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MCLE Self Study

[Note: A space limitation necessitated partial coverage. Differences including Trial, Appeal, and Prior Suit will be presented, upon completion of the next casebook and Nutshell editions.]

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Practice and Pleading

Choosing State or Federal Procedure

A generation ago there were fewer procedural differences between the state and federal judicial systems. But the federal rules have dimmed from beacon to flicker. A growing number of state procedural codes no longer slavishly track the Federal Rules of Civil Procedure. And most practitioners encounter this tactical minefield of differences only after getting involved in them.

This summary of some of the prominent differences in jurisdiction, pleadings, and discovery should help guide those faced with making a choice between the two systems. Trial, appeal, and the impact of a prior lawsuit are not discussed here.

Concurrent Jurisdiction

There is a presumption of concurrent subject-matter jurisdiction between state and federal courts. Both plaintiffs and defendants may choose between them. (*Tafflin v. Levitt*, 493 U.S. 455, 458 (1990).) Unless Congress vests exclusive jurisdiction in the federal courts—as with bankruptcy, for example—claims arising under federal law may be heard in either judicial system. And because there is no longer a minimum amount in controversy necessary for most federal cases, a federal claim may be filed as either a limited or unlimited case in California's superior courts.

Diverse citizenship of the parties—in which no plaintiff and no defendant are domiciled in the same state—is the other basis for accessing the federal courts. If the controversy is worth more than \$75,000 in a diversity claim, a plaintiff may then choose either state or federal court. A defendant has the general right to remove both federal question and diversity cases from state to federal court. However, only a nonresident may remove a diversity-based state law claim to federal court. (28 U.S.C. § 1441(b).)

Subject-Matter Jurisdiction

Federal courts have limited subject-matter jurisdiction: They cannot hear cases for which there is no statutory or constitutional authority. A plaintiff must plead "affirmatively and distinctly, the existence of whatever is essential" to establish federal jurisdiction. (*Smith v. McCullough*, 270 U.S. 456, 459 (1926) and 28 U.S.C.S, Rule 4, Form 2.) State courts exercise general jurisdiction and presumptively can hear all cases, including most cases arising under federal law. Unlike federal court, state court plaintiffs do not have to plead jurisdiction—only a statement of facts and demand for judgment. (Cal. Civ. Proc. Code § 425.10.)

There is only one trial court level in the federal judicial system: the federal district court. (28 U.S.C. § 84.) California has three trial court levels, based essentially on the amount in controversy: small claims cases, with up to \$7,500 or \$5,000 in controversy, depending on type of plaintiff; and limited or unlimited superior court cases, depending on whether the dispute is worth more or less than \$25,000. (Cal. Civ. Proc. Code §§ 86 and 88.)

A state defendant's cross-complaint against a plaintiff may confer jurisdiction, even when the original complaint does not. A plaintiff's limited civil case is reclassified as an unlimited case whenever the defendant's cross-complaint seeks more than \$25,000—or it generally seeks equitable relief.

In the Ninth Circuit, a compulsory counterclaim confers federal jurisdiction—absent the plaintiff's objection. (*Brix v. People's Mut. Life Ins. Co.*, 2 Cal. 2d 446, 448 (1935).) This arguably clashes with U.S. Supreme Court precedent limiting jurisdiction to the plaintiff's complaint. (*Compare Fenton v. Freedman*, 748 F.2d 1358, 1359 (1984) with *Louisville & N.R. Co.*

v. Mottley, 211 U.S. 149, 153 (1908).)

Personal Jurisdiction

The federal rules generally provide for service according to the law of the state in which the district court is located—or the state in which service is affected. (Fed. R. Civ. Proc. 4(e)(1).) But California's rules do not incorporate the service rules of other states. (Cal. Civ. Proc. Code § 413.10.)

Substituted service is permitted in both systems. In California, however, it is permitted only if process "cannot with reasonable diligence" be personally delivered to an individual defendant. This predicate does not apply to a corporate defendant, which is always served via substituted service on its designated agent. (Cal. Civ. Proc. Code § 415.20(b).) In federal court, personal and substituted service are on par. No showing of an attempt to achieve personal service is required, even when state law demands it. (*Hanna v. Plummer*, 380 U.S. 460, 473—74 (1965).)

In California, the denial of a motion to quash service triggers a ten-day period within which the defendant must seek appellate review. (Cal. Civ. Proc. Code § 418.10(c).) Federal defendants normally appeal only after judgment. (*McLish v. Roff*, 141 U.S. 661, 667—68 (1891).)

