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Wendy Collins Perdue
University of Richmond, wperdue@richmond.edu

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Author(s): Wendy C. Perdue
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Chapter 1

RECENT DEVELOPMENTS IN FEDERAL JURISDICTION AND PLEADING

Wendy C. Perdue

Georgetown University Law Center

I. Subject Matter Jurisdiction

A. Diversity Jurisdiction

In JP Morgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd., 536 U.S. 88 (2002), the Supreme Court held that citizens of the British Virgin Islands (BVI) are "citizens or subjects of a foreign state" for purposes of the alienage jurisdiction under 28 U.S.C. § 1332(a)(2). The Second Circuit had held that BVI citizens fall outside of § 1332 because BVI is a British Overseas Territory, is not recognized as an independent nation, and its citizens are not consider citizens of the U.K. The Supreme Court rejected this position.

For purposes of diversity, corporations are considered citizens of their state of incorporation and of the state of their principle place of business. 28 U.S.C. § 1332(c). One issue that has divided courts is what is the principle place of business of an inactive corporation. The Second Circuit has held that the principle place of business is the place where the corporation last transacted business. See USA, Inc. v. Parke Constr. Group, Inc., 183 F.3d 105 (2d Cir. 1999). In contrast, the Third Circuit has taken the position that an inactive corporation has no principle place of business. See Midlantic Nat'l Bank v. Hansen, 48 F.3d 693, 696 (3rd Cir. 1995). Finally, the Fifth Circuit has rejected both the these bright line approaches and held that an inactive corporation's last place of business

is relevant but not dispositive. See Harris v. Black Clawson Co., 961 F.2d 547 (5th Cir. 1992).

Nearly 200 years ago, the Supreme Court held that the Constitution does not give the federal courts diversity jurisdiction over suits between two aliens. See Hodgson v. Bowerbank, 5 Cranch 303 (1809). In 1988, Congress amended the diversity statute to provide: "For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled." 28 U.S.C. § 1332(a). Thus, a resident alien domiciled in New York would be considered a New York citizen and no diversity would exist in a suit between that resident alien and another New York citizen. Suppose however our New York resident alien sues a citizen of France. Would jurisdiction exceed the limits of Article III? The courts have split on this question. Some courts, including district courts in New York, have held that the language added to § 1332 can be used to defeat diversity but not create it. See Steinberg v. Quarto Publ'g PLC, 2000 U.S. Dist. LEXIS 18274 (S.D.N.Y.); Lee v. Trans Am. Trucking Serv., 111 F. Supp.2d 135 (E.D.N.Y. 1999). Others have suggested that the language can create jurisdiction. See Singh v. Daimler-Benz AG, 9 F.3d 303 (3d Cir. 1993).

B. Removal

1. What is Removable

The Supreme Court has held that a defendant cannot avoid the requirements of § 1441 by relying on the All Writs Act as a basis for removal. Syngenta Crop Prot., Inc. v. Henson, 123 S.Ct. 366 (2002). In that case, the plaintiff had filed a state court action that had been stayed when the plaintiff intervened in a federal court suit involving similar claims. The federal court action was settled and called for a dismissal of the state suit. Despite the stipulation in the settlement, the state court concluded that the plaintiff was not required to dismiss all the claims in the state court action. When the state court refused to dismiss the entire claim, the defendant removed, relying on the All Writs Act, and argued that removal was necessary in aid of the federal court's jurisdiction. The Court rejected this approach holding that the All Writs Act is not a substitute for § 1441's requirement that a federal court have original jurisdiction over an action in order for it to be removed from a state court.

Sometimes a defendant will seek to remove on the basis of diversity a suit in which the plaintiff's complaint is either silent on the amount in controversy or alleges less than the jurisdictional amount. Although many court have held that only the amount actually demanded is in controversy, see, e.g., Mehlenbacher v. Akzo Nobel Salt. Inc., 216 F.3d 291 (2d Cir. 2000), other courts are more flexible. For example, the Fifth Circuit has held that even where a plaintiff's complaint seeks less than the

jurisdictional amount, jurisdiction is proper if the defendant can show by a preponderance of the evidence that the amount in controversy is met. See DeAguilar v. Boeing Co., 47 F.3d 1404 (5th Cir.), cert. denied, 516 U.S. 865 (1995).

