisdiction over state law claims?
After court grants SJ on federal claims, it should decline supplemental jurisdiction when disputed facts on state claim

See Reynolds v. County of San Diego (9th Cir. 1996) 84 F.3d 1162
28 U.S.C. Sec. 1367(c)

- Novel or Complex
- Decline Suppl. Jx.
- Subst. Predomin.
- Other Compelling Reason
- Federal Claim Dismissed
Miner’s Tips

- Test same transaction conclusions
- Wear state judicial hat only when it fits
- Dismiss or remand if federal claim independently disposed before trial
Golden Nugget #7: Personal Jurisdiction

Ford Motor Co. v. Montana 8th Judicial Dist. (2021) 141 S.Ct. 1017
Personal Jurisdiction Exploring

Ford Motor Co. (Mich.) assembled Explorer in Kentucky, sold it to dealership in Washington who sold it to Oregon resident.

Explorer purchased and brought to Montana where accident caused death. P reps. allege death due to design defect in vehicle.

Ford owns multiple Montana dealerships, pervasively advertises Explorer in Montana as safe and stable, and sells Explorers in all 50 states.

Motion to dismiss for lack of personal jurisdiction?
Specific Jurisdiction 3-Step

Purposeful Availment - Direction

Arising out of or Related to Forum Contacts

Compellingly Unreasonable?
Ford Motor Co. v. Montana 8th Judicial Dist. (2021) 141 S.Ct. 1017

- Specific jurisdiction if P’s claims arise out of or relate to the D’s forum contacts (“case-linked”). Here, Ford “systematically served” the market, creating “strong relationship” among the defendant, the forum and the litigation.

Due Process Requires Defendant have certain minimum contacts with forum state such that maintenance of suit does not offend traditional notions of fair play and substantial justice.
For Limited Personal Jurisdiction, Count the Minimum Contact “Rocks” Related to the Cause of Action Itself (i.e., don’t count the unrelated trade show attendance)
Miner’s Tips

- Count the contacts as “rocks on a pile”
- Look solely at D’s forum-based contacts
- Keep a close eye on electronic contacts
Golden Nugget #8: Choosing a Mine

*Becker v. U.S. Dist. Court (9th Cir. 2021)*
993 F.3d 731
P worked for WFB and was unhappy with management of 401(k) plan, so sued in N.D. Cal for ERISA violations.

Plan contained forum selection clause for the District of Minnesota (where plan administered).

WFB moves to transfer venue to Minnesota.

Grant Motion to transfer?
**Becker v. U.S. Dist. Ct. (9th Cir. 2021)**
993 F.3d 731

- Clause enforceable except in the rarest of cases

- Here, clause furthers ERISA’s goal of uniformity by funneling all Plan oversight through one federal court

---

See *Turner v. Costa Crociere Spa* (11th Cir. 2021) 9 F.4th 1341--forum clause in cruise contract selecting Italian forum enforceable as to Covid-related claims despite hardship to class; *Lewis v. Liberty Mut. Ins. Co.* (9th Cir. 2020) 953 F.3d 1160—forum clause applies when suing derivatively though contact; *Lee v. Fisher* (9th Cir. 2022) 34 F.4th 777—venue in derivative suit controlled by forum selection clause in corporate bylaws; cf. *Wilson v. Huuuge, Inc.* (9th Cir. 2019) 944 F.3d 1212—arbitration clause unenforceable since inconspicuously placed in browsewrap “buried twenty thousand leagues under the sea”
Waiver of Removal By Contract?

Contract with Forum Selection Clause

"Venue for litigation shall be in Linn County, Oregon"

Remand since there is no federal courthouse in Linn County?

Attempted removal to federal court
REMAND

City of Albany v. CH2M, Inc.
(9th Cir. 2019) 924 F.3d 1306

• Clear and unequivocal waiver of right to remove

See also Simonoff v. Expedia, Inc. (9th Cir. 2011) 643 F.3d 1202—removal allowed if clause says “courts IN King County”; Dynamics CRM Recruiting Solution v. UMA Education (5th Cir. 2022) 31 F.4th 914 (same); see also Autoridad de Energia v. Vitol, S.A. (1st Cir. 2017) 859 F.3d 140—removal waived if co-defendant’s forum selection clause vests exclusive jurisdiction in “courts of Commonwealth of Puerto Rico”; but see Kamm v. ITEX (9th Cir. 2009) 568 F.3d 752—motion to remand based on forum selection clause not a “defect” under statute so 30-day time limit for motion does not apply
Miner’s Tips

- Always, always read the forum selection clause
- Remember, such clauses are presumptively enforceable (and trump private interests)
- Forum clause can preclude (or require) federal court venue
Golden Nugget #9

Twiqbal

Olson v. Major League Baseball
(2d Cir. 2022)
29 F.4th 59
A Twiqbal Case

Fantasy baseball league (owned by MLB) sued for implying no cheating in baseball

MLB moves to dismiss asserting that it is well known that there is cheating in baseball

MTD: Allegations Implausible?
No consumer could plausibly rely on any statement by MLB that it was free from cheating as cheating is known to occur.

See See *Levitt v. Yelp* (9th Cir. 2014) 765 F.3d 1123—implausible that ISP deliberately made false posts to increase ad revenues; *Whitaker v. Tesla Motors, Inc.* (9th Cir. 2021) 985 F.3d 1173—allegations in ADA case against Tesla that it “failed to provide accessible service counters” was conclusory; *Nelson Auto Ctr. v. Multimedia Holdings Corp.* (8th Cir. 2021) 951 F.3d 952—conclusory allegation so actual malice in defamation suit insufficient; *cf. Vasquez v. Indiana Univ. Health, Inc.* (7th Cir. 2022) 40 F.4th 582—antitrust complaint made plausible allegations of geographic market; *Atchley v. Astrazenica* (D.C. Cir. 2022) 22 F.4th 204—sufficient allegations of aiding and abetting; TWG § 17-X[A][1], 17.277, § 23-II[G][10]
Twombly/Iqbal: Two-Step

**T I - TWO STEP**

**Ignore Conclusory Allegations**

**Consider allegations showing plausible entitlement to relief**
Plausibility & Affirmative Defenses

- **Lawyer Question**: Does the plausibility standard of *Iqbal/Twombly* apply to affirmative defenses?

- **Search Query**: “affirmative defense /5 plausible”

- **Results**: Click highlighted “affirmative defense” and it takes you to ¶19.190 “Pleading Plausible Affirmative Defense” and a brief scroll up to ¶19.187 reflects the court decisions on this question.

- **Answer**: GEOMC Co. v. Calmare Therapeutics, Inc. (2d Cir. 2019) 918 F.3d. 92—Twombly/Iqbal apply to pleading of affirmative defenses (e.g. comparative negligence, failure to join a necessary party)
THINGS I HATE
1. VANDALISM
2. IRONY
3. LISTS
Miner’s Tips

- Conspiracy
- Bad Faith
- Alter Ego
- Qualified Immunity
- Color of Law
- Malice
- Monell Policy
- Multiple Defendants
- Retaliation
- Complex Claims
Miner’s Tip – Summary Judgment

**SUMMARY JUDGMENT**

(TWG § 43-II)

- **Missing Element**
- **Pure Question of Law**
- **As a Whole Evidence Insufficient**
Summary Judgment Granted

Question of Law Examples

- Res Judicata
- Statute of Limitations
- Whether Plaintiff is “Public Figure”
- “Employee” under FLSA
- Statutory Bar
- Statute of Frauds

Plaintiff need not present evidence on elements of claim not identified as at issue by the defendant’s motion (e.g. designated affirmative defense). *Hamric v. Wilderness Expeditions* (10th Cir. 2021) 6 F.4th 1108; see also *Flynn v. FCA US LLC* (7th Cir. 2022) 39 F.4th 946—court not obligated to search record for uncited materials
Other Recent Developments

Staying Ahead
WAGSTAFFE ALERT:

New law mandating that employees have the option to reject arbitration of claims for sexual assault or harassment. H.R. 4445, S.B. 2342 (2022); see also California Labor Code § 432.6 (employees cannot be compelled to sign employment agreements waiving court actions of discrimination claims as condition of employment); *Chamber of Commerce of the United States v. Bonta* (9th Cir. 2021) 13 F.4th 766
Hot New Golden Nugget
Rule 30(b)(6)

Amendment Effective:
December 1, 2020
NEW RULES AND PRACTICES 2021

Re: Confer in Good Faith About the Matters for Examination

Conferral Mandate for Corporate Designee Depos
Hot New Law in 2022: Implicit Bias Training for California Courts & Attorneys

- AB- 242 -- It’s the Law in 2022
- Every CA lawyer and Court staff, including judges are mandated to complete 2.0 MCLE hours in Implicit Bias

https://breakingbarrierz.com
NOW AVAILABLE

California Courts & Attorneys – Implicit Bias Training

Discover how California Attorneys are fulfilling their Implicit Bias Training MCLE requirements with Breaking BarrierZ interactive, online courses

ACCESS NOW
Breaking BarrierZ is offering CA Attorneys and members of the CA Courts a way to fulfill California’s mandated AB-242 Implicit Bias Training requirement – 2.0 hours of Implicit Bias Training for all Attorneys & Court Staff – in an engaging, convenient & cost efficient, and thought-provoking format.

As a CA VIP Attorney customer, you will have access to special pricing for this state-of-the-art online program and you can complete the training on your own time and from the comfort of your office or home office.
Modern Mining

Virtual World Litigation
Appear Virtually

“7 Steps to Romancing the Virtual Classroom”
J. Wagstaffe (LAW 360, May 2020)

Courts
Arbitrations
Mediations
Testify Virtually

Trials (FRCP 43(a))

Depositions (FRCP 30(b)(4))

Miner’s Tips

Don’t Live in the Past
Let TWG Help You Mine Your Next Golden Nugget!!

Use it/Cite it: Many of You Have it!