Pleading

Pleading nomenclature differs somewhat in the two judicial systems. In both, the plaintiff files an original complaint. In federal court, the relevant terms for the defendant's pleadings are: counterclaim against the plaintiff; cross-claim against a codefendant; and third-party claim against a fresh defendant—that is, one sued by the original defendant but not the plaintiff. (Fed. R. Civ. P. 7(a).) In state court, all three pleadings are called cross-complaints. (Cal. Civ. Proc. Code § 422.10.)

Under the federal "notice" pleading standard, the plaintiff need only generally notify the defendant about the relevant transaction or occurrence. Failure to plead an element, although necessary to win at trial, does not subject a federal complaint to a motion to dismiss for failure to state a claim. But California's "fact" pleading standard requires a factual assertion for each element of each cause of action. The absence of any element necessary for stating a complete prima facie case renders that count subject to demurrer. (*Conley v. Gibson*, 355 U.S. 41, 45—46 (1957); Cal. Civ. Proc. Code § 425.10(a)(1) and *Bach v. County of Butte*, 147 Cal. App. 3d 554, 561 (1983).)

In federal court, plaintiffs state the amount of damages in the complaint, especially in diversity-based cases, in which the amount in controversy must be more than \$75,000. (28 U.S.C. § 1332(a).) The amount of damages may not be included in a state court personal injury or wrongful death case. Upon a defendant's demand, or plaintiff's desire to seek a default judgment, California plaintiffs must, instead, file and serve a Statement of Damages. (Cal. Civ. Proc. Code § 425.10(b) and Judicial Council Form 982(a)(24).)

Unlike federal court, where all damages are stated in the complaint, a California plaintiff may not state an amount of punitive damages in any case. (Cal. Civ. Proc. Code § 3295(e).)

The Federal Rules of Civil Procedure do not authorize plaintiffs to name Doe defendants. But in California, these procedural phantoms are treated as parties from the date of filing. They may retain their shadowy existence in the caption and charging allegations of cases removed from state courts. (Fed. R. Civ. P. 10(a) and 28 U.S.C. §1441(a); Cal. Civ. Proc. Code § 474.) But federal judges cannot dismiss such cases on the basis that the plaintiff might later add a nondiverse defendant.

Federal plaintiffs have a 120-day period within which to serve all defendants, commencing with the plaintiff filing the case. Under California practice, this period is three years, except for general civil cases governed by the California Government Code and local rule-driven case-management procedures. (*Compare* Fed. R. Civ. P. 4(m) with Cal. Civ. Proc. Code §583.210(a).) Federal trial courts have held that, because state law effectively extends the statute of limitations for Doe defendants, the applicable service period includes California's three-year diligent-prosecution statute. (*Motley v. Parks*, 198 F.R.D. 532, 534 (C.D. Cal. 2000).)

Unlike federal practice, California has a growing number of gatekeeping statutes. Perhaps the most prominent is the Anti-SLAPP special motion to strike. It is designed to discourage frivolous claims by requiring an early determination of probability of success at trial. A defendant who is

sued allegedly in retaliation for engaging in constitutionally protected activity, with the exception of commercial speech, can temporarily halt discovery by filing such a motion at the outset of the lawsuit. Without regard to the plaintiff's motivation for suing, the defendant's supporting affidavit can shift the burden to the plaintiff to make a more detailed prima facie showing, beyond the complaint, of prevailing on the merits.

Federal rules do not limit discovery that way. They ensure that adequate discovery will occur before a Rule 56 summary judgment motion is considered. As a result, the discovery-limiting aspects of California's anti-SLAPP statutes "collide with the discovery-allowing aspects of Rule 56 ... and cannot apply in federal court." (Cal. Civ. Proc. Code § 425.16 and *Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832, 846 (9th Cir. 2001).)

Venue

If a state defendant is entitled to a change of venue for one cause of action, the entire case may be transferred. (*Brown v. Superior Court*, 37 Cal. 3d 477, 488 (1984).) In federal court any claim filed in the wrong venue can be dismissed or transferred via defense motion. (Fed. R. Civ. P. 12(b)(3), 28 U.S.C. § 1406(b), and *Smith v. United States*, 953 F.2d 1116, 1119 n.5 (9th Cir. 1991).)

Federal courts may transfer a case across state lines to any other district in the nation. (28 U.S.C. § 1404(a) and (d).) State courts, however, cannot dump their judicial garbage onto other states. A California superior court can only dismiss or stay a California action pending the defendant's appearance in the other state's courts. (Cal. Civ. Proc. Code § 418.10(a)(2).) The parties may stipulate—or the court can transfer a case—to the nearest or most accessible court in which there is no similar venue objection. (Cal. Civ. Proc. Code § 398.) A federal case can be transferred only to a venue alternative in which the case might have been properly filed by the plaintiff. (28 U.S.C. § 1404(a), as interpreted by *Hoffman v. Blaski*, 363 U.S. 335, 344 (1960).)

