Lect 7

**Removal**

* Removal vs. Transfer:
  + Transfer – moving between federal district courts / or moving within one state court system
  + Removal – starting in state court and defendant requesting that the action be brought up into the federal court system
* A case removed from state court will be removed to the federal district court that encompasses that state court
* Is removal possible?
  + This is answered (with one exception) by asking: Would federal jurisdiction have been possible if the action had been originally brought in federal court?
    - Does the case satisfied §1331 or §1332?

*Hypo -*

*A (CA) sues D (NY) and C (CA) for battery in state court in Nevada. Can B and C remove?*

* No, not complete diversity – A could not have brought this originally in federal court

*Can B remove?*

* No! Plaintiff is the master of the complaint. If P wants to sue the two defendants, he gets the two defendants.

*Hypo -*

*A (Nev.) sues B (CA) and C (Oreg.) in California state court for battery. A asks for $80k each from B and C. May B and C remove?*

* Because A is suing in the CA (the home state of one of the defendants), B cannot remove the case to federal court. (In-state defendant bar)
  + this is the exception to the rule that removal is possible if the action could have been brought originally in federal court
* 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.
* A could have filed the case in federal court if she wanted.

*Hypo -*

*A (CA) sues B (NY) and C (NJ) for battery. A asks B for more than $75k but C for only 20k. May the case be successfully removed by B and C?*

* No, the case does not meet the amount-in-controversy requirement. (A plaintiff may not aggregate claims against different defendants to meet amount requirement).

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

No – provided that the amount asked from C is the real amt in controversy

So how does a D show that the amt in controversy is more than the P is asking for?

* 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).
  + Some states will allow you get more than what you ask, in this case if there is a possibility that the amount could be higher than AIC - it may be removable
    - St. Paul Mercury Test is not the standard for removal
    - 1446(c)(2)(b)
      * If the defendant can show by a preponderance of the evidence shows that the amount in controversy exceeds $75,000
      * Tougher standard than the St. Paul Mercury Test
      * Preponderance of the evidence is a slightly confusing and ambiguous term
        + evidence is always considered to determine AIC – one looks to the pleadings – not sure what preponderance of the evidence means in that context

Devices Defeating Diversity/Alienage

* Adding diversity-destroying plaintiffs to defeat diversity
  + Or plaintiffs who are asking for the less than the minimum
  + You can assign a fraction of your contract to another party to defeat diversity
  + Much less common to assign part of your lawsuit
    - Much more likely find another Plaintiff who was affected by defendant’s action
* Adding defendants to defeat diversity
  + Find another defendant that they can add (co-defendant) who is below the minimum or is diversity-destroying (or is in-state)
  + Often used when you sue a corporation and then you also include an individual employee in the suit to defeat diversity

Joining defendants to defeat diversity often works, but keep in mind…Fraudulent Joinder

* Rose v. Giamatti
  + Pete Rose from Ohio sues Giamatti (MLB Commissioner) – joins Cincinnati Reds as defendants to attempt to defeat diversity and keep the case in Ohio state court
    - The Reds were fraudulently joined so the case can be removed
    - “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….”
    - Green: the issue is not just that Rose failed to state a claim against the Reds
      * the plaintiff’s claim against the fraudulently joined party has to be even worse than that e.g.
      * defendant cannot provider the relief requested at all
      * or the claim is not even colorable – there is no possibility that you state a claim

1446(b)(2)(A)

* You need *all* defendants to agree to remove the case to federal court
* You can defeat removal if you add a defendant who does not want to be removed

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
* If you tried to remove a case from state court that had exclusive subject matter jurisdiction in federal court (e.g. patent claim), the feds can accept the federal claim
* before 1441(f) that was not so

Avitts v. Amoco Production

* Avitts was suing multiple companies in texas state court due to property damage from oil companies on their real property
* Removed to federal court - the original claim vaguely mentioned federal law
  + They stated that state and federal law were applicable
    - But they didn’t state how federal law was violated
* After removal, defendants asked for a more definite statement
  + Denied, but
  + Plaintiffs rewrote the complaint anyway, this time excluding language referencing federal cause of action
* Federal court issued preliminary injunction for the plaintiffs, requiring environmental study
  + Preliminary injunction is initial command to defendant so that if the plaintiff is entitled to relief it will be possible to provide it
* Now the Ds ask for remand and the Ps challenge it
* District court denied remand
* Preliminary injunction goes to court of appeals which decides that there’s no SMJ and therefore the case has to be remanded back to state court.

Procedure for removal

* Defendant has 30 days from service (or otherwise being aware of complaint) to remove a case to federal court
* if a later served defendant wants to remove (within 30 days of receiving complaint), earlier served defendants can consent even though their own 30 days are up
* if a case’s removability is only ascertainable later, the defendant has 30 days from that point to remove
  + you cannot remove a case under 1332 (diversity or alienage) after 1 year from filing however unless the reason that the case’s removability was not known by the defendant until then was due to the plaintiff’s bad faith
  + not so for removal under 1331 – that can occur even after a year

Waiving Objections to non-removability

* after removal a plaintiff can waive certain objections to non-removability if he fails to mention them within 30 days of removal – eg that the defendant removed more than 30 days after receiving the complaint or that not all defendants consented to removal
  + but waiver cannot apply to objections that the removed action lacks SMJ
* what about the in-state defendant rule? Is it procedural or is it jurisdictional?
* Procedural!
* Alex Steiger (right?) asks (roughly) what about a court bringing the matter up sua sponte (that is, on its own motion)?
* Will talk a bit about this Wed.