The Wagstaffe Group Practice Guide & Current Awareness

LexisNexis®
Litigate with Confidence

- **Online Platform**
  - LexisNexis®

- **TWG Current Awareness:**
  - **Updated every 2 weeks**

- **Daily Tweets**
  - @JWagstaffeLxNx

- **2022 Monthly Articles** – new trends, new cases
Subject Matter Jurisdiction Update – 2022

Jim Wagstaffe

Use it/Cite it – You all Have it online!!
(It’s in your Federal Courts contract)

Follow me: @JWagstaffeLxNX
Email me: wagstaffe@wvbrlaw.com
Jurisdiction v. Claim-Processing Requirements and Elements

- **Statutory Time Limits Generally Not Jurisdictional**: Statutory time limitations generally are not jurisdictional. [Boechler, P.C. v. Comm’r of IRC (2022) 142 S.Ct. 2354--IRC 30-day time limit to petition for review in Tax Court jurisdictional (26 U.S.C. § 6630(d)(1); Martz v. Horazdovksy (9th Cir. 2022) – statute of limitations for shipowner’s notice not jurisdictional; Securities and Exchange Comm’n v. Fowler (2d Cir. 2021) 6 F.4th 255--five year time limit for SEC to file enforcement action (28 U.S.C. § 2462)--not jurisdictional; Walby v. United States (Fed. Cir. 2020) 957 F.3d 1295--time for filing tax refund claim (I.R.C. §7422(a)) not jurisdictional; T Mobile Northeast LLC v. City of Wilmington (3d Cir. 2019) 913 F.3d 311--time limit for seeking district court review of zoning authority’s zoning decision in telecommunications matter not jurisdictional; Edmonson v. Eagle Nat’l Bank, (4th Cir. 2019) 922 F.3d 535—RESPA’s one year SOL is not jurisdictional and thus subject to equitable tolling; Maalouf v. Islamic Republic of Iran (D.C. Cir. 2019) 923 F.3d 1095--statutory time limitations generally are not jurisdictional and court will not raise sua sponte; Neutraceutical Corp. v. Lambert (2019) 139 S.Ct. 710—Rule 23(f)’s 14-day time limit for seeking permission to appeal (since found in procedural rule not a statute) is not jurisdictional, though also not subject to equitable tolling; U.S. v. Kwai Fun Wong (2015) 135 S.Ct. 1625—timing for presenting claim and bringing subsequent FTCA claim (28 U.S.C. § 2401(b)) not jurisdictional; Jackson v. Modly (D.C. Cir. 2020) 949 F.3d 763--§ 2401(a) also non-jurisdictional]

  - **Compare—time limits jurisdictional**: If Congress makes it express, a time limit can be jurisdictional. [SNJ Limited v. Comm’r of Internal Revenue (9th Cir. 2022) 28 F.4th 936--time limit to petition tax court for adjustment (IRC § 6234(c)) is jurisdictional; Organic Cannabis Foundation, LLC v. Comm’r of Internal Revenue (9th Cir. 2020) 962 F.3d 1082—time to challenge IRS deficiency determination jurisdictional; Bowles v. Russell (2007) 551 U.S. 205—timing of filing notice of original appeal jurisdictional, 28 U.S.C. § 2107(a); see also Groves v. United States, 941 F.3d 315 (7th Cir. 2019) (Barrett, J.) (10-day time limit to petition appellate court 28 U.S.C. § 1292(b) interlocutory review is jurisdictional—time limits transferring adjudicatory authority from one Article III court to another is jurisdictional]

**ALERT**: [The Supreme Court has granted certiorari to determine whether the statute of limitations in the Quiet Title Act (28 U.S.C. § 2409a(g)) is a jurisdictional or claims processing rule. Wilkins v. U.S., No. 21-1164]

- **Exhaustion of remedies**: Courts had been split as to whether and under what circumstances exhaustion of remedies requirements are jurisdictional. However, the Supreme Court’s decision on the subject may render asunder such splits (unless Congress clearly delineates the exhaustion requirement as jurisdictional, it is not jurisdictional). [Fort Bend County, Texas v. Davis (2019) 139 S.Ct. 1843--Title VII exhaustion not jurisdictional]
• **Non-Jurisdictional:** 
  Donnelly v. Controlled Applic. Review (2d Cir. 2022) 37 F.4th 44—

o **Jurisdictional:** 
  Global Rescue Jets, LLC v. Kaiser Found. Health Plan, Inc. (9th Cir. 2022) 30 F.4th 905—no jurisdiction if Medicare Act exhaustion not satisfied; Valentin-Marrero v. Commonwealth of Puerto Rico (1st Cir. 2022) 2022 U.S. App. LEXIS 21843—presence of live contract as ERISA plan not jurisdictional; Sanzone v. Mercy Health (8th Cir. 2020) 954 F.3d 1031--presence of live contract as ERISA plan not jurisdictional; Smith v. Regional Transit Authority (5th Cir. 2014) 756 F.3d 340; Dahl v. Charles F. Dahl Defined Benefit Pension (10th Cir. 2014) 744 F.3d 623; North Jersey Brain & Spine Center (3rd Cir. 2015) 801 F.3d 369--whether plaintiff is a “plan participant” within the meaning of ERISA is a non-jurisdictional defect treated as a missing element of the claim; Leeson v. Transamerica Disability Income Plan (9th Cir. 2012) 671 F.3d 969--same.

• **Statutory Elements:** 
  Generally, whether a complaint satisfies the elements of a claim set forth in a statute is a non-jurisdictional defect to be raised by a Rule 12(b)(6), not a Rule 12(b)(1) motion. [See Arbaugh v. Y & H Corp. (2006) 546 U.S. 500—Title VII’s numerosity requirement not jurisdictional; Day v. AT&T Disability Income Plan (9th Cir. 2012) 685 F.3d 848--minimum age requirement to qualify for age discrimination lawsuit under ADEA not jurisdictional; Montes v. Janitorial Partners (D.C. Cir. 2017) 859 F.3d 1079—failure to opt-in in FLSA case not jurisdictional; but see Brownback v. King (2021) 141 S.Ct. 740—every element of FTCA claim considered to be “jurisdictional”; Flores v. Pompeo (5th Cir. 2019) 936 F.3d 273—since residence requirement when seeking declaration of citizenship (8 U.S.C. § 1503(a)) is clearly defined by statute as “jurisdictional” it is]
- **False Claims Act:** The original source requirement has been held to be jurisdictional. [U.S. ex rel. Hanks v. U.S. (2d Cir. 2020) 961 F.3d 131; Amphastar Pharm. v. Aventis Pharma (9th Cir. 2017) 856 F.3d 656—same; U.S. ex rel Antoon v. Cleveland Clinic Found. (6th Cir. 2015) 788 F.3d 605—same; but see In re Plavix Marketing, Sales Practices & Products (3d Cir. 2020) 974 F.3d 228—first to file rule (31 USC § 3730(b)(5)) does not raise jurisdictional defect; U.S. ex rel. Carter v. Halliburton co. (4th Cir. 710 F.3d 171, 181—contra; U.S. ex rel Ambroseccchia v. Paddock Labs (8th Cir. 2017) 855 F.3d 949—public disclosure bar for FCA not jurisdictional; U.S. v. Majestic Blue Fisheries (3rd Cir. 2016) 812 F.3d 294—same; U.S. v. Humana (11th Cir. 2015) 776 F.3d 805—same]

- **Jurisdiction Stripping Statutes:** If Congress passes a specific “jurisdiction stripping” statute a court lacks subject matter jurisdiction to decide the matter. [See Perna v. Health One Credit Union (6th Cir. 2020) 983 F.3d 258—statute stripped federal courts of jurisdiction over covered credit unions (12 U.S.C. § 1787(b)(13)(D); see also Abraugh v. Alimus (5th Cir. Feb. 14, 2022)—lack of prudential standing under state law not matter of subject matter jurisdiction but goes to merits of claim; North Mill Street, LLC v. City of Aspen (10th Cir. 2021) 6 F.4th 1216—ripeness requirement for takings claim in federal court is prudential, not jurisdictional]

**Other Elemental Defects:**

- RICO injury to business or property requirement not jurisdictional. [Ryder v. Hyles (7th Cir. 2022) 27 F.4th 1253]

- Arbitrability determination not jurisdictional. [Robert D. Mabe, Inc. v. OptumRX (3d Cir. 8/4/22) 2022 U.S. App. LEXIS 21547]

- In Lanham Act case raising alleged absence of protectable mark not jurisdictional. [Wickfire, L.L.C. v. Woodruff (5th Cir. 2021) 989 F.3d 343]

- Doctrine of non-consular review not jurisdictional. [Del Valle v. Sec’y of State (11th Cir. 2021) 16 F.4th 832]


- Plaintiff filing pseudonymously is not a jurisdictional defect depriving the court of Article III authority. [B.R. v. F.C.S.B. (4th Cir. 2021) 17 F.4th 485]

- Federal tax exception to Declaratory Judgment Act (28 U.S.C. § 2201(a)) is a jurisdictional defect. [Rivero v. Fid. Invs., Inc. (5th Cir. 2021) 1 F.4th 340]

- Sum certain requirement in FTCA not jurisdictional. [Copen v. United States (6th Cir. 2021) 3 F.4th 875; contra Mader v. United States (8th Cir. 2011) 654 F.3d 794]
• Failure to prove required property interest in takings claim goes to merits not jurisdictional standing. [CHKRS, LLC v. City of Dublin (6th Cir. 2021) 984 F.3d 483]

• Dispute over existence of contract and assignability of trademark are not jurisdictional. [SM Kids, LLC v. Google, LLC (2d Cir. 2020) 963 F.3d 206]

• Liability limitation in contract is not jurisdictional. [Cooper v. Tokyo Elec. Power Co. (9th Cir. 2020) 960 F.3d 549]

• Brown v. United States (Fed. Cir. 2022) 22 F.4th 1008—existence of “duly filed” request for tax refund not jurisdictional;

• Substantial compliance with FRAP Rule 3’s notice of appeal requirements is jurisdictional. [See Kohlbeck v. Wyndham Vacation Resorts, Inc. (8th Cir. 2021) 7 F.4th 729]

• Extraterritorial reach of antitrust laws is not jurisdictional. [Biocad JSC v. F. Hoffmann-La Roach (2d Cir. 2019) 942 F.3d 88; see also SEC v. Scoville (10th Cir. 2019) 913 F.3d 1204—extraterritorial reach of antifraud provisions of federal securities laws not jurisdictional]

• Religious organization exemption to Title VII is not jurisdictional. [Garcia v. Salvation Army (9th Cir. 2019) 918 F.3d 997; Sanzone v. Mercy Health (8th Cir. 2020) 954 F.3d 1031--same for religious exemption under ERISA]

• Whether plaintiff is employee or independent contractor under the FLSA (29 U.S.C. § 216(b)) is an “ingredient of the claim” and not a jurisdictional requirement. [Tijerino v. Stetson Desert Project, LLC (9th Cir. 2019) 934 F.3d 968]

• Whether a defendant is an “enterprise engaged in commerce” subject to the overtime requirements of the FLSA is not jurisdictional. [Biziko v. Van Horne (5th Cir. 2020) 981 F.3d 418]

