SUBJECT MATTER JURISDICTION UPDATE - 2020

JIM WAGSTAFFE

The Wagstaffe Group Prac. Guide: Fed. Civ. Proc. Before Trial (LN 2020)

Twitter Handle: @JWagstaffeLxNx

wagstaffe@wvbrlaw.com

Jurisdiction v. Claim-Processing Requirements and Elements

- **Statutory Time Limits Generally Not Jurisdictional:** Statutory time limitations generally are 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; *Jackson v. Modly* (D.C. Cir. 2020) 949 F.3d 763--§ 2401(a) also non-jurisdictional; *Chance v. Zinke* (10th Cir. 2018) 898 F.3d 1025--same; *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--statutes of limitation 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]

    - ***Compare—time limits jurisdictional:*** *Groves v. U.S.* (7th Cir. 2019) 941 F.3d 315—ten day time limit for seeking sec. 1292(b) interlocutory appeal is jurisdictional and cannot be retriggered by district court re-issuing order; *Duggan v. 4100 15 L Comm'r of Internal Revenue* (9th Cir. 2018) 879 F.3d 1029--review of levy jurisdictional, as time limit was within jurisdiction-granting section of 26 U.S.C. §6330(d)(1); *Rubel v. Rubel* (3d Cir. 2017) 856 F.3d 301--ex-spouse challenge to tax liability is jurisdictional per statute; *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]

- **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 most recent 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 is not jurisdictional]

    - ***Non-Jurisdictional***: *United States v. Alam* (6th Cir. 2020) 960 F.3d 831--failure to exhaust remedies by seeking modification of prison term first to Bureau of Prisons (18 U.S.C. § 3582(c)) not jurisdictional; *A1 Diabetes & Med. Supply v. Azar* (6th Cir. 2019) 937 F.3d 613—exhaustion requirement before seeking court review of administrative Medicare decision (42 U.S.C. § 405(h)) not jurisdictional; *LULAC v. Wheeler* (9th Cir. 2018) 899 F.3d 814—FFDCA's exhaustion requirement not jurisdictional (21 U.S.C. § 346a(h)(1)); *Delgado v. Merit Systems Protection Bd.* (7th Cir. 2018) 880 F.3d 913--first filing whistleblower complaint with Office of Special counsel not jurisdictional (5 U.S.C. § 1214(a)(3)); *Goldberg v. U.S.* (7th Cir. 2018) 881 F.3d 529—exhaustion not

jurisdictional and can be waived in damage actions against IRS for unauthorized tax collections (26 U.S.C. § 7433); *Staudner v. Robinson Aviation, Inc.* (4th Cir. 2018) 910 F.3d 141—exhaustion of § 301(a) collective bargaining agreement grievance not jurisdictional.

- ***Jurisdictional*:** *Seaway Bank & Trust Co. v. J&A Series I, LLC* (7th Cir. 2020) 962 F.3d 926--exhaustion requirement of FIRREA (12 U.S.C. § 1821(d)) is jurisdictional prerequisite to suit in district court; *Daly v. Citigroup, Inc.* (2d Cir. 2019) 939 F.3d 415--failure to exhaust OSHA remedies is a jurisdictional defect in Dodd-Frank whistleblower claim (18 U.S.C. § 1514A(b)(1);*Cooke v. United States* (2d Cir. 2019) 918 F.3d 77; *Vazquez v. Sessions* (5th Cir. 2018) 885 F.3d 862--requirement that alien exhaust administrative remedies (8 U.S.C. § 1252(d)(1)) is a jurisdictional bar; *Lin v. U.S. Attorney General* (11th Cir. 2018) 881 F.3d 860—same; *NFL Players Ass'n v. NFL* (5th Cir. 2017) 874 F.3d 22--exhaustion of grievance requirements under LMRA jurisdictional*; LNV Corp. v. Outsource Services Mgt., LLC* (10th Cir. 2017) 869 F.3d 662—same; *Acha v. Dept. of Agriculture* (10th Cir. 2016) 841 F.3d 878—whistleblower exhaustion to Office of Special Counsel (5 U.S.C. §1214(a)(3)) is jurisdictional.