Rejecting the approach of several district courts, the Sixth Circuit has held that post-removal stipulations cannot be used to defeat jurisdiction. In Rogers v. Wal-Mart Stores, Inc., 230 F.3d 868 (6 th Cir. 2000), the plaintiff had filed a complaint in state court seeking nearly a million dollars in damages, which the defendant properly removed. In the course of discovery, the plaintiff stated that her damages exceeded $447,000. Prior to an adjudication, the parties stipulated to a dismissal without prejudice. The plaintiff then filed a new complaint in state court based on the same incident, but this complaint sought an amount "not to exceed $75,000." The defendant again removed. The plaintiff sought a removal and included a stipulation admitting that her total damages did not exceed $75,000 and stating that she would not amend her complaint to seek additional damages. The court held that removal was proper because events occurring after removal that reduce the amount in controversy "do not oust jurisdiction. Id. at 872. In light of the plaintiff's allegation and discovery response in the first case, the court concluded the amount in controversy was met.

2. Who Can Remove

   Only defendants can remove, but not all defendants can remove. The Sixth Circuit has held that a third party defendant cannot remove, even if its claim is "separate and independent" within the meaning of § 1441(c). First Nat'l Bank of Pulaski v. Curry, 301 F.3d 456 (6 th Cir. 2002). Although there is general agreement that ordinarily third party defendants cannot remove, the Fifth Circuit has held that a third party can remove a claim that is "separate and independent." See Carl Heck Engineers, Inc. v. Lafourche Parish Police Jury, 622 F.2d 133, 135 (5 th Cir. 1980).

3. Time for Removal

   The removal statute has strict time limits. The defendant must remove within 30 days of receipt of the pleadings. 28 U.S.C. § 1446(b). In Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344 (1999), the Supreme Court held that the 30 period is triggered by simultaneous service of the summons and complaint, or receipt of the complaint, "through service or otherwise," after and apart from service of the summons, but not by mere receipt of courtesy copy of the complaint unattended by any formal service.

   Because all properly served defendants must join in the removal, some courts have held that the failure of the first defendant served to remove within 30 days will prevent all subsequently served defendants from removing. See Brown v. Demco,

Inc., 792 F.2d 478 (5th Cir. 1986). Other courts, including district courts in New York, allow each defendant 30 days to remove. See Buerly v. Alusuisse Flexible Packaging, Inc., 184 F.3d 527, 533 (6 th Cir. 1999); Brown v. Tokio Marine & Fire Ins. Co., 284 F.3d 871 (8 th Cir. 2002); Russell v. LJA Trucking, Inc., 2001 U.S. Dist. LEXIS 6249 (E.D.N.Y.); Varela v. Flintlock Constr., Inc., 148 F. Supp. 2d 297 (S.D.N.Y.).

Some states (such as New Jersey) prohibit a plaintiff from stating in the initial complaint the amount of relief sought. In such a state the defendant may not know whether the amount in controversy is met making the case removable. The Eighth Circuit has joined the Third and the Fifth and held that "the thirty-day time limit of § 1446(b) begins running upon receipt of the initial complaint only when the complaint explicitly discloses the plaintiff is seeking damages in excess of the federal jurisdictional amount." In re Willis, 228 F.3d 896, 897 (8 th Cir. 2000). See Foster v. Mutual Fire, Marine & Inland Ins. Co., 986 F.2d 48 (3 rd Cir. 1993); Chapman v. Powermatic, Inc., 969 F.2d 160 (5 th Cir. 1992); Vartanian v. Terzian, 960 F. Supp. 58 (D.N.J. 1997). Similarly, the Eastern District of New York has held that a defendant has no duty to investigate whether a claim meets the jurisdictional requirements when the complaint includes no specific allegations from which the defendant can determine that it is removable. See Soto v. Apple Towing, 111 F. Supp. 2d 222 (E.D.N.Y. 2000).

4. After Removal

   Once a case is removed, there is no requirement that the federal court to adjudicate subject-matter jurisdiction before considering a challenge to personal jurisdiction. Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574 (1999).

C. Supplemental Jurisdiction

One of the issues that has split the circuits is whether 28 U.S.C. § 1367 alters the rule of Zahn v. International Paper Co., 414 U.S. 291 (1973), that in a class action based on diversity, all members of the class must meet the amount in controversy. The most recent circuit court decision on this is Rosmer v. Pfizer, Inc., 263 F.3d 110 (4 th Cir. 2001). That court has joined the Fifth, Seventh, and Ninth Circuits in holding that there is supplemental jurisdiction over all class members regardless of whether they meet the amount in controversy. See In re Abbott Labs., 51 F.3d 524, 528-29 (5th Cir. 1995), aff'd by an equally divided court sub nom. Free v. Abbott Labs., 529 U.S. 333 (2000) (per curiam); In re Brand Name Prescription Drugs Antitrust Litig., 123 F.3d 599, 607 (7 th Cir. 1997); Gibson v. Chrystler Corp., 261 F.3d 927 (9 th 2001), cert. denied, 534 U.S. 1104 (2002). The Third, Eight, and Tenth have gone the other way. See Meritcare, Inc. v. St. Paul Mercury, Ins., Co., 166 F.3d 214, 221-222 (3d Cir. 1999); Trimble v. Asarco, Inc., 232