• Whether a required document is an “agency record” for purposes of FOIA (5 U.S.C. § 552(a)(4)(B)) is not jurisdictional. [Cause of Action Institute v. Office of Management & Budget (D.C. Cir. 2021) 10 F.4th 849]

• Ban on successive habeas petitions is not jurisdictional. [Holland v. Warden Canaan USP (3d Cir. 2021) 998 F.3d 70]

Order of Determination

• Ordinarily, courts must first address the subject matter jurisdiction issue (since it goes to judicial power) in advance of then deciding issues of personal jurisdiction, venue and finally the merits. [La Alliance for Human Rights v. City of Los Angeles (9th Cir. 2021) 14 F.4th 947—Article III standing is matter of subject matter jurisdiction and must be decided before the merits; but see Butcher v. Wendt (2d Cir. 2020) 975 F.3d 236—rule against hypothetical jurisdiction applies only to Article III, not prudential limitations such as Rooker-Feldman bar]
• Nevertheless, the court has discretion in appropriate cases first to decide other threshold issues, particularly if the subject matter jurisdiction is novel and difficult. [See Ruhragas AG v. Marathon Oil Co. (1999) 526 U.S. 574-- discretion of court to decide personal jurisdiction issue before subject matter jurisdiction; Erwin-Simpson v. AirAsia Berhad (5th Cir. 2021) 985 F.3d 883—same; Whitaker v. Monroe Staffing Servs., LLC (4th Cir. July 22, 2022) 2022 U.S. App. LEXIS 20278—court has discretion first to address venue transfer before jurisdiction; East Coast Repair & Fabrication, LLC v. United States (4th Cir. 2021) 16 F.4th 87—issue preclusion dismissal prior to complex subject matter jurisdiction ruling; Snoqualmie Indian Tribe v. Washington (9th Cir. 2021) 8 F.4th 853—same]

Compare—Sovereign Immunity

• If a governmental defendant has sovereign immunity, that goes to the power of the court to adjudicate, and therefore a dismissal will be for want of subject matter jurisdiction. [See, e.g., Gaetano v. United States (6th Cir. 2021) 994 F.3d 501—action to quash IRS summons is action against U.S. requiring waiver of sovereign immunity; Robinson v. United States Dep’t of Educ. (4th Cir. 2019) 917 F.3d 799—since U.S. Department of Education is not a “person” within meaning of the FCRA, case dismissed for lack of jurisdiction due to sovereign immunity]

Federal Question Jurisdiction

Jurisdiction First – No Hypothetical Jurisdiction

• The court should ordinarily first decide issues of subject matter jurisdiction, then issues of personal jurisdiction and venue (which are subject to waiver), and only then issues addressing the merits. [Kaplan v. Central Bank of Islamic Republic of Iran (D.C. Cir. 2018) 896 F.3d 501—ordinarily decide personal jurisdiction before merits issues; Erwin-Simpson v. AirAsia Berhad (5th Cir. 2021) 985 F.3d 883—discretion of court to decide personal jurisdiction issue before subject matter jurisdiction via remand motion; Estate of Cummings v. Community Health Systems, Inc. (10th Cir. 2018) 881 F.3d 793—same; see also Dimondstein v. Stidman (D.C. Cir. 2021) 986 F.3d 870—personal jurisdiction decided before venue; Hamilton v. Bromley (3rd Cir. 2017) 862 F.3d 329—court must decide Article III mootness issue before Younger abstention]

• However, “there is no unyielding jurisdictional hierarchy” such that courts can choose among varying jurisdictional threshold grounds for “denying audience to a case on the merits.” [Hill v. Warsewa (10th Cir. 2020) 947 F.3d 1305; see also Butcher v. Wendt (2d Cir. 2020) 975 F.3d 236—court may dismiss case on merits before reaching statutory jurisdictional grounds, e.g. Rooker-Feldman dismissal; Whitaker v. Monroe Staffing Servs., LLC (4th Cir. July 22, 2022) 2022 U.S. App. LEXIS 20278—court has discretion first to address venue transfer before jurisdiction]

• Court can sua sponte conclude that it lacks subject matter jurisdiction, but should not do so without giving notice to the parties and an opportunity to be heard. [McIntosh v. Royal
Caribbean Cruises, Ltd. (11th Cir. 2021) 5 F.4th 1309; Carver v. Atwood (5th Cir. 2021) 18 F.4th 494

“Arising Under” – General Rules

- **Federal law creates the right to sue:** The most common example of “federal question” jurisdiction is where the right to sue is created expressly or impliedly in a federal statute. [See Banks v. Cotter Corp. (8th Cir. 2022) 22 F.4th 788—action arising from nuclear incident arises under federal statute]

- **Federal defense insufficient:** Simply because a claim is filed that anticipates a federal defense or involves consideration of a federal defense ordinarily is insufficient to provide a basis for federal question jurisdiction. [Mitchell v. Advanced HCS, L.L.C. (5th Cir. 2022) 28 F.4th 580—federal immunity under PREP statute is a defense and is not completely preemptive to support federal subject matter jurisdiction; Saldana v. Glenhaven Healthcare LLC (9th Cir. 2022) 27 F.4th 679—same; Maglioli v. All. HC Holdings LLC (3d Cir. 2021) 16 F.4th 393—same]

And as shown below, the same rule applies when removal is sought on federal question grounds. [See, e.g., Box v. PetroTel, Inc. (5th Cir. 2022) 33 F.4th 195—contract illegality defense re federal securities issue not removable; Vlaming v. West Point Sch. Bd. (4th Cir. 2021) 10 F.4th 300—no removal of wrongful termination simply because D has Title IX defense; La. Indep. Pharmacies Ass’n v. Express Scripts, Inc. (5th Cir. July 20, 2022) 2022 U.S. App. LEXIS 20025—no jurisdiction simply because preemption defense raised in declaratory relief case]

- **State law claim with “substantial” federal question:** In certain circumstances, and even in the absence of a federally-created cause of action, “arising under” jurisdiction exists if there is a “substantial federal question.” [Grable & Sons v. Darue Eng. (2005) 546 U.S. 308] However, such jurisdiction is “a password opening federal courts to any state action embracing a point of federal law” only when the claim “necessarily raises a stated federal issue, [that is] actually disputed and substantial, [and] which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities.” [Id. at 314]; see also Sarauer v. Int’l Ass’n of Machinists and Aerospace Workers, Dist. No. 10 (7th Cir. 2020) 966 F.3d 661—“embedded federal question” doctrine applies to whether a CBA was renewed, modified or extended]

- **Cases Finding “Substantial Federal Question”:** Old Dominion Elec. Coop. v. PJM Interconnection, LLC (4th Cir. 2022) 24 F.4th 271—claim involving interpretation of federal tariff is substantial federal question; Avon Nursing and Rehab. v. Becerra (2d Cir. 2021) 995 F.3d 305—federal question jurisdiction exists under Medicaid Act over challenge to HSS regulation as to surveys; Tantaros v. Fox News Network (2d Cir. 2021) 12 F.4th 135—substantial federal question over dispute as to state statute prohibiting mandatory arbitration “except where inconsistent with federal law” and since claim requires pleading consistency with federal law; Wulfschleger v. Royal Canin USA, Inc. (8th Cir. 2020) 953 F.3d 519—claim citing state antitrust law but explicitly claiming violation of FDCA raised substantial federal question; Hornish Joint Living Trust v. King County (9th Cir. 2018) 899 F.3d 680—state claims to declare property rights in railway corridor raised substantial federal question under National Trails System Act due to federal interest to preserve shrinking rail trackage; Bd. of Comm’rs v. Tenn. Gas Pipeline Co. (5th Cir. 2017) 850 F.3d 714—suit by local flood protection authority alleging oil companies’ activities damaged coastal lands raises substantial federal question since federal law provides standard of care; Turbeville v.
Financial Industry Regulatory Authority (11th Cir. 2017) 874 F.3d 1268—removal jurisdiction existed over case against FINRA for defamation based on its federally regulated disclosure and investigation]

- **Cases Not Finding “Substantial Federal Question”:** Vlaming v. West Point School Bd. (4th Cir. 2021) 10 F.4th 300—state constitutional claims with Title IX defense; Intellisoft, Ltd. v. Acer American Corp. (Fed. Cir. 2020) 955 F.3d 927—state claim for trade secret infringement asserting defendant incorporated into patent application does not arise under federal law; Miller v. Bruenger (6th Cir. 2020) 949 F.3d 986—dispute over benefits under life insurance policy issued to federal worker and governed by Federal Employees’ Group Life Insurance Act does not raise a substantial federal question; Burrell v. Bayer Corp. (4th Cir. 2019) 918 F.3d 372—product liability case not federal question simply because medical device regulated by FDA; AMTAX Holdings 227, LLC v. Tenants’ Development II Corp. (1st Cir. 2021) 15 F.4th 551—no jurisdiction simply because federal issue embedded in state dispute between investors in affordable housing case]

- **Mere reference to federal law insufficient:** Merely because a state law claim makes a reference to federal law generally does not equal “arising under” federal question jurisdiction. [See E. Cent. Ill. Pipe Trades Health & Welfare Fund v. Prather Plumbing & Heating, Inc. (7th Cir. 2021) 3 F.4th 954—claim by benefit funds against successor entity to employee benefit plan did not arise under ERISA as federal statute provides no cause of action even if state claim governed by federal common law; Jackson County Bank v. Dusablon (7th Cir. 2019) 915 F.3d 422—trade secret violation suit by bank against former employee not federal question just because case may involve securities law; NeuroRepair, Inc. v. Nath Law Grp. (Fed Cir. 2015) 781 F.3d 1340, 1342—malpractice claim arising out of federal patent infringement claim]

- **Considerations:** A substantial federal question is more likely to be present if one of the following exists: (1) a pure issue of federal law is dispositive of the case; (2) the court’s resolution of the issue will control numerous other cases; or (3) the government has a direct interest in the availability of a federal forum to vindicate its own administrative action. [Inspired Dev. Grp., Ltd. Liab. Co. v. Inspired Prods. Grp., Ltd. Liab. Co. (Fed. Cir. 2019) 938 F.3d 1355, 1364; see also Benalcazar v. Genoa Twp. (6th Cir. 2021) 1 F.4th 421—jurisdiction exists unless claim wholly frivolous and not arguable]

- **Declaratory relief cases**

  In a declaratory relief action, the court will look to the coercive action anticipated by the action and then determine if that claim (not any defense) arises under federal law. [Patel v. Hamilton Med. Ctr., Inc. (11th Cir. 2020) 967 F.3d 1190—declaratory relief action seeking determination that defendant enjoys no immunity from damages under federal statute does not arise under federal law]

