Lect 12

Devices to create/defeat diversity/alienage

To create diversity by changing plaintiffs is hard

* Because many causes of action (tort) are not assignable and because if you did successfully assign it (eg in a contract case), they would own the suit and not you
* But to keep cases from being fake assigned to create diversity there is
* 28 USC §1359  
  A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court.
* Notice that if there is real assignment of interest – if the assignee now really owns the lawsuit, it will work to create diversity

Assigning to co-plaintiffs to defeat diversity will still work only in contract cases and other assignable actions, but it is easier, because it is enough to assign only part and then sue as co-plaintiffs

Some courts have not allowed diversity to be defeated when a really small amount (1/100) is assigned

Choosing only diverse defendants to sue to create diversity is fine. In general the plaintiff can choose the defendants he wants to sue – cases where a defendant is a “necessary party” are rare (we will talk about it later)

* Because of the requirement of complete diversity, a plaintiff who wishes to keep a case in state court can do so by joining a diversity destroying defendant (that is, a defendant from the same state as he is).

Sometimes however a court concludes that the diversity destroying defendant is not properly joined

Fraudulent joinder  
Rose v Giamatti

- Rose sued Bart Giamatti (the Commissioner of Baseball) and Major League Baseball Ass’n and the Cincinnati Reds in Ohio state ct for an injunction against a hearing concerning Rose’s gambling

- Rose’s domicile is Ohio, Giamatti’s is NY, the Reds in Ohio, and MLB has the domicile of all of its members, because it is an unincorporated association (and thus is an Ohioan)

- Ds removed

- Rose moved for remand

- Dist Ct denied the motion for a remand

- held that the Red and MLB can be ignored for the purposes of determining diversity jurisdiction:

In fraudulent joinder cases the underlying reason for removal is that there is no factual basis upon which it can be claimed that the resident defendant is jointly liable or where there is such liability there is no purpose to prosecute the action against the resident defendant in good faith….  
Other courts have held that the party opposing remand has the burden of establishing either that there is no possibility that the plaintiff can establish a valid cause of action under state law against the non-diverse defendant, or that there has been an outright fraud in the plaintiff's pleading of jurisdictional facts.

- the main reason was that the Reds and MLB could not provide the relief that Rose requested, because of the independence of the commissioner

- other grounds for fraudulent joinder are: the finding that there was fraud in the pleading of jurisdictional facts (e.g. lying about a party’s domicile); or that the plaintiff has no possible cause of action against the diversity destroying defendant

- notice that in identifying whether the plaintiff has no possible cause of action, the court applies a standard that is more deferential to the plaintiff that it would if, after having determined it had jurisdiction of the case, it attempted to decide whether the plaintiff states a claim.

- to decide whether the plaintiff states a claim the court must have already asserted jurisdiction

- but the question in fraudulent joinder is whether the court has jurisdiction at all

- thus, if there are colorable arguments that the plaintiff states a claim, even if those arguments might in the end fail, the court should not find that there was fraudulent joinder

* P (NJ) wishes to sue the D Corp. for fraud
* D Corp. has is incorporated in NY with PPB in NY
* P does not want the action removed by the D Corp. to federal court
* Therefore P joins X (NJ), an accountant who was in part responsible for the D Corp.’s misrepresentations, as a defendant

Can the D Corp. successfully remove? No – in this case joinder to defeat diversity worked, even though P is not really interested in going after X. The claim against X is colorable

**REMOVAL**

* with an exception, a defendant can remove an action in state court to federal court if there would have been smj in fed ct if the plaintiff had sued there originally
* Here is the exception:
* 1441(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.
* No removal under diversity/alienage if there is an in-state defendant
* distinguish removal from transfer within fed ct system
  + Removal involves the case going from state court to the Federal District where the state court is located
  + Transfer involves moving a case from one Federal District to another
    - We will discuss it later
  + Note that there is no transfer from one state ct system to another (eg Calif. State ct to Nevada state ct)

A (Cal.) sues B (NY) and C (Cal) for battery in state court in Nevada  
Can B and C remove

* No – there is no complete diversity, so the action could not have been brought originally by the plaintiff in Federal Court
* Can only B remove? No – unless B can show that C was fraudulently joined, the case cannot be broken apart. The plaintiff is the master of his claim and can join the defendants he wishes.