- **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 F3d 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 *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]

  These principles apply in the following illustrative areas:

  - **ERISA**: Whether a claim involves an ERISA "plan" is a non-jurisdictional defect giving rise to a FRCP 12(b)(6) motion only. [*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; also whether a plaintiff is a "plan participant" within the meaning of ERISA is a non-jurisdictional defect treated as a missing element of the claim. *North Jersey Brain & Spine Center* (3rd Cir. 2015) 801 F.3d 369; *Leeson v. Transamerica Disability Income Plan* (9th Cir. 2012) 671 F.3d 969--same]

  - **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 Clinc Found.* (6th Cir. 2015) 788 F.3d 605—same; but see *United States v. AT&T* (D.C. Cir. 2015) 791 F.3d 112--first to file rule (31 USC § 3730(b)(5)) does not raise jurisdictional defect; *U.S. ex rel Ambrosecchia 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. [*Patchak v. Zinke* (2018) 138 S.Ct. 897–since Congress in Gun Lake Act, 128 Stat. 1913, stated such a case "shall not be filed or maintained in a Federal court" it imposed "jurisdictional" consequences; *see also Franchise Tax Bd. of Cal. v. Hyatt* (2019) 139 S.Ct. 1485--States have sovereign immunity from being sued in the courts of other states]

Other Elemental Defects:

- 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]

- Depositing full amount at stake in statutory interpleader action is a jurisdictional prerequisite. [*Acuity v. Rex, LLC* (8th Cir. 2019) 929 F.3d 995]

- Anti-Terrorism Act "act of war" exception not jurisdictional. [*Kaplan v. Central Bank of Islamic Republic of Iran* (D.C. Cir. 2018) 896 F.3d 501]

- Foreign Sovereign Immunities Act (FSIA) and immunities thereunder are jurisdictional. [*Bolivarian Republic of Venezuela v. Helmerich & Payne* (2017) 137 S.Ct. 1312]

- 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 a plaintiff is an 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 claim comes under a collective bargaining agreement is not jurisdictional under §301. [*Tackett v. M& G Polymers* (6th Cir. 2009) 561 F.3d 478; *Pittsburgh Mack Sales & Serv. V. Int'l Union of Operating Engineers* (3rd Cir. 2009) 580 F.3d 185; *contra ABF Freight System v. Int'l Broth. Of Teamsters* (8th Cir. 2011) 645 F.3d 954]

Compare—Sovereign Immunity

- If a governmental defendant has sovereign immunity, that goes to the power of the court to adjudicate, dismissal will be for want of subject matter jurisdiction. [See, e.g., *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; *Sangha v. Navig8 ShipManagement Private Ltd.* (5th Cir. 2018) 882 F.3d 96—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 *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) F.3d -- court may dismiss case on merits before reaching *statutory* jurisdictional grounds, e.g. *Rooker-Feldman* dismissal]

"Arising Under" – General Rules

- **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 Knick v. Township of Scott* (2019) 139 S.Ct. 2162–takings claims can be brought immediately in federal court under 42 U.S.C. § 1983 without first seeking compensation in state court]

    - ***Cases Finding "Substantial Federal Question":*** *Wullschleger 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; *Sarauer v. Int'l Ass'n & Aero. Workers,Dist. No. 10* (7th Cir. 2020) 966 F.3d 661—when a collective bargaining agreement becomes effective is question of federal law and thus removable to federal court; *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; *North Carolina v. Alcoa Power Generating, Inc.* (4th Cir. 2017) 853 F.3d 140—questions of navigability for determining state riverbed title are governed by federal law; *State of New York ex rel Jacobson v. Wells Fargo* (2nd Cir. 2016) 824 F.3d 308--state false claims act raises substantial federal question since proving false statement required proof of violation of federal tax laws]

- ***Cases Not Finding "Substantial Federal Question":*** *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; *Inspired Development Group v. Inspired Products Group* (Fed. Cir. 2019) 938 F.3d 1355—contract and unjust enrichment claims based on licensing of a patented product does not raise substantial federal question; *Naragansett Indian Tribe v. Rhode Island Department of Transportation* (1st Cir. 2018) 903 F.3d 26—Indian tribe's claim federal agency alleged breach contract on historic bridge project not substantial federal question; *Mays v. City of Flint* (6th Cir. 2017) 871 F.3d 437—no substantial federal question over tainted drinking water case simply because state officers working with EPA; *Webb v. Financial Industry Regulatory Authority* (7th Cir. 2018) 889 F.3d 853--whether FINRA breached its arbitration agreement does not raise substantial federal question]