  However, declaratory relief jurisdiction is discretionary and the federal court has the authority to decline to entertain such a case—particularly if it is parallel to or duplicative of claims already pending in state court. [Cardinal Health v. Nat’l Union Fire Ins. Co. (6th Cir. 2022) 29 792—factors: settle controversy, forum shopping, procedural fencing, state-federal comity,

- **Jurisdiction over federally chartered corporation:** Generally, if a federally chartered corporation has a charter that provides that the entity may “sue and be sued” in federal court, federal jurisdiction exists. [Federal Home Loan Bank of Boston v. Moody’s Corp. (1st Cir. 2016) 821 F.3d 102, 109; however if the charter provides that the entity can sue or be sued in “any court of competent jurisdiction, State or Federal” there is no arising under jurisdiction because the language constitutes “a reference to a court with an existing source of subject-matter jurisdiction”—Lightfoot v. Cendant Mortgage Corp. (2017) 137 S.Ct. 553—Fannie Mae’s charter providing for jurisdiction in “any court of competent jurisdiction” does not provide for federal jurisdiction since it contemplates court in which there is an otherwise existing source of subject matter jurisdiction]

- **Bivens Claims Limited**

  Historically, courts could, in appropriate circumstances, find that there is an implied right of action directly under the U.S. Constitution (so-called Bivens claims). In recent years, however, courts would do so only in the precise circumstances of the isolated Supreme Court cases so holding. [Hernandez v. Mesa (2020) 140 S.Ct. 735—no Bivens implied cause of action unless (1) it is precisely akin to context of one of the three claims (Bivens/Carlson/Davis) recognized before, and (2) there’re no special factors counseling hesitation; compare Byrd v. Lamb (5th Cir. 2021) 990 F.3d 879--Homeland Security officer allegedly threatened P with a gun in a parking lot; Ahmed v. Weyker (8th Cir. 2020) 984 F.3d 564--false arrest and manufacturing evidence different]

  The Supreme Court has now ruled that a Bivens claim does not exist for a First Amendment retaliation claim against Border Patrol agents. In so ruling, the High Court severely limited (or eliminated) the Bivens remedy since there is no reason not to think that Congress might be better equipped to create a damages remedy. [Egbert v. Boule (2022) 142 S.Ct. 1793]

- **Federal “Enclave” Jurisdiction**

  If a claim arises on a federal “enclave” (e.g. military base) there is federal question jurisdiction. [Lake v. Ohana Military Communities (9th Cir. 2021) 14 F.4th 993—no federal enclave jurisdiction over military bases in Hawaii where state shares control]

- **“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”; see also Knighton v. Cedarville Rancheria (9th Cir. 2019) 922 F.3d 892--tribal jurisdiction over accident on Indian land even if involving non-tribal member]

- **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 F3d 586, 590-591]

- **Compare state law claims**: No jurisdiction over state law claims relating to contract to provide energy and mineral services to Indian tribe. [Becker v. Ute Indian Tribe of the Uintah and Ouray Reservation (10th Cir. 2014) 770 F.3d 944; compare Michigan v. Bay Mills Indian Community (2014) 134 S. Ct. 2024, 2030-2035--courts do not have jurisdiction in suits against tribes for acts on land outside the Native American reservation because such suits are barred by tribal sovereign immunity; Narragansett Indian Tribe v. Rhode Island Dept. of Transp. (1st Cir. 2018) 903 F.3d 26—no federal question jurisdiction in Tribe’s claim state broke promise concerning bridge reconstruction over historic tribal land since no claim made under National Historic Preservation Act (54 U.S.C. § 300101)]

- **Compare—scope of tribal immunity**: If a lawsuit arises from personal conduct of the defendant and not from the official duties of a tribal official, there is no sovereign immunity. [Lewis v. Clarke (2017) 137 S.Ct. 1285—no sovereign immunity for limo driver sued for injuries from a traffic accident occurring while transporting customers to an Indian casino, even if the tribe indemnified him from the liability]

### Jurisdiction Over Cases Reviewed After Arbitration

- **Petitions to Compel Arbitration**: There will be federal question jurisdiction in actions seeking to compel arbitration when, if one “looks through” the petition, it is predicated on an action that arises under federal law. [Vaden v. Discover Bank (2009) 556 U.S. 49, 62— inquiry is whether, save for the arbitration agreement, jurisdiction exists. McCormick v. Amer. Online, Inc. (4th Cir. 2018) 909 F.3d 677—same]

- **Not Petitions to Vacate or Confirm**: Unless there is a separate basis for federal jurisdiction (e.g. diversity), federal courts will not utilize the “look through” approach when the matter involves a petition to vacate or confirm an arbitration. In other words, simply because an arbitration might involve a federal claim or issue does not provide a separate jurisdictional basis when parties seek to vacate or confirm that award. [Badgerow v. Walters (2022) 142 S.Ct. 1310]

### Motions to Dismiss for Lack of Subject Matter Jurisdiction

If a court is considering dismissing an action for lack of subject matter jurisdiction, it can do so sua sponte—but only after giving the parties notice and an opportunity to be heard. [McIntosh v. Royal Caribbean Cruises, Ltd. (11th Cir. 2021) 5 F.4th 1309; Carver v. Atwood (5th Cir. 2021) 18 F.4th 494—same]
Diversity Jurisdiction

Domicile of individuals

• The domicile of individuals is determined by where the person is domiciled and intends to remain permanently. [See, e.g., Wagstaff & Cartwell, LLP v. Lewis (8th Cir.July 15, 2022) 2022 U.S. App. LEXIS 19597—objective facts (e.g. voter registration, property tax records, etc.); Hearts with Haiti, Inc. v. Kendrick (1st Cir. 2017) (856 F.3d 1 (Souter, J.)—missionary from Iowa is domiciled in Haiti (and hence no diversity) since living there for 20 years and a permanent resident despite being registered to vote and having driver’s license in Iowa; Eckerberg v. Inter-State Studio & Publishing Co. (8th Cir.2017) 860 F.3d 1079—that military person assigned to various places did not change his original Florida domicile; Van Buskirk v. United Grp. Of Cos. (2d Cir. 2019) 935 F.3d 49—declaration generally stating plaintiff had moved to Florida insufficient]

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; Grace Ranch, LLC v. BP America Production Co. (5th Cir. 2021) 989 F3d 301—if state party, no diversity jurisdiction]

• 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; see also Lamar Co. v. Mississippi Transp. Com’n (5th Cir. 2020) 976 F.3d 524—state commission not independent of state and hence as alter ego of state, its presence as party defeats diversity; Grace Ranch, LLC v. BP America Production Co. (5th Cir. 2021) 989 F.3d 301—state not party to the citizen enforcement suit even if state ultimately benefits from suit to remedy contaminated land]

No Diversity if Any Party is “Stateless”

• If any party (including partners or members of LLC’s) are American citizens permanently domiciled abroad, they will not be treated as “state citizens” and their “stateless” status forecloses diversity jurisdiction. [Page v. Democratic Nat’l Comm. (7th Cir. 2021) 2 F.4th 630—no diversity in case naming law firm partnership with “stateless” partners domiciled abroad]

Bar on Diversity in Suits Between Aliens

• If there is otherwise no complete diversity of citizenship, and there is an alien plaintiff suing an alien defendant, there is no diversity or alienage jurisdiction. [Vantage Drilling Co. v. Su (5th Cir. 2014) 741 F.3d 535; Peninsula Asset Mgt. v. Hankouk (6th Cir. 2007) 509 F.3d 271, 272-273—same; Baylay v. Etihad Airways (7th Cir. 2018) 881 F.3d 1032—no diversity when alien plaintiff sues citizens and alien; McIntosh v. Royal Caribbean Cruises, Ltd. (11th Cir. 2021) 5 F.4th 1309—same; Akno 1010 Mkt. St. St. Louis Mo. LLC
v. Nahid Pourtaghi (6th Cir. August 8, 2022) 2022 U.S. App. LEXIS 21842--no diversity if LLC of LLC includes foreign citizen with foreign citizen on other side;

• Compare citizen domiciled abroad – If any of the parties are citizens but domiciled abroad, then there can be no diversity jurisdiction. [Louisiana Municipal Police Employees Retirement System v. Wynn (9th Cir. 2016) 829 3d 1048--finding jurisdiction lacking but dismissing nondiverse, dispensable party to preserve jurisdiction]

Pleading Diversity

• If complete diversity is disputed, party invoking federal jurisdiction must submit actual evidence to support allegation. [See West v. Louisville Gas & Elec. Co. (7th Cir. 2020) 951 F.3d 827—citizenship of all partners and LLC members must be identified; Platinum-Montaur Life Scis., LLC v. Navidea Biopharmaceuticals, Inc. (2d Cir. 2019) 943 F.3d 613—party invoking diversity jurisdiction (defendant on removal) has burden of establishing citizenship of all members of non-corporate artificial entities; Midcap Media Finance, L.L.C. v. Pathway Data, Inc.(5th Cir. 2019) 929 F.3d 310—same; Purchasing Power, LLC v. Bluestem Brands, Inc. (11th Cir. 2017) 851 F.3d 1218; compare Carolina Casualty Ins. Co. v. Team Equipment, Inc. (9th Cir. 2014) 741 F.3d 1082—allegation of LLC’s members on information and belief authorized if jurisdictional facts within defendant’s possession and not reasonably available to plaintiff—jurisdictional issue to be resolved post-filing on defendant’s motion and giving plaintiff leave to amend; Dancel v. Groupon (7th Cir. 2019) 940 F.3d 381—CAFA removal not satisfied by “negative citizenship” allegation some P’s “undoubtedly” diverse]

Corporation’s Principal Place of Business

• Under Hertz test, a corporation’s principal place of business for diversity purposes is the center of its overall direction, control and coordination, i.e., its “nerve center” where officers make significant corporate decisions and set corporate policy (in contrast to where it conducts its day-to-day activities). [Big Shoulders Capital LLC v. San Luis & Rio Grande Railroad, Inc. (7th Cir. 2021) 13 F.4th 560 – nerve center is corporation’s “brain and synonymous with its executive headquarters”; Hoschar v. Appalachian Power Co. (4th Cir. 2014) 739 F.3d 163; Gu v. Invista Sarl (5th Cir. 2017) 739 F.3d 163; Harrison v. Granite Bay Care, Inc. (1st Cir. 2016) 811 F.3d 36; Johnson v. SmithKline Beecham (3rd Cir. 2013) 724 F.3d 337, 352—corporate holding company (as member of LLC) has principal place of business where it, not UK parent company, makes corporate decisions; 3123 SMB LLC v. Horn (9th Cir. 2018) 880 F.3d 461–newly formed holding company’s nerve center is location where board meetings to be held; see CostCommand, LLC v. WH Administrators (D.C. Cir. 2016) 830 F.3d 19—single director controlled corporate decisions; Bearbones, Inc. v. Peerless Indemnity Insurance (1st Cir. 2019) 936 F.3d 12—corporate citizenship challenged for first time on appeal; see also Hawkins v. i-TV Digitalis Tavkozlesi zrt (4th Cir. 2019) 935 F.3d 211—in examining whether foreign entity is a “corporation” depends on comparing entity’s substantive features to American corporation]