F.3d 946 (8 th Cir. 2000); Leonhardt v. Western Sugar Co., 160 F.3d 631 (10 th Cir. 1998). In 2000, the Supreme Court took certiorari on a case that would have resolved this question but Justice O'Connor recused herself and the ruling below was affirmed by an equally divided court. Free v. Abbott Labs., 529 U.S. 333 (2000) (per curiam). Although the Second Circuit has not ruled on this issue, several district courts in the circuit have and held that § 1367 doe not alter the rule in Zahn. See Mehlenbacher v. Akzo Nobel Salt, Inc., 207 F. Supp. 2d 71 (W.D.N.Y. 2002); In re Ciprofloxacin Hydrochloride Antitrust Litig., 166 F. Supp. 2d 740 (E.D.N.Y. 2001); Greenberg v. Trace Int'l Holdings, 1999 U.S. Dist. LEXIS 11985 (S.D.N.Y.).

The same rationale that courts have used to conclude that Zahn was overruled can also be used outside of the class action context. The Seventh Circuit has held that there is supplemental jurisdiction over claims by individual plaintiffs who do not meet the amount in controversy. Stromberg Metal Works v. Press Mech., Inc., 77 F.3d 928 (7 th Cir. 1996). At least one district court has held that there is also supplemental jurisdiction over a claim by a non-diverse plaintiff. Sunpoint Securities, Inc. v. Porta, 192 F.R.D. 716 (M.D. Fla. 2000). This holding significantly undermines the total diversity rule, but is supported by a literal reading of the language of § 1367.

D. The New Multiparty, Multiforum Trial Jurisdiction Act of 2002 Litigation

After much discussion of the proposed Class Action Fairness Act which would grant federal jurisdiction over most multistate class actions, Congress in November 2002 passed instead the Multiparty, Multiforum Trial Jurisdiction Act. This little noticed Act, codified at 28 U.S.C. § 1369, provides that "The district courts shall have original jurisdiction of any civil action involving minimal diversity between adverse parties that arises from a single accident, where at least 75 natural persons have died in the accident at a discrete location." The statute then calls for district courts to abstain where "the substantial majority of all plaintiffs are citizens of a single State of which the primary defendants are also citizens" and "the claims asserted will be governed primarily by the laws of that State." The Act also includes special venue and removal provisions. See 28 U.S.C. §§ 1391(g), 1441(e). A description of the Act and its brief history can be found at Georgene Vairo, An Important Act with Two Antecedents More Controversial Than the Original, Nat'l L. J., Dec. 16, 2002, p. B7.

II. Personal Jurisdiction and Notice

A. Electronic Service

In Rio Props., Inc. v. Rio Int'l Interlink, 284 F.3d 1007 (9 th Cir. 2002), the court upheld service of process by e-mail on foreign Internet business, ordered pursuant to FRCP 4(f).

B. Service Under FRCP 4(k)(2)

One of the complications for a plaintiff seeking to use Rule 4(k)(2) is that the Rule is only available if the defendant "is not subject to the jurisdiction of the courts of general jurisdiction of any state." Obviously, it would be quite burdensome if the plaintiff were required to list all 50 states and explain as to each why there is no jurisdiction. The Seventh Circuit has offered an ingenious solution to this problem. The court explained:

A defendant who wants to preclude use of Rule 4(k)(2) has only to name some other state in which the suit could proceed. Naming a more appropriate state would amount to a consent to personal jurisdiction there. If, however, the defendant contends that he cannot be sued in the forum state and refuses to identify any other where suit is possible, then the federal court is entitled to use Rule 4(k)(2).

IST Int'l, Inc. v. Borden Ladner Gervais LLP, 256 F.3d 548, 552 (7 th Cir. 2001).