A (Cal.) sues B (NY) and C (NJ) for battery  
A suing for B for more than 75K but C for only 20K  
  
May the case be successfully removed by B and C?

* + - * no - can defeat removal even if there is complete diversity if the amt in controversy against a defendant is below the jurisdictional minimum
        + NOTE: with multiple *plaintiffs* against a single defendant, there is an exception to the rule that the jurisdictional minimum must be satisfied with respect to all parties
        + We will discuss this exception later – in connection with Allapattah
        + It is not relevant in this case, where there is a P suing multiple Ds
      * note however, it must really be the case that the amount in controversy in A’s action against C is below the jurisdictional minimum. As we shall later see, simply because A asks for 20K from C does not mean that the amount in controversy is not for more than 75K.
* A (Nev.) sues B (Cal.) and C(Oreg.) in California state court for battery
* A asks for $80k each from B and C
* May B and C remove?

- NO – B is an in-state defendant

1441(b)(2)  
  
A civil action otherwise removable solely on the basis of the jurisdiction under section 1332(a) of this title may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought. WHY have this?

- makes sense - such a D cannot claim a need to protect himself from state ct bias

A (Nev.) sues B (France) and C (Oreg.) in Nevada state court for battery. A asks for $80k each from B and C. B wants to remove but C refuses. May the case be successfully removed to the D. Nev.?

1446(b)(2)(A)   
When a civil action is removed solely under section 1441(a), all defendants who have been properly joined and served must join in or consent to the removal of the action.

All Ds must agree to removal

* Green thinks this doesn’t make sense
* A (Cal.) sues B (Cal.) in California state court for battery
* B counterclaims against A for violation of federal civil rights law
* May A remove?
* No – under 1441 only Ds may remove, not P’s

- Shamrock Oil

Can – B remove –

* No – Mottley
* One must look to the plaintiff’s well pleaded complaint to determine whether the court has original jurisdiction
  + One does not look to federal defenses (or federal counterclaims)

Green: this is a bad rule

* Imagine an officer knows that he will be sued by someone he arrested under federal civil rights law
* He wants the action to be litigated in state court
* So what does he do? Sues the person he arrested in state court for a state law action associated with the arrest
* If the state court system has a compulsory counterclaim rule (as many do) the person arrested will have to bring as counterclaims against the officer all causes of action he has concerning the arrest – which would include the federal civil rights action
* And (per the bad rule) the arrested person will not be able to remove to federal court

1441(f) The court to which such civil action is removed is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim

What’s that there for?

- assume P files fed *antitrust* action against D in state ct, D removes

- before 1441(f) the Federal Court would have to dismiss the action because there was no jurisdiction before the state court (because fed antitrust actions have *exclusive* federal subject matter jurisdiction)

- now removal is possible

P (Mass.) sues D (NY) in Mass. state court under state law battery. D removes and then makes a motion to dismiss for lack of PJ. Permissible? Waiver?  
  
no waiver of defense of lack of PJ

* Can remove and then get the action dismissed entirely
* **Procedure for Removal**

Must remove within 30 days of receipt or service of complaint, assuming that removability is evident from the complaint

* If it is evident only later, must remove 30 days from receipt of whatever paper (eg amended complaint) that made it evident

- but if a year has passed after filing before it becomes evident that it is removable, then cannot be removed, unless there is a finding that the P acted in bad faith to prevent the D from removing (includes bad faith concealment of amount in controversy)

To remove one files a Notice of removal with Fed Ct setting forth grounds

Gives P and state ct notification of filing

It is removed – although the Federal Court may conclude that removal was improper and therefore should be remanded

**Jurisd Amt. for diversity**

* P brings a diversity suit in federal court against D alleging $100k for personal injuries in negligence
* P recovers only $3k from the jury.
* Should the court dismiss for want of diversity rather than enter a judgment for $3k?
* would be crazy, P could never lose the case!

- the question is the amount in controversy, not the amount actually recovered

One could imagine a system in which the plaintiff could satisfy the amount in controversy simply by asking for +75K in damages – take the amount requested at face value

* after all, P’s allegations are subject to R 11  
  - also subject to

1332(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $75,000…and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

But there is more scrutiny – although it is still very generous to the plaintiff

St. Paul Mercury standard – applies to a plaintiff claiming diversity jurisdiction in Federal Court – does not apply to a defendant seeking to remove

“It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal.”