Citizenship of Federal Corporation

A federally chartered corporation (e.g. federal credit union) is a corporation for diversity purposes, but since it is neither incorporated by a state or a foreign nation, its citizenship is only where it has its principal place of business. [Navy Federal Credit Union v. Ltd Financial Services, LP (4th Cir. 2020) 972 F.3d 344—use of word “and” in defining corporate citizenship for diversity means “in addition to”]
Citizenship of Dissolved Corporations

- Dissolved (or inactive) corporations have no principal place of business such that only their place of incorporation is used for determining diversity jurisdiction. [Holston Investments, Inc. v. LanLogistics Corp. (11th Cir. 2012) 677 F.3d 1068; see also Athena Automotive, Inc. v. DiGregorio (4th Cir. 1999) 166 F.3d 288]

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); Caron v. NCL (Bahamas), Ltd. (11th Cir. 2018) 910 F.3d 1359—no diversity jurisdiction in suit between foreign plaintiff and defendant incorporated in foreign country even if PPB is in United States; McIntosh v. Royal Caribbean Cruises, Ltd. (11th Cir. 2021) 5 F.4th 1309--same]

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. [Soaring Wind Energy, L.L.C. v. Catic USA Inc. (5th Cir. 2020) 946 F.3d 742; Purchasing Power, LLC v. Bluestem Brands, Inc. (11th Cir. 2017) 851 F.3d 1218; Jet Midwest Int’l Co., Ltd. v. Jet Midwest Group, LLC (8th Cir. 2019) 932 F.3d 1102, 1104; see West v. Louisville Gas & Elec. Co. (7th Cir. 2020) 951 F.3d 827—identities and citizenship of all partners or LLC members must be revealed; Akno 1010 Mkt. St. St. Louis Mo. LLC v. Nahid Pourtaghi (6th Cir. August 8, 2022) 2022 U.S. App. LEXIS 21842--no diversity if LLC of LLC includes foreign citizen with foreign citizen on other side; Qi Qin v. Deslongchomps (7th Cir. 2022) 31 F.4th 576—no “preservation” deposition to determine LLC’s citizenship]

Citizenship of Partnerships

- Like LLC’s, the citizenship of a partnership ordinarily is determined by considering the citizenship of every partner, and if the partnership is a named or indispensable party in the case, the partnership will take on the citizenship of each of its members. [See Moss v. Princip (5th Cir. 2019) 913 F.3d 508—in suit between partners court can dismiss partnership as dispensable party; West v. Louisville Gas & Elec. Co. (7th Cir. 2020) 951 F.3d 827—insufficient to say generally “no one on our side is a citizen of the opposing litigant’s side”]

Citizenship of Trusts and Trustees

- The citizenship of a real estate investment trust (REIT) is treated as a non-corporate entity taking on the citizenship, not of its trustee, but of each of its members (including its shareholders). [Americold Realty Trust v. ConAgra Foods, Inc. (2015) 136 S.Ct. 1012, 1015; RTP LLC v. Orix Real Estate Capital (7th Cir. 2016) 827 F.3d 689; Zoroastrian Center v. Rustam Guiv Found. (4th Cir. 2016) 822 F.3d 739, 748-750]

- The rule is different if the case involves a “traditional” trust in the sense that a fiduciary duty has been created by the private creation of a trust; in such cases courts have looked solely to the citizenship of the trustee as the trust has no standing to sue or be sued. [Demarest v. HSBC
Alert: Fed. R. Civ. P. 7.1 (amendment effective December 1, 2022): The Rule will require all parties to an action based on diversity jurisdiction to file a disclosure statement with each party’s first appearance or pleading stating the names and citizenship of every individual or entity whose citizenship is attributed to that party. Consistent with current Rule 7.1, this disclosure statement would be filed with each party’s first appearance, pleading, petition, motion, response, or other request addressed to the court.

**Citizenship of Indian Tribes**

- Indian tribes are generally considered not to be citizens of any state, and therefore they destroy complete diversity of parties for the purposes of the diversity statute.  
  [Narragansett Indian Tribe v. Rhode Island Dept. of Transp. (1st Cir. 2018) 903 F.3d 26]

**Amount in Controversy**

- **Legal Certainty Test:** To warrant dismissal, it must appear to a legal certainty that the claim is really less than the jurisdictional amount. [Bronner v. Duggan (D.C. Cir. 2020) 962 F.3d 596—professors’ individual suit against academic association for endorsing Israeli boycott did not satisfy amount in controversy; McIntosh v. Royal Caribbean Cruises, Ltd. (11th Cir. 2021) 5 F.4th 1309—damages caused by canceled cruise satisfy amount in controversy requirement; Maine Community Health Options v. Albertsons Cos. (9th Cir. 2021) 993 F.3d 720—amount in controversy as to subpoena enforcement action under FAA measured by either benefit to plaintiff or detriment to defendant; see also Phelps Oil & Gas, LLC v. Noble Energy Inc. (10th Cir. 2021) 5 F.4th 1122—amount in controversy cannot include uncertain, contingent or collateral claims]

- **Validity of Insurance Policy:** If a declaratory relief action involves the validity of the insurance policy, then the full policy limits constitute the amount in controversy.  
  [Elhouty v. Lincoln Beneficial Life (9th Cir. 2018) 886 F.3d 752]

- **Future damages included:** While jurisdiction is assessed at the time it is invoked originally or by way of removal, future damages recoverable in the action are included in determining the amount in controversy.  
  [Chavez v. J.P. Morgan Chase & Co. (9th Cir. 2018) 888 F.3d 463—future lost wages recoverable in actions included; Arias v. Residence Inn by Marriott (9th Cir. 2019) 936 F.3d 920—in assessing amount in controversy defendant is permitted to rely on a chain of reasoning that includes assumptions; see also Mojtabai v. Mojtabai (1st Cir. 2021) 4 F.4th 77—amount in controversy satisfied by value of equitable relief to discharge lien on property]
• **Petitions re Arbitration:** There is a split of authority as to calculating the amount in controversy in actions to confirm or vacate arbitration results, with some courts following the award approach and others looking at the amount of the demand. [*Ford v. Hamilton Invs., Inc.* (6th Cir. 1994) 29 F.3d 255, 260—award; *Pershing, LLC v. Kiebach* (5th Cir. 2016) 819 F.3d 179, 182-183 – demand]

• **Attorney fees:** Attorney fees will be counted toward the amount-in-controversy only if they rare recoverable by contract or statute. [*Webb v. FINRA* (7th Cir. 2018) 889 F.3d 853; *Fritsch v. Swift Transp. Co. of Arizona, LLC* (9th Cir. 2018) 899 F.3d 785--same]

### 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; *Scotts Co. LLC v. Seeds, Inc.* (9th Cir. 2012) 688 F.3d 1154, 1157-1158—in considering realignment, court considers primary matter in dispute; see also *Moss v. Princip*, 913 F.3d 508, 514–515 (5th Cir. 2018) (partnership dismissed as dispensable party); compare *Valencia v. Allstate Texas Lloyd’s* (5th Cir. 2020) 976 F.3d 1310, 1314—nursing facility administrator could be personally liable and hence was not a sham defendant; see also *Henson v. Union Pac. R.R. Co.* (8th Cir. 2021) 3 F.4th 1075—if only conclusory allegations against individual defendant in employment discrimination suit, found to be fraudulently joined; *Couzens v. Donahue* (8th Cir. 2017) 854 F.3d 508—defendant not properly sued in individual capacity; *Alviar v. Lillard* (5th Cir. 2017) 854 F.3d 286 --no evidence of required willful intent for agent’s individual liability for tortious interference; *Hicks v. Martinrea Auto Structures (United States), Inc.* (5th Cir. 2021) 12 F.4th 571—sufficient evidence of individual liability (even if deposition testimony calls liability into question) such that complete diversity absent compelling remand; see also *Ticer v Imperium Ins. Co.* (5th Cir. 2021) 20F.4th 1040--court rejects misjoinder as a basis for finding sham joinder on removal]
However, the failure to include more than conclusory allegations against an otherwise nondiverse defendant can support a finding of fraudulent joinder, thus, allowing removal on diversity grounds. [Henson v. Union Pac. R.R. Co. (8th Cir. 2021) 3 F.4th 1075]

**Bar on Removal by Served Local Defendants**

Even if diversity complete (i.e., an out-of-state plaintiff), if one of the properly joined and served defendants is local (citizen of forum state sued by an out-of-state plaintiff), removal is statutorily barred (28 U.S.C. § 1441(b)(2)).