- ***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 *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; see also *Cook Cty. Republican Party v. Sapone* (7th Cir. 2017) 870 F.3d 709—political party's declaratory relief action regarding seating of elected individual did not raise federal question despite First Amendment defense]

- **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]

- **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. July 30, 2020) 2020 U.S. App. LEXIS 24016—declaratory relief action seeking determination that defendant enjoys no immunity from damages under federal statute does not arise under federal law]

- **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]

"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 Unitah 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]

- ***Petitions to Vacate or Confirm***: There is a split as to whether there is federal jurisdiction on the "look through" approach when the matter involves a petition to vacate or confirm an arbitration. *Ortiz-Espinosa v. BBVA Securities of Puerto Rico, Inc.* (1st Cir. 2017) 852 F.3d 36)—look through approach and allows jurisdiction; *Doscher v. Sea Port Securities, LLC* (2d Cir. 2016) 832 F.3d 372—same; contra *Magruder v. Fid. Brokerage Servs. LLC* (7th Cir. 2016) 818 F.3d 285—no look through jurisdiction for review or enforcement of arbitration award; *Goldman v. Citigroup Glob. Mkts. Inc.* (3d Cir. 2016) 834 F.3d 242—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., 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; *In re Fresenius Granuflo/Naturalyte Dialsysate Prod. Liab. Litig.* (D. Mass. 2015) 76 F.Supp.3d 268--if state is real party to action, it is "jurisdictional spoiler" for diversity]

- State, not citizens thereof, was the real party in interest of *parens patrae* 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]

Bar on Diversity in Suits Between Aliens

- If there is otherwise no complete diversity of citizenship, if 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]

- ***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 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]

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). [*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 Dissolved Corporations

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

Citizenship of Foreign Corporations

- All corporations are considered citizens of both the place of incorporation and the principal place of business. Thus, this results in denial of diversity jurisdiction for plaintiffs who are citizens of either the principal place of business or the place of incorporation of a corporation irrespective of whether it is within or outside of the U.S. [28 USC §1332(c)(1); *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]

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]

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]

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 Bank* (9th Cir. 2019) 920 F.3d 1223; *Alliant Tax Credit 31 v. Murphy* (11th Cir. 2019) 924 F.3d 1134; *GBForefront, L.P. v. Forefront Mg't Group, LLC* (3d Cir. 2018) 888 F.3d 29; *Raymond Loubier Irrevocable Trust v. Loubier* (2nd Cir. 2017) 858 F.3d 719; see also *SGK Properties LLC v. U.S. Bank Nat'l Ass'n* (5th Cir. 2018) 881 F.3d 933--when Bank sued in capacity of trustee, look only to citizenship of trustee; *Byname v. Bank of New York Mellon* (5th Cir. 2017) 866 F.3d 351—when traditional trust is real party in interest, look to citizenship of trustee; *Doermer v. Oxford Financial Group* (7th Cir. 2018) 884 F.3d 643--same; *Wang v. New Mighty U.S. Trust* (D.C. Cir. 2016) 843 F.3d 487—same]

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]

- **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. JP 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]

- **Petitions re Arbitration:** There is a split of authority as to calculating the a]mount 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 ecoverable 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) F.3d -- party not named as defendant, even if defendant misnamed—cannot remove action].

Fraudulent Joinder

Fraudulent joinder requires more than grounds sufficient for a Rule 12(b)(6) dismissal – rather, it requires that there be no possibility of recovery with "extraordinarily strong" evidence there is no basis for a claim against the designated defendant. [*Grancare, LLC v. Thrower by and through Mills* (9th Cir. 2018) 889 F.3d 543—nursing facility administrator could be personally liable and hence was not a sham defendant; *Murphy v. Aurora Loan Services, LLC* (8th Cir. 2012) 699 F.3d 1027--fraudulent joinder upheld when negligent misrepresentation claim against law firm barred by established immunity from suit state law protection; *see also Couzens v. Donahue* (8th Cir. 2017) 854 F.3d 508--defendant not properly sued in individual capacity; *Alviar v. Lilllard* (5th Cir. 2017) 854 F.3d 286 --no evidence of required willful intent for agent's individual liability for tortious interference; *Casias v. Wal-Mart Stores, Inc.* (6th Cir. 2012) 695 F.3d 428, 433—joinder of nondiverse corporate manager a sham party in wrongful termination suit because he did not actively participate in termination decision]