Rule 4(k)(2) has been applied in an interesting case involving the Internet. In Graduate Management Admissions Council v. Raju, 2003 U.S.Dist. LEXIS 979 (E.D.Va.), the plaintiff brought federal copyright, trademark, cyberpiracy and unfair competition claims against an Indian citizen who ran a web site that offered material to prepare for the Graduate Management Admission Test. Suit was brought in federal court in Virginia but the court found that the defendant had insufficient contacts with Virginia to satisfy 14 th amendment requirement. However, the court upheld personal jurisdiction relying on Rule 4(k)(2). The court found that the defendant had "targeted the United States market" and had sufficient contacts with the United States as a whole to satisfy Rule 4(k)(2). The court listed a number of aspects of the web site which supported the conclusion that the site was targeted at the U.S.: the price for items was in U.S. dollars, there was a toll free number for U.S. citizens, and testimonials on the site featured U.S. citizens,

C. Due Process Requirements of Notice

In Dusenbery v. United States, 534 U.S. 161 (2002), the Supreme Court reaffirmed that notice need only be "reasonably calculated" to apprise the party-actual notice is not required. The case involved a forfeiture procedure against a prisoner in a federal correctional institution. Notice was sent by certified mail and was delivered to the prison, but there was no evidence as to whether the prisoner actually received the letter. The Court held that this notice was constitutionally sufficient and rejected the argument that the government was required to take special steps to assure that the prisoner received the notice.

III. Venue, Forum Non Conveniens and Forum Selection Clauses

A. Venue in Federal Court

The facts of Uffner v. La Reunion Francaise, S.A., 244 F.3d 38 (1 st Cir. 2001), highlight that under § 1391(a)(2) it is not necessary to determine either the best venue or the place

where the claim technically "arose." In Uffner, a sailing yacht sank in Puerto Rican waters. When the insurance company refused to reimburse the owners for the loss, the owners filed a claim in federal court in Puerto Rico for bad-faith denial of insurance. The insurance company objected to venue on the grounds that the claim was fundamentally a suit on an insurance contract. The only connection with Puerto Rico was that the boat sank there, but the loss of the boat was not in dispute. The issue in the case was whether the owner had complied with certain obligations under the contract. The Court of Appeals rejected this argument and held that the place of the loss was "substantial" for venue purposes.

B. Forum Non Conveniens

In Iragorri v. United Technologies Corp., 274 F.3d 65 (2d Cir. 2001) (en banc), the Second Circuit held that a U.S. citizen plaintiff is entitled to deference in his choice of forum even if suit is not filed in plaintiff's home state, provided plaintiff's was dictated by reasons other than forum-shopping. In Iragorri the decedent, a U.S. citizen and Florida domiciliary, was killed after falling down an open elevator shaft in an apartment building in Columbia, where he was temporarily residing. The decedent's widow and children brought suit against the elevator manufacturer and parent corporation in Connecticut, the defendant's principal place of business. The district court dismissed on grounds of forum non conveniens. The Second Circuit reversed and remanded, finding that the district court had incorrectly assumed that a plaintiff's choice of forum is entitled to deference only when the plaintiff sues in the plaintiff's home district.

Sometimes in ruling on a forum non conveniens motion an issue before the court is the adequacy of an alternative forum. In Aguinda v. Texaco, Inc., 303 F.3d 470 (2d Cir. 2002), the Second Circuit held that Ecuador could provide an adequate alternative forum for a class action environmental suit. The court found that although Ecuador does not permit class actions, it does allow joinder of litigants with similar causes of action. The court also rejected arguments that Ecuadorian courts are unreceptive to tort suits and that they are subject to corrupt influences and incapable of acting impartially.

C. Forum Selection Clauses

The cases are split on how to characterize a motion to dismiss on the basis of a forum selection clause. Compare Silva v. Encyclopedia Britannica, Inc., 239 F.3d 385 (1st Cir. 2001) (defenses based forum selection clause to be raised under 12(b)(6), failure to state a claim), with New Moon Shipping Co. v. Man B&W Diesel AG, 121 F.3d 24 (2d Cir. 1997) (defense based on forum selection clause raised under 12(b)(1), lack of subject matter jurisdiction), and Lipcon v. Underwriters at Lloys's, London, 148 F.3d 1285 (11 th Cir. 1998), cert. denied, 525 U.S. 1093 (1999) (forum selection clause is a matter of venue under 12(b)(3)). This characterization matters because if a defense based on a forum selection clause is a matter of venue, it is waived if not raised in the first motion or in the

answer, whereas it is not waived if it is viewed as going to subject matter jurisdiction or failure to state a claim.

IV. Pleadings

A. The Complaint

The Supreme Court's most recent pleading case, Swierkiewicz v. Sorema, 534 U.S. 506 (2002), reaffirms the principle of notice pleading and holds that an employment discrimination complaint need not contain specific facts establishing a prima facie case. The plaintiff had sued alleging that he was fired in violation of Title VII and the Age Discrimination Act. The District Court dismissed the case on the grounds that the plaintiff had not adequately alleged circumstances that support an inference of discrimination. Although the Court had previously established a framework for proving a prima facie case of discrimination, see McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), the Swierkiewicz Court held that McDonnell Douglas established an evidentiary standard, not a pleading requirement. The Court concluded:

petitioner's complaint easily satisfies the requirements of Rule 8(a) because it gives respondent fair notice of the basis for petitioner's claims. Petitioner alleged that he had been terminated on account of his national origin in violation of Title VII and on account of his age in violation of the ADEA His complaint detailed the events leading to his termination, provided relevant dates, and included the ages and nationalities of at least some of the relevant persons involved with his termination These allegations give respondent fair notice of what petitioner's claims are and the grounds upon which they rest.