- **Compare—“Snap” removal:** However, if the local defendant voluntarily appears and removes before formal service (so-called “snap removal”), or if the out-of-state defendant(s) are the only one yet served, removal is proper under the literal reading of section 1441(b)(2). [Texas Brine Co. v. American Arbitration Ass’n, Inc. (5th Cir. 2020) 955 F.3d 482—unserved local defendant can remove action if complete diversity exists; Encompass Ins. Co. v. Stone Mansion Restaurant (3d Cir. 2018) 902 F.3d 147—same; Gibbons v. Bristol-Myers Squibb Co. (2d Cir. 2019) 919 F.3d 699—same; contra Gentile v. Biogen Idec, Inc. (D. Mass. 2013) 934 F.Supp.2d 313, 317-318—(collecting cases reasoning that intention of local defendant prohibition defied by allowing snap removal); Kern v. KRSO (N.D. Ill. 2020) 2020 U.S. Dist. LEXIS 122804—same]

- **Local Defendant Bar is Not Jurisdictional:** If a plaintiff desires to obtain a remand an action on the ground of the local defendant bar, the plaintiff must make the motion within thirty days of removal or remand is waived. [Holbein v. TAW Enterprises, Inc. (8th Cir. 2020) 983 F.3d 1049—local defendant bar is not jurisdictional]

**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. [Home Depot U.S.A., Inc. v. Jackson (2019) 139 S.Ct. 1743, 1749—no removal in CAFA case by non-original defendant; Bowling v. U.S. Bank Nat’l Ass’n (11th Cir. 2020) 963 F.3d 1030—same if third party attempts to remove under 28 U.S.C. 1441(c)]

**Amount in Controversy on Removal**

- **Legal Certainty Test:** If the amount in controversy does not, to a legal certainty, exceed $75,000 in an action filed originally in federal court, an action predicated on diversity jurisdiction must be dismissed even if the parties would prefer it be in federal court. [Mensah v. Owners Ins. Co. (8th Cir. 2020) 951 F.3d 941—requested uninsured motorist amount $61,718.67; cf. Turtine v. Peterson (8th Cir. 2020) 959 F.3d 873—plausible defamation claims concern more than $75,000]

- **Alleging Amount in Controversy on Removal**

Defendant removing on diversity grounds need allege only short and plaint statement of plausible satisfaction of amount in controversy requirement. [Dart Cherokee Basin Operating
Co., LLC v. Owens (2014) 134 S.Ct. 1788; Academy of Country Music v. Continental Casualty (9th Cir. 2021) 991 F.3d 1059--defendant does not need to “prove” amount in controversy in notice of removal and sua sponte remand thereon improper; see also Carrozza v. CVS Pharmacy, Inc. (1st Cir. 2021) 992 F.3d 44--removal can be based on plaintiff’s settlement $650,000 pre-filing settlement demand even if defendant offered only $5,000; Durbois v. Deutsche Bank Nat’l Trust Co. (5th Cir. 2022) 37 F.4th 1053--diversity removal defeated if plaintiff expressly seeks less than $75,000

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, even if the claims in the two suits are transactionally related. [Energy Mgt. Services, LLC v. City of Alexandria (5th Cir. 2014) 739 F.3d 255; see also Industria Lechera de Puerto Rico, Inc. v. Beiro (1st Cir. 2021) 989 F.3d 116--violating a prior federal consent decree is not a basis for removing state law claim]

No Removal When Plaintiff Lacks Standing

If a plaintiff lacks standing under Article III (i.e., lack of injury in fact), then removal is improper for lack of subject matter jurisdiction and remand must be ordered. [Mack v. USAA Cas. Ins. Co. (11th Cir. 2021) 994 F.3d 1353; Dalton v. JJSC Properties, LLC (8th Cir. 2020) 967 F.3d 909--if plaintiff lacks standing to sue, court must remand action to federal court even if claim arises under federal law;]

Removal Based on Well Pleaded Complaint

Removal on federal question allowed if well pleaded complaint states claim that arises under federal law. [Banks v. Cotter Corp. (8th Cir. 2022) 22 F.4th 788--action arising from nuclear incident arises under federal statute; Old Dominion Elec. Coop. v. PJM Interconnection, LLC (4th Cir. 2022) 224 F.4th 271—claim involving interpretation of federal tariff is substantial federal question; compare Vlaming v. West Point School Bd. (4th Cir. 2021) 10 F.4th 300—no removal of state constitutional claims with Title IX defense]

• By comparison, if the state court complaint is uncertain and does not clearly refer to a federal claim for relief removal cannot take place until and if the claims are clarified by amendment or otherwise more certainly as arising under federal law. [Quinn v. Guerrero (5th Cir. 2017) 863 F.3d 353, 359--ambiguous references to excessive force and U.S. Constitution do not convert state law assault and battery claims into ones removable to federal court; Industria Lechera De Puerto Rico v Beiro (1st Cir. 2021) 989 F.3d 116—no removal of claim on basis it violated prior federal consent decree; Lake v. Ohana Military Cmtys., LLC (9th Cir. 2021) 14 F.4th 993—no removal simply because state claim affects
“federal interest” in safety of military housing alleging failure of housing builders to inform of pesticide contamination

- Removal on the basis of the Grable decision and a substantial federal question is not authorized as to a complaint setting forth state law claims attacking a lender’s foreclosure and to quiet title even though based on a federal statute (12 U.S.C. § 1701j-3—regulating due on sale clauses but not providing a federal cause of action). [Estate of Cornell v. Bayview Loan Servicing, LLC (6th Cir. 2018) 908 F.3d 1008; see also Miller v. Bruenger (6th Cir. 2020) 949 F.3d 986—dispute over benefits under life insurance policy issued to federal worker and governed by Federal Employees’ Group Life Insurance Act does not raise substantial federal question; Estate of Maglioli v. All. HC Holdings LLC (3d Cir. 2021) 16 F.4th 393—Covid-19 negligence claims against nursing homes not removable]

- Merely because allegedly defective product regulated by FDA does not mean action arises under federal law. [Burrell v. Bayer Corp. (4th Cir. 2019) 918 F.3d 372—no federal question jurisdiction exists over removal of unlawful detainer action simply because of a possible defense under federal tenant protection laws; Intellisoft, Ltd. v. Acer American Corp. (Fed. Cir. 2020) 955 F.3d 927—state claim for trade secret infringement defendant incorporated into patent application does not arise under federal law; but see Wulschleger v. Royal Canin U.S.A., Inc. (8th Cir. 2020) 953 F.3d 519—removal jurisdiction proper of state law unfair practices claim based on buying D’s products based on deception that FDA approved products; Agyin v. Razmzan (2d Cir. 2021) 986 F.3d 168—removal of medical malpractice allowed as physician acting for health center receiving federal funds and deemed employee of Public Health Service]

- A regulatory taking claim based on alleged violations of state law does not arise under federal law or otherwise provide for a removable substantial federal question, even if the state statute was written to comply with federal laws (e.g. laws regulating outdoor advertising). [Lamar Co. v. Mississippi Transp. Com’n (5th Cir. 2020) 976 F.3d 524]

- Action does not involve “substantial federal question” and allow removal simply because independent state law claims involve federal issues (e.g. climate change). [City of Oakland v. BP PLC (9th Cir. 2020) 960 F.3d 570—state nuisance claim arising out of climate change liability not removable—and amending post-removal to add federal common law claim does not cure removal defect; City & Cnty. of Honolulu v. Sunoco LP (9th Cir. July 7, 2022) 2022 U.S.App. LEXIS 18640—same; Bd. of Cty. Comm’rs of Boulder Cty. v. Suncor Energy (10th Cir. 2022) 25 F.4th 238—same; Rhode Island v. Shell Oil Prod. Co. (1st Cir. 2022) 35 F.4th 44—same; Mayor and City Council of Baltimore v. BP LLC (4th Cir. 2022) 31 F.4th 178—same; and see City of New York v. Chevron Corp. (2d Cir. 2021) 993 F.3d 81—issues different if original jurisdiction and raising issues of federal common law for global warming damage claims]

- The presence of a federal defense does not authorize removal on federal question grounds. [Mitchell v. Advanced HCS, L.L.C. (5th Cir. 2022) 28 F.4th 580—federal immunity under PREP statute; Saldana v. Glenhaven Healthcare LLC (9th Cir. 2022) 27 F.4th 679—same; Maglioli v. All. HC Holdings LLC (3d Cir. 2021) 16 F.4th 393—same; Box v. PetroTel, Inc. (5th Cir. 2022) 33 F.4th 195—contract illegality defense re federal securities issue not removable; La. Indep. Pharmacies Ass’n v. Express Scripts, Inc. (5th Cir. July 20, 2022) 2022 U.S. App. LEXIS 20025—no jurisdiction simply because preemption defense raised in declaratory relief case]
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; but see E. Cent. Ill. Pipe Trades Health & Welfare Fund v. Prather Plumbing & Heating, Inc. (7th Cir. 2021) 3 F.4th 954—claim by benefit funds against successor entity to employee benefit plan did not arise under ERISA]
  
  - Labor Law Preemption
    - Claims for tortious interference against union and its president under labor agreement and for defamation as to propriety of union’s actions thereunder completely preempted by LMRA and, thus, removal authorized. [Adamo Demolition Co. v. Int’l Union of Operating Engineers Local 150 (6th Cir. 2021) 3 F.4th 866—claims for tortious interference and defamation relating to labor agreement completely preempted by LMRA and, thus, removal authorized; see also Rose (1st Cir. 2021) 1 F.4th 56—LMRA preemption found]
    
    - 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; see also Markham v. Wertin (8th Cir. 2017) 861 F.3d 748—no preemption of state discrimination claims since resolved without reference to CBA; Dent v. NFL (9th Cir. 2018) 902 F.3d 1109]

  - ERISA Preemption
    - No complete preemption if party would lack standing under ERISA or would not otherwise have a colorable claim to benefits contemplated by the statute. [McCulloch v. Orthopaedic (2nd Cir. 2017) 857 F.3d 141—no removal under ERISA over promissory estoppel claim by out-of-state provider who lacked standing under ERISA; Hansen v. Group Health Cooperative (9th Cir. 2018) 902 F.3d 1051—no ERISA preemption if claim based on duty independently granted under state law]
    
    - 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]
Where severance benefit rights arose under an employment agreement referencing an ERISA plan solely to assign value to benefits, was independent of ERISA plan for preemption purposes. [Dakota, Minnesota & Eastern R.R. Corp. v. Schieffer (8th Cir. 2013) 711 F.3d 878, 882; see also Gardner v. Heartland Industrial Partners, LP (6th Cir. 2013) 715 F.3d 609, 614—tortious interference with pension plan contract claim did not require interpretation of ERISA plan terms]

Federal Officer Removal

• Actions can be removed under the federal officer removal statute (28 U.S.C. § 1442).
  
  • Removal Upheld: St. Charles Surg. Hosp., LLC v. La. Health Serv. & Indem. Co. (5th Cir. 2021) 990 F.3d 447—removal allowed if private company administering FHBA-governed health insurance plan since OPM exercised strong level of control; Williams v. Lockheed Martin Corp. (5th Cir. 2021) 990 F.3d 852—federal officer removal upheld upon exposure while working for company acting under federal officer; Agyin v. Razmzan (2d Cir. 2021) 986 F.3d 168—removal of medical malpractice allowed as physician acting for health center receiving federal funds and deemed employee of Public Health Service; Stirling v. Minasian (9th Cir. 2020) 955 F.3d 795—since defendant serving both state and federal government, “acting under” requirement satisfied; K&D LLC v. Trump Old Post Office LLC (D.C. Cir. 2020) 951 F.3d 503—federal officer removal upheld since defendant raised colorable federal defense of lawful performance of presidential duties; Latiolais v. Huntington Ingalls, Inc. (5th Cir. 2020) 951 F.3d 286—exposure to asbestos while Navy’s ship being repaired at shipyard under federal contract authorized removal; Baker v. Atlantic Richfield Co. (7th Cir. 2020) 962 F.3d 937—company complying with governmental World War II requirements acting under federal officer and removal allowed.