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) F.Supp.3d (same)]

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]

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 American Airlines, Inc. v. Sabre, Inc.* (5th Cir. 2012) 694 F.3d 539, 543; *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 contains federal claim for relief as evidenced by incorporation of EEOC charge under Title VII attached to state court complaint. [*Davoodi v. Austin Independent School Dist.* (5th Cir. 2014) 755 F.3d 307]

- 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]

- 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 a substantial federal question]

- 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]
-]

- Action does not involve "substantial federal question" and allow removal simply because independent state law claims involve federal issues. [*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; *Cty. of San Mateo v. Chevron Corp.* (9th Cir. 2020) 960 F.3d 586—same; *Bd. of Cty. Comm'rs v. Suncor Energy (U.S.A.) Inc.* (10th Cir. 2020) 965 F.3d 792—same]

No Complete Preemption

- Without a federal cause of action which in effect replaces a state law claim (e.g. LMRA, ERISA), there is an exceptionally strong presumption against complete preemption and removal under the artful pleading doctrine. [*Johnson v. MFS Petroleum Co.* (8th Cir. 2012) 701 F.3d 243, 249—no complete preemption under Petroleum Marketing

  Practices Act in class action by gas consumers for misrepresentation of grade of gasoline; *Sheehan v. Broadband Access Services, Inc.* (D. R.I. 2012) 889 F.Supp. 2d 284—no complete preemption of claims of violation of state drug testing laws under Federal Omnibus Transportation Employee Testing Act]

  - **Labor Law Preemption**

  - Claims for money had and received, unjust enrichment and conversion brought by union employee essentially were ones for unpaid wages, hinging on an interpretation of the CBA. Thus, removal authorized. [*Cavallaro v. UMass*

Mem'l Healthcare, Inc. (1st Cir. 2012) 678 F.3d 1, 5]

- On the other hand, if a workplace safety claim depends on an independent and non-negotiable state right, it is not completely preempted. This may be true even if CBA also speaks to safety standards, so long as the claim does not rely on a construction of the CBA for recovery. [*McKnight v. Dresser, Inc.* (5th Cir. 2012) 676 F.3d 426, 434; 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: 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; *Butler v. Coast Elec. Power Ass'n* (5th Cir. 2019) 926

F.3d 190—argument that state refund procedure preempted by federal law sufficient for federal officer removal; *Zeringue v. Crane Co.* (5th Cir. 2017) 846 F.3d 785—federal officer removal over asbestos claim against government contractor supplying product to Navy; *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: 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; see also *Mayor and City Council of Baltimore v. BP PLC* (4th Cir. 2020) 952 F.3d 452—climate change suit against oil and gas companies not removable under federal officer removal statute.

- *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) F.3d -- if state court lacked jurisdiction, no derivative jurisdiction rule can be raised to dismiss removed federal action]

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 F3d 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]

- 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 F3d 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]

- "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]

- 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]

- 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]

- 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). [*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 927]

- 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. [*Coronoa-Contreras v. Gruel* (9th Cir. 2017) 857 F.3d 1025; *City of Albuqerque v. Soto Enterp.* (10th Cir. 2017) 864 F.3d 1089]

Waiver of Right to Remove

A defendant waives the right to remove by clearly and unequivocally waiving the right to a federal forum. [*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 1306—same; *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"; *City of Albuquerque v. Soto Enterp.* (10th Cir. 2017) 864 F.3d 1089—filing motion to dismiss on the merits in state court waives removal; *Kenny v. Wal-Mart Stores, Inc.* (9th Cir. 2018) 881 F.3d 786--no waiver by seeking dismissal of state court complaint that does not yet disclose right to remove; *see generally Stone Surgical,LLC v. Stryker Corp.* (6th Cir. 2017) 858 F.3d 383]

Effect of Removal

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. Aug. 4, 2020) 2020 U.S. App. LEXIS 24626---removal to incorrect federal district is a procedural error, not a jurisdictional one]

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. [*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]

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]
- ***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 *Integranet 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]