Federal judges consider the convenience of both parties and witnesses. (28 U.S.C. § 1404(a).) State transfer decisions normally do not consider party convenience, absent health problems. (Cal. Civ. Proc. Code § 397(c).)

Discovery

Information about federal witnesses, relevant documents, plaintiff's calculation of damages, and defendant's insurance coverage are core "initial" discovery. Each must be automatically provided near the outset of a federal lawsuit. (Fed. R. Civ. P. 26(a)(1).) In California practice, they must be requested. Also in California, interrogatories do not continue to speak. The responder has no general duty to update prior answers. (Cal. Civ. Proc. Code § 2030.060(g).)

California curbs various discovery devices by its "Rule of 35." It limits the number of specially prepared interrogatories or requests for admission, with possible supplementation of earlier answers before trial. In limited civil cases, the parties are generally confined to 35 *total* discovery requests for all forms of discovery, including only one deposition. (Cal. Civ. Proc. Code §§ 94(a), 2030.030(a)1, and 2033.030(a).) In federal proceedings, there is a presumptive limit of ten depositions per side, 25 interrogatories, and no presumptive limit on the number of requests for admissions. (Fed. R. Civ. P. 30(a)(2)(A), 33(a), and 36.)

In state court, the party submitting requests for admissions has the burden of filing a "deemed admitted" motion when an adverse party fails to respond. (Cal. Civ. Proc. Code § 2033.280(b).) In federal court, the party who failed to timely answer admission requests has the burden of filing a motion to vacate the resulting automatic admissions. (Fed. R. Civ. P. 36(b).)

Prior discovery answers generally need not be supplemented by the responding party in California, assuming the original response was correct and complete when given. (Cal. Civ. Proc. Code § 2030.060(g).) Federal core discovery responses must be seasonably updated by the responding party. That party must also automatically update other prior responses, if additional or corrective information would not otherwise be known to the propounding party. (Fed. R. Civ. P. 26(e)(2).)

Offer of Judgment

In California, either party may make a statutory offer of judgment; it remains open for 30 days, is revocable, and applies when there is a defense judgment. (Cal. Civ. Proc. Code § 998 and T.

M. Cobb Co. v. Superior Court, 36 Cal. 3d 273, 278 (1984).) In federal practice, only the defending party—which includes the plaintiff, should the defendant file a counterclaim—may make an offer of judgment; it remains open for 10 days, is irrevocable, and does not apply to defense judgments. (Fed. R. Civ. P. 68 and *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 350 (1981).)

In California, where either party may make this statutory offer, a counteroffer does not revoke the adverse party's offer of judgment. (*Poster v. Southern Cal. Rapid Transit Dist.*, 52 Cal. 3d 266, 270 (1990).) A federal plaintiff would not make such a counteroffer, as Rule 68 limits the offer of judgment to the defending party.

Summary Judgment

California federalized summary judgment motion practice in the early 1990s with amendments to the Code of Civil Procedure. But a few differences remain. First, the U.S. Supreme Court characterizes the summary judgment motion as a welcome historical maneuver in the federal arsenal for streamlining litigation. (*Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).) State appellate courts, on the other hand, still label it a "drastic" remedy. (See, e.g., *Baptist v. Robinson*, 143 Cal. App. 4th 151, 158 (2006).)

Second, a federal defendant may merely point out—near the end of the discovery stage—that the plaintiff has no evidence to support a claim. (*Celotex*, 477 U.S. at 323.) The moving party in state court must present proof of the lack of evidence to shift the burden to the adversary. This requirement can be satisfied via moving party affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which a state court can take judicial notice. (*Aguilar v. Atlantic Richfield Co.*, 25 Cal. 4th 826, 853—54 (2001).)

Third, the state code requires a separate statement setting forth all material facts that the moving party contends are undisputed, followed by a reference to the supporting evidence. The opposition papers must also include a statement that responds to each of the material facts the moving party contends are undisputed. (Cal. Civ. Proc. Code § 437c(b)(1) and (3).) Because a summary judgment motion is not considered "drastic" in federal court, the Federal Rules of Civil Procedure do not require this level of specificity. (See Fed. R. Civ. P. 56.)

Fourth, the state notice and response periods are remarkably longer than in federal practice. A federal motion for summary judgment may be filed 10 days before the hearing. The opposition may be filed 1 day before the hearing. (Fed. R. Civ. P. 56(c).) But California's notice period is 75 days before the hearing—and a minimum of 14 days for the response. (Cal. Civ. Proc. Code §437c(a) and (b)(2).)

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