  • Removal Unauthorized: Lake v. Ohana Military Cmtys., LLC (9th Cir. 2021) 14 F.4th 993—no federal officer removal simply if private firm complying with federal law or assisting federal superior; Riggs v. Airbus Helicopters, Inc. (9th Cir. 2019) 939 F.3d 981—no federal officer removal simply because helicopter manufacturer inspected aircraft under FAA regulations but not acting under or assisting federal officers; Mays v. City of Flint (6th Cir. 2017) 871 F.3d 437—rejecting federal officer removal when state officials not acting under supervision of federal agency.

  • No Removal if State Court Without Jurisdiction: While Congress has abrogated the so-called “derivative jurisdiction” requirement under the general removal statute (28 U.S.C. § 1441(f)), it has not done so if removal is sought under the federal officer removal provision. [Ricci v. Salzman (7th Cir. 2020) 976 F.3d 768—if state court lacked jurisdiction, no derivative jurisdiction rule can be raised to dismiss removed federal action; but see Reynolds v. Behrman Capital IV, L.P. (11th Cir. 2021) 988 F.3d 1314—absence of personal jurisdiction in state court does not bar removal]

  • Federal Officer Removal Ruling Appealable: While ordinarily remand decisions are not appealable, if the remand was based on an alleged absence of federal officer removal status, an appeal is authorized. [See BP P.L.C v. Mayor and City Council of Baltimore (2021) 141 S.Ct. 1532—appellate review of federal officer removal may also include review of all grounds given for remand to state court]
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 U.S.C. § 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) 133 S.Ct. 1345, 1348; see also Faltermeier v. FCA U S LLC (8th Cir. 2018) 899 F.3d 617--plaintiff stipulation to limit recoverable attorney’s fees does not defeat CAFA removal; see also Singh v. American Honda Finance Corp. (9th Cir. 2019) 925 F.3d 1053—CAFA abstention doctrine did not require remand since post-removal plaintiff added federal question claim]

- Parens patriae suit brought by State on behalf of its citizens is not a “class action” within the meaning of CAFA. [Purdue Pharma L.P. v. Kentucky (2nd Cir. 2013) 704 F.3d 208, 217; Erie Ins. Exchange v. Erie Indem. Co. (3rd Cir. 2013) 722 F.3d 154, 158-159—same as to state-authorized right of members of unincorporated association to bring suit on its behalf; see also Nessel v. Amerigas Partners, L.P. (6th Cir. 2020) 954 F.3d 831—state AG’s “class action” under state consumer protection statute not removable under CAFA since it lacks attributes of Rule 23 class action; Canela v. Costco Wholesale Corp. (9th Cir. 2020) 971 F.3d 845—PAGA case not “class action” allowing removal under CAFA]

- If an otherwise nonremovable action (e.g. CAFA case with mandatory abstention) is amended post-removal, that amendment cures any jurisdictional defect and establishes federal subject-matter jurisdiction. [Singh v. American Honda Finance Corp. (9th Cir. 2019) 925 F.3d 1053]

- The amount in controversy on removal of an action under CAFA must be shown by a preponderance of the evidence. [Dart Cherokee Basin Operating Co., LLC v. Owens (2014) 134 S.Ct. 1788—notice of removal need include only plausible allegation of CAFA amount in controversy and defendant can later provide evidence to meet preponderance burden; Dudley v. Eli Lilly & Co. (11th Cir. 2014) 778 F.3d 909—CAFA amount not satisfied because defendant failed to identify specific number of class members who did not receive promised compensation; Judon v. Travelers Property Casualty Co. of America (3rd Cir. 2014) 773 F.3d 495—conjecture as to CAFA amount in controversy insufficient; Salter v. Quality Carriers, Inc. (9th Cir. 2020) 974 F.3d 959—facial attack on CAFA amount in controversy requires only sufficient allegation of jurisdiction; Harris v. KM Industrial, Inc. (9th Cir. 2920) 980 F.3d 694—if factual attack, defendant must show CAFA amount in controversy satisfied by preponderance of
evidence]

- “Any defendant” language in CAFA does not allow a third party defendant to remove to federal court. [U.S.A., Inc. v. Jackson (2019) 139 S.Ct. 1743; 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]

- Pleading minimal diversity for a CAFA removal can be made on information and belief. [Ehrman v. Cox Communications, Inc. (9th Cir. 2019) 932 F.3d 1223; Turner v. GoAuto Ins. Co. (5th Cir. 2022) 33 F.4th 214—no CAFA minimal diversity if P defines class to include only non-diverse Ds]

- 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**

- 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; compare Romulus v. CVS Pharmacy, Inc. (1st Cir. 2014) 770 F.3d 67, 74—removal based on information in plaintiff’s email; Morgan v. Huntington Ingalls (5th Cir. 2018) 879 F.3d 602—“other paper” rule runs from receipt of removal disclosing deposition transcript, not upon testimony; Hoffman v. Saul Holdings 10th Cir. 1999) 194 F.3d 1072—contra; Dietrich v. Boeing Co. (9th Cir. 2021) 14 F.4th 1089—neither deposition testimony nor transcript is a “paper in the case” triggering the time limit to remove]

- Time to remove is not triggered by service on statutory agent, but rather when defendant actually receives copy of complaint. [Elliott v. America States (4th Cir. 2018) 883 F.3d 384; Anderson v. State Farm Mut. Auto Ins. Co. (9th Cir. 2019) 917 F.3d 1126—same; but see Railey v. Sunset Food Mart, Inc. (7th Cir. 2021) 16 F.4th 234—defendant has burden to remove if it holds information about its own operations discerned with ease showing removability (here preemption)]

- 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). [McClaren v. The UPS Store Inc. (3d Cir. 2022) 32 F.4th 232; Dietrich v. Boeing Co. (9th Cir. 2021) 14 F.4th 1089—ambiguity as to existence of facts showing basis for federal officer removal; Railey v. Sunset Food Mart, Inc. (7th Cir. 2021) 16 F.4th 34—time to remove CAFA case may be triggered by disclosure of facts even if earlier ground to remove passed; 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; Graiser v. Visionworks (6th Cir. 2016) 819 F.3d 277, 283—CAFA removal time not triggered until defendant receives sufficient information from plaintiff; see also Intellisoft, Ltd. v. Acer American Corp. (Fed. Cir. 2020) 955 F.3d 927—time to remove claim based on proposed amendment adding federal claim not triggered until amendment granted and pleading operative]
• If defendant is not properly served under state law, then the time to remove does not commence and later removal not untimely. *Shakouri v. Davis* (5th Cir. 2019) 923 F.3d 407

• The 30-day removal deadline in a CAFA case is not triggered simply because the data as to the requisite $5 million amount in controversy is contained in defendant’s own files. *Kuxhausen v. BMW Fin’l Services NA LLC* (9th Cir. 2013) 707 F.3d 1136, 1139; see also *Walker v. Trailer Transit, Inc.* (7th Cir. 2013) 727 F.3d 19, 824-826

• Outside one-year limit for removal of diversity case does not apply if plaintiff in bad faith dismissed nondiverse defendant without settlement two days after deadline. *Hoyt v. Lane Constr. Corp.* (5th Cir. 2019) 927 F.3d 287

**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 92; *Taylor v. Medtronic, Inc.* (2d Cir. 2021) 15 F.4th 148—served co-defendant’s failure to join until 17 days after time to remove lapsed too late and remand required

• If a served co-defendant has signed a valid forum selection clause that prohibits removal (e.g. by agreeing to a mandatory clause placing exclusively selecting state court only), then it cannot consent to removal as would be required. *Autoridad de Energia v. Vitol, S.A.* (1st Cir. 2017) 859 F.3d 140

**No Sua Sponte Remand for Procedural Defects**

• If the defect on removal is procedural and not one of jurisdiction, the court may not sua sponte remand. *Corona-Contreras v. Gruel* (9th Cir. 2017) 857 F.3d 1025; *City of Albuquerque v. Soto Enterp.* (10th Cir. 2017) 864 F.3d 1089; note however that courts may nevertheless issue an order to show cause re the propriety of removal

**Waiver of Right to Remove**

• *Waiver of Removal By Contract:* A defendant waives the right to remove by clearly and unequivocally waiving the right to a federal forum. *Dynamics CRM Recruiting Solution v. UMA Education* (5th Cir. 2022) 31 F.4th 914; *Grand View v. Helix Electric*, 847 F.3d 255 (5th Cir. 2017)—forum selection clause consenting to “sole and exclusive jurisdiction of the courts of Harris County, Texas” waives right of removal; *Medtronic Sofamor Danek, Inc. v. Gannon* (8th Cir. 2019) 913 F.3d 704—defendant waived right to remove by entering into related agreement stating claims “arising out of or related to this Agreement must be litigated in Minnesota state court”; *Bartels v. Saber Healthcare Group, LLC* (4th Cir. 2018) 880 F.3d 668—limiting forum to state county where there is no federal court bars removal; *City of Albany v. CH2M Hill, Inc.* (9th Cir. 2019) 924 F.3d
Waiver by Failure to Move to Remand on Non-Jurisdictional Defect Within 30 Days: [Holbein v. TAW Enterprises, Inc. (8th Cir. 2020) 983 F.3d 1049—a plaintiff waives right to remand on a non-jurisdictional defect if the motion is not made within 30 days of removal, e.g. local defendant bar remand; Shipley v. Helping Hands Therapy (11th Cir. 2021) 996 F.3d 1157—raising non-jurisdictional defect in reply brief filed more than 30 days after removal untimely; Hinkley v. Envoy Air, Inc. (5th Cir. 2020) 968 F.3d 544—removal to wrong district is procedural defect and waived if no timely remand motion; but see Kamm v. ITEX (9th Cir. 2009) 568 F.3d 752—motion to remand based on forum selection clause not a “defect” under statute so 30-day time limit for motion does not apply]

Effect of Removal on State Court Jurisdiction

Upon removal, the state court loses all jurisdiction over the case and its subsequent proceedings and judgment are not simply erroneous but absolutely void (and cannot later be corrected by a nunc pro tunc order). [Roman Catholic Archdiocese v. Feliciano (2020) 140 S.Ct. 696]

Time to Move to Remand

Plainly, a motion to remand for lack of subject matter jurisdiction can be made at any time; in contrast, a motion to remand for procedural errors must be made within 30 days of removal. [See Hinkley v. Envoy Air, Inc. (5th Cir. 2020) 983 F.3d 544—removal to incorrect federal district is a procedural error, not a jurisdictional one; Holbein v. TAW Enterprises, Inc. (8th Cir. 2020) 983 F.3d 1049—remand based on local defendant bar must be made within 30 days of removal]