- easier way of putting it – must be legally possible to get above jur min

- hard not to satisfy this standard when the plaintiff asks for compensation due to physical or emotional injuries - generally will always be legally possible that the plaintiff will get more than $75K

- the standard is usually found to have been violated in connection with financial cases, where the amount a possible damages is clear

- Glannon wrongly suggests in deciding whether the jur min is satisfied a court looks only to the pleadings

- that’s not so, courts sometimes look to the evidence available at the beginning of the case

- but again remember that the court is trying to determine whether it has jurisdiction; it cannot engage in the sort of searching inquiry that it might undertake once it has jurisdiction

What about the amount in controversy when a defendant removes? What does the defendant have to show?

* P (NY) brings an action against D (NJ) in NY state court for loss of his hand in a car accident
* P asks for $70k
* May D remove?

This question has been answered by the Clarification Act of 2011

1446(c)(2) If removal of a civil action is sought on the basis of the jurisdiction conferred by section 1332(a), the sum demanded in good faith in the initial pleading shall be deemed to be the amount in controversy, except that-  
(A) the notice of removal may assert the amount in controversy if the initial pleading seeks--   
(i) nonmonetary relief; or   
(ii) a money judgment, but the State practice either does not permit demand for a specific sum or permits recovery of damages in excess of the amount demanded; and   
(B) removal of the action is proper on the basis of an amount in controversy asserted under subparagraph (A) if the district court finds, by the preponderance of the evidence, that the amount in controversy exceeds the amount specified in section 1332(a).

So D can remove if the practice in state court allows the plaintiff to get more than the amount requested, and D can show by a preponderance of the evidence that the amount in controversy is more than $75,000.

Green: the preponderance of the evidence standard is a bit odd, because often the amount in controversy is determined on the basis of the pleadings, without looking at any evidence

Green: it is also odd that it should be more difficult for a defendant to remove to Federal Court that it is for the plaintiff to sue in Federal Court originally

1) P (NY) brings $50,000 breach of contract claim together with an unrelated $50,000 battery claim against D (NJ). Diversity case?

- YES – can aggregate, even if actions are unrelated

2) P and D had an agreement for P to do work for D for $50,000. P does the work but D doesn't pay. In P's (NY) complaint against D (NJ), P asks for $50,000 under a theory of breach of contract. Alternatively - if it is found that there is no contract - he asks for $40,000 in quantuum meruit (the fair market value of the labor he performed).  Diversity case?

- NO aggregation possible, because it is not possible for the plaintiff to receive both forms of relief at the same time

3) P1 (NY) and P2 (NY) join to bring battery actions against D (NJ) concerning a brawl in which all three were involved. Each asks for $50,000 in damages. Diversity case?

- NO – coplaintiffs may not aggregate their actions against a defendant in order to get above the jurisdictional minimum

Same thing is true of a plaintiff against codefendants

Does this makes sense?

* imagine that out of state D is seeking to remove case
  + As far as the D is concerned, if there is state court prejudice against him, he will suffer to the tune of $100,000. So why shouldn’t he be able to remove?

NOTE: We will discuss later the following scenario, in which one co-P is above the jurisdictional minimum but another is not - eg

P1 (NY) and P2 (NY) join to bring battery actions against D (NJ) concerning a brawl in which all three were involved. P1 asks for $80,000 in damages and P2 for $50,000.

In this case there is supplemental jurisdiction for P2 under Allapattah

Ignore this for now

To repeat-

Aggregation is possible only concerning an individual plaintiff’s claims against the individual defendant

With the following exception...

Someone has died. The two children of the decedent (P1 and P2) are the distributees of his estate -- that is, they have a right to inherit. P1 and P2 bring an action against the executor of the estate (D), who, they allege, has absconded with $80,000. $40,000 of that should go to P1 and $40,000 to P2. Under an exception to the nonaggregation rule, announced in Shields v Thomas, 58 U.S. (17 How.) 3 (1855), P1 and P2 may aggregate their claims against D to meet the jurisdictional minimum.  What is unusual about their claims against D that would make aggregation possible here?

* they must get the relief together
* if one gets it the other does too
* compare P1 and P2 suing D for battery, P1 might get relief but not P2
* Aggregation is possible in such cases, under the theory that the plaintiffs are asserting a common and undivided right