B. Private Securities Litigation Reform Act of 1995 (PSLRA)

The PSLRA imposed heightened pleading requirements for securities fraud cases., but there is a three way split among the circuits as to what that Act requires. The Act requires plaintiffs to "state with particularity facts giving rise to a strong inference that the defendant acted with the requisite state of mind." The Second, Third, and Eighth Circuits have held that the Act can be met either through facts showing "defendants had both motive and opportunity to commit fraud" or facts constituting "strong circumstantial evidence of conscious misbehavior or recklessness." See Novak v. Kasaks, 216 F.3d 300 (2d Cir.), cert. denied, 531 U.S. 1012 (2000); In re Advanta Sec. Litig., 180 F.3d 525 (3d Cir. 1999); Florida St. Bd. of Admin. v. Green Tree Fin. Corp., 270 F.3d 645 (8 th Cir. 2001). In contrast, the Ninth Circuit has held that the PSLRA requires plaintiffs to plead, at a minimum, particular facts giving rise to a strong inference of deliberate or conscious recklessness and that "motive and opportunity" are not sufficient. See In re Silicon Graphics Inc. Sec. Litig., 183 F.3d 970, 978-79 (9th Cir. 1999). Finally, the First, Fifth, Sixth, Tenth, and Eleventh Circuits have taken a middle approach. They have held that

the primary effect of the PSLRA is to require a pleading to state facts giving rise to a "strong inference of scienter." Allegations of motive and opportunity may or may not rise to that level in a particular case. See Nathenson v. Zonagen Inc., 267 F.3d 400 (5th Cir. 2001); City of Philadelphia v. Fleming Cos., 264 F.3d 1245 (10th Cir. 2001); Helwig v. Vencor, Inc., 251 F.3d 540, 551 (6th Cir. 2001) (en banc); Greebel v. FTP Software, Inc., 194 F.3d 185, 197 (1st Cir. 1999); Bryant v. Avado Brands, Inc., 187 F.3d 1271, 1282-83 (11th Cir. 1999). See generally Christopher Fairman, Heightened Pleading, 81 Tex. L. Rev. 551 (2002).

C. Defendant's Options in Response

Although Rule 8(c) requires that all affirmative defenses be included in the pleadings, the failure to include an affirmative defense in the answer does not necessarily waive that defense. In Lafreniere Park Foundation v. Broussard, 221 F.3d 804 (5th Cir. 2000), the court held that an affirmative defense of res judicata was not waived even though it was raised for the first time in a motion for summary judgment submitted fourteen months after the answer was filed. Quoting from an earlier opinion, the court explained that "where the matter is raised in the trial court in a manner that does not result in unfair surprise technical failure to comply precisely with Rule 8(c) is not fatal." Id. at 808.

D. Amended Pleadings

In Alvin v. Suzuki, 227 F.3d 107 (3d. Cir. 2000), the district court refused to grant a motion to amend the complaint on grounds that the motion to amend was inconsistent with a prior case management order. The court of appeals reversed noting the "case management concerns" are "not among those justifying a refusal of leave to amend," id. at 122, and finding that there was no evidence of bad faith, delay or prejudice.

E. Veracity in Pleading: Rule 11

Rule 11 provides that before a litigant may file a Rule 11 motion, he must serve the motion on the other party and allow that party 21 days to withdraw or correct the offending document. The Fourth Circuit has held that while the 21-day rule is "mandatory," it is not "jurisdictional" and can therefore be waived. See Rector v. Approved Fed. Savings Bank, 265 F.3d 248 (4 th Cir. 2001). In Rector, the court found that the issue had been waived because it had not been raised in the district court and indeed was not raised in the court of appeals until the case's second trip to that court following a remand. Although other courts have not confronted the same facts as Rector, the Ninth Circuit has held that the requirement of service of the Rule 11 motion 21 days prior to filing the motion is not waived by providing time for corrective action after service of the Rule 11 motion. See Radcliffe v. Rainbow Construction Co., 254 F.3d 772 (9 th Cir.), cert. denied, 534 U.S. 1020 (2001).