Appealability of Remand Decision

If the court remands the action for lack of subject matter jurisdiction, the ruling remanding the action to state court is not appealable (28 U.S.C. § 1447(d); Vachon v. Travelers Home and Marine Insurance Co. (11th Cir. 2021) 20 F.4th 1343; however, if the removal was pursuant to 28 U.S.C. § 1442 (civil rights removal) or § 1443 (federal officer removal) an appeal may go forward and appellate review may also include review of all grounds (even those ordinarily not appealable) given for remanding the action to state court. [BP P.L.C v. Mayor and City Council of Baltimore, (2021) 141 S.Ct. 1532 (“After all, the statute allows courts of appeals to examine the whole of a district court’s ‘order,’ not just some of its parts or pieces.”; Dietrich v. Boeing Co. (9th Cir. 2021) 14 F.4th 1089—appeal allowed from remand decision rejecting federal officer removal]
On the other hand, if the district court remands the action on abstention grounds, the decision is subject to appellate review, and the district court should hold the remand and transfer of the file to the state court pending such an appeal. [Forty Six Hundred LLC v. Cadence Educ., LLC (1st Cir. 2021) 15 F.4th 70]

**Supplemental Jurisdiction**

**Supplemental Jurisdiction—Same Transaction or Occurrence Requirement**

- Courts have supplemental jurisdiction over transactionally related claims including claims raised in third party complaints. [GN Netcom, Inc. v. Plantronics, Inc. (3d Cir. 2019) 930 F.3d 76--federal question jurisdiction existed over plaintiff’s federal antitrust claims and supplemental jurisdiction was proper over the related state law tortious interference claim; Weaver v. Metropolitan Life Ins. Co. (5th Cir. 2019) 939 F.3d 618--supplemental jurisdiction exists over claims between non-diverse co-defendants joined on a Rule 22 interpleader claim; see also D’Onofrio v. Vacations Publ’ns, Inc. (5th Cir. 2018) 88 F.3d 197; Watson v. Cartee (6th Cir. 2016) 817 F.3d 299, 303]

- If, on the other hand, the claims do not arise out of the same transaction or occurrence, the assertion of supplemental jurisdiction is improper. [Kubala v. Smith (6th Cir. 2021) 984 F.3d 1132--federal first amendment claim unrelated to separate state law sexual harassment claim; Prolite Bldg. Supply LLC v. MW Mfrs., Inc. (7th Cir. 2018) 891 F.3d 756—warranty and service contract claims for defective windows not supplemental since did not have common nucleus of operative fact; S J Associated Pathologists, P.L.L.C. v. Cigna Healthcare of Texas, Inc. (5th Cir. 2020) 964 F.3d 369—federal securities claim unrelated to separate state law contract claim and must be remanded (or dismissed)]

**Retention or Dismissal of Supplemental Claims or Parties**

- Federal courts typically will decline continuing jurisdiction over supplemental state law claims once the federal claims are dismissed or resolved. [Robinson v. Town of Marshfield (1st Cir. 2020) 950 F.3d 21--when federal claims dismissed abuse of discretion to retain state claims unless doing so would serve interests of fairness, judicial economy, convenience and comity; King v. City of Crestwood (8th Cir. 2018) 899 F.3d 643—same; Sexual Minorities Uganda v. Lively (1st Cir. 2018) 899 F.3d 24—broad discretion to dismiss; also Nuevos Destinos, LLC v. Peck (8th Cir. 2021) 999 F.3d 641—one federal question and supplemental claims dismissed, amending to add diversity ground rejected; Rubenstein v. Yehuda (11th Cir. 2022) 38 F.4th 982—party waives dismissal of supplemental claim when not seeking dismissal in motion]

- **Factors:** Factors that lean in favor of continuing to exercise supplemental jurisdiction are whether:
  - trial is imminent and the court has expended time and resources on the
matter;
  
- 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. [Catzin v. Thank You & Good Luck Corp. (2d Cir. 2018) 899 F.3d 77--abuse of discretion to dismiss remaining supplemental claims sua sponte, without notice and days before trial; see also Integrinet Physician Resource, Inc. v. Texas Independent Providers, L.L.C. (5th Cir. 2019) 945 F.3d 232--abuse of discretion to retain supplemental claims since discretion is not a “blank check”; Lambert v. Fiorentini (1st Cir. 2020) 949 F.3d 22--can be abuse of discretion to retain jurisdiction if state law claim presents substantial question of state law better addressed by state courts; Lavite v. Dunstan (7th Cir. 2019) 932 F.3d 1020--rule to decline jurisdiction after dismissal of federal claim “is not rigid, but this practice is common and usually sensible if all claims within the court’s original jurisdiction have been resolved before trial”]

Courts often will simultaneously rule on related state law claims if the court’s reasoning in dismissing the federal claims applies equally to the state laws claims; while declining supplemental jurisdiction if there is no analogue for the state claims and the reasoning in ruling on the federal claims does not bear on the remaining claims. [Robinson v. Town of Marshfield (1st Cir. 2020) 950 F.3d 21]

**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. [Cohen v. Postal Holdings, LLC (2d Cir. 2017) 873 F.3d 394; Arena v. Graybar Electric Co. (5th Cir. 2012) 669 F.3d 214, 222]

- Similarly, if the Court finds that there is no personal jurisdiction over the anchor federal question claim, then there can be no supplemental jurisdiction at all over included state law claims – even if they are transactionally related. [NexLearn v. Allen Interactions, Inc., (Fed. Cir. 2017) 859 F.3d 1371, 1381]

- If the action has been dismissed without the court expressly retaining jurisdiction to enforce a settlement, there is no supplemental or ancillary jurisdiction to decide the now-state law claim for breach of the settlement agreement. [See National City Golf Finance v. Scott (5th Cir. 2018) 899 F.3d 412]

**Tolling Statute Upon Dismissal of Supplemental Claims**

- After dismissal of federal claims, the statute of limitations is tolled for 30 days pending the refiling of the claims in state court. [Artis v. Dist. of Columbia (2018) 138 S.Ct. 594]

**Ancillary (enforcement) Jurisdiction** Once a federal court dismisses an action, the court does
not generally have jurisdiction over further matters (e.g. enforcement of a settlement) unless it is (1) ruling on matters inextricably linked to the judgment (e.g. awarding attorney’s fees and costs), (2) enforcing an existing consent decree or if it has expressly in the dismissal retained jurisdiction to enforce any settlements, or (3) ruling on an existing lien or other enforcement mechanism. [See Kokkonen v. Guardian Life Ins. Co. of America (1994) 511 U.S. 375—settlement enforcement; Vikas WSP, Ltd. v. Economy Mud Products Co. (5th Cir. 2022) 23 F.4th 442—same; Boim v. American Muslims for Palestine (2d Cir. 2021) 9 F.4th 545—enforcement against same party or alter ego; Nichols v. Longo (7th Cir. 2022) 22 F.4th 695—jurisdiction permitted to rule on fee motion after judgment but not over contractual fee dispute between attorney and client; Butt v. United Bhd. of Carpenters (3d Cir. 2021) 999 F.3d 882—ancillary jurisdiction over former attorney’s post-dismissal motion to intervene and enforce attorney’s fees lien]
INTRODUCTION TO FEDERAL COURT

Office of the Clerk of Court: John Morrill, Clerk of Court
10. The Clerk’s Office is located on the 4th floor of the Carter-Keep U.S. Courthouse, 333 West Broadway, San Diego, California 92101. Clerks are available to assist you with filing questions and research. Main telephone line: 619-557-5600.

- Schwartz Courthouse – 20 chambers and 16 courtrooms
- Carter-Keep Courthouse – 12 chambers and 6 courtrooms (2 new courtrooms under construction)
9. Our website is casd.uscourts.gov
   + News, Notices & Events
   + General Orders & Chief Judge Orders
   + Attorney Admissions
   + CM/ECF
   + Local Rules
   + Judge Pages with Chambers Rules & Contact Info.
   + Court Calendars
   + Forms
   + Fee Schedule
   + Contact Information and Court Locations
8. You must be admitted to practice in the Southern District before filing documents or making an appearance. The Clerk’s Office will process your attorney admission packet online. The $213 fee can also be paid online.
7. After you are admitted to practice in the Southern District, you should immediately register for CM/ECF, our electronic case filing system. There is no fee to register and our attorney admissions clerk will help you with registration. This also adds you to our email announcements, so register soon.
6. Electronic filing is mandatory in the Southern District for attorneys. It is available 24/7. We provide training for lawyers and support staff.
5. The CM/ECF Policies & Procedures Manual will answer many of your questions about electronic filing. It is available on our website.

If you need help filing a document, call our CM/ECF Help Line: 866-233-7983.
CM/ECF ADMINISTRATIVE POLICIES AND PROCEDURES

- Documents must be filed electronically
  - Some Exceptions: Criminal Sealed Documents; Documents Filed in the Courtroom (see exceptions to electronically filed documents).

- Service of documents

- Courtesy copies for Judicial Officers

- Signatures

- Proposed orders

- Sealed documents

- QC Mailer / Discrepancy Orders
4. Our courtrooms have the latest evidence presentation technology. The Clerk’s Office can help familiarize you with using the system prior to your scheduled hearing. Contact the Courtroom Deputy for assistance before the hearing.
3. The Clerk’s Office is the custodian of public monies. A court order is required to deposit and disburse funds. Our Financial Department can assist with sample orders.

We collect:
- Registry Funds (Civil and Criminal)
- Filing Fees
- Fines and Restitution
2. To order a transcript, contact the Court Reporter/Court Recorder directly. The Court Reporter’s name is included on the docket. For hearings held before a Magistrate Judge, contact the Courtroom Deputy. You can find contact information on the Judge’s page on the website.
1. We strive to be a user-friendly Clerk’s Office

   Helpful links & resources
   - Website: [www.casd.uscourts.gov](http://www.casd.uscourts.gov)
   - PACER: [https://pacer.uscourts.gov/](https://pacer.uscourts.gov/)
   - ecfhelp@casd.uscourts.gov
   - CM/ECF Help: 866-233-7983
OTHER SERVICES PROVIDED BY THE CLERK’S OFFICE

- Jury Management / Jury Summons
- Interpreting services
- Statistical Reporting to the Administrative Office U.S. Courts
- Bill of Costs
- Administrative Support
  - (Budget, I.T., Space, HR)