# Why You Want To Be In Federal Court: THINGS YOU MAY NOT APPRECIATE

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In representing businesses and individuals that often have the right and jurisdictional basis to remove a suit from state court to Federal Court, I am constantly surprised by the hesitation of counsel for co-defendants to support a removal. The Federal Courts have diversity jurisdiction when a suit involves a controversy between citizens of different states and the matter in controversy exceeds $75,000 (excluding interest and costs). See 28 U.S.C. Section 1332(a). While diversity jurisdiction exists in part to permit a defendant to transfer a case from a perceived less favorable State Court venue to a more neutral location based upon a perception of being "home towned," all defendants [that have been served] must consent to the removal. Explanations for refusal to consent by co-defendants' counsel have varied. Some claim that their clients want to "hold their money longer". Others simply do not have the manpower or motivation to undertake discovery in what are often quick discovery periods. Others simply believe that there is no tangible benefit to defending a case in Federal Court.

The perception of litigating a matter in a more favorable venue is not the only reason to seek Federal Court jurisdiction where it may exist. To the extent a client may defend suits in multiple jurisdictions in Federal Court, there are certain cost savings that may be significant when accumulated over the life of a case, year after year.

Many routine, agreed or non-dispositive motions are ruled upon without the necessity of an appearance in court. Eliminating the necessity of appearing in court five to ten times could certainly reduce legal fees and litigation costs.

For discovery motions, many Federal judges and magistrates do not favor briefing schedules. Briefs may be filed and delivered to the court and a ruling may be forthcoming at the initial hearing date. This practice may eliminate at least one appearance in court albeit the responding attorney will have less time in which to prepare a response.

Most filings must be made electronically rather than through the filings of hard copies. In terms of flexibility, some District Courts afford an opportunity for late (after business hours) filings. For example, the Northern District of Illinois has a drop box for filing that is open from 7:00 a.m. until 6:00 p.m., Monday through Friday, excluding Federal holidays.

In Federal Court, written discovery is generally not filed. Rather, a certificate of service that a party has served with written discovery (or responses) is filed. This eliminates the necessity of copies of certain documents from being filed with the court.

The necessity to even file a discovery motion may be lessened in Federal Court. While attorneys have no lesser duty to resolve discovery issues in state court, practical experience demonstrates that parties often avoid rulings on contested issues in Federal Court.

The Federal Rules of Civil Procedure offer additional potential cost-shifting measures. Fed. R. Civ. P. 26(b)(4)C states that "unless manifest injustice would result, the court must require that the party seeking discovery: (i) pay the expert a reasonable fee for time spent in responding to discovery and shall also pay the [producing] party "a fair portion of the fees and expenses reasonably incurred in obtaining the expert's facts and opinions." In other words, the plaintiff may be required to pay for the defendant's expert's deposition. Whether or not this rule should be enforced is a different issue. If the plaintiff and defendant both have experts, unless one party has a significant number of experts more than the other, it may not be worth a battle over the recovery of those costs.

This cost shifting mechanism and the potential overall costs and expenses associated with the venue case become even more significant in those Federal jurisdictions where judges consider non-retained treating physicians as experts for purposes of disclosures under Fed. R. Civ. P. 26. Under Fed. R. Civ. P. 26(a)(2), a party is required to disclose the identity of any experts along with a written report—"prepared and signed by the witness"—if the witness is (1) retained *or* (2) specially employed to provide expert testimony in the case or one whose duties as the party's employee

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regularly involved giving expert testimony. The report must include all opinions, the bases for them, all data relied upon, any exhibits used, the witness's qualifications, and a list of other cases in the prior four (4) years in which the witness has testified as well as any compensation to be paid.

Some Federal judges have required that for proper disclosure of opinions of treating physicians, the proponent offering a treating physician at trial must produce a result satisfying the requirements of Rule 26(a)(2)(B) on issues of causation, prognosis and the future impact of the injury, or for testimony where a treating physician testifies beyond the scope of treatment, observation and diagnosis. See for example, *Griffith v. N.E. Illinois Regional Commuter Railroad Commuter Railroad Corp.*, 233 FRD.513 516 (N.D. Illinois 2006). See also, *Musser v. Gentiva Health Services*, 356 F.3d 751, 758 (7th Cir. 2004) and *Zarecki v. National Railroad Passenger Corporation*, 914 F.Supp 1566, 1573 (N.D. Illinois 1996).

Whether a particular Federal judge or magistrate requires parties to comply with Rule 26 as to treating physicians must be determined on a case by case basis. It may be as simple as looking at the on-line web page for a specific district court judge or magistrate.

In Federal Court, a final pre-trial order, either in the abbreviated or traditional form as set by rule, is required. This encompasses preparation in advance of trial of jury instructions, motions in limine, and memorandum of law. This is useful to all counsel because they are not confronted with voluminous motions in limine on the eve of trial for which counsel may have no choice but to involve numerous other lawyers that have less familiarity with the litigation in order to prepare timely responses. The pre-trial orders are blueprints of the issues and evidence that is expected to be established at trial by both parties.

Offers of judgment pursuant to Federal Rule of Civil Procedure 68 may be significant in jurisdictions where state law does not provide such "offers." Subsection (b) permits the offeror to recover certain costs incurred after an unaccepted offer has been made and expired; offers not accepted automatically expire after ten (10) days or are considered withdrawn per subsection (b). Defense counsel and insurers need to consider that by extending an offer of judgment, a plaintiff may file acceptance of the offer with the Clerk of the Court. The clerk will enter a judgment. Counsel should consult with the named defendant before extending such an offer. If the offer is accepted, do not forget to file a satisfaction of judgment thereafter; recorded judgments that are not recorded to be satisfied may impair credit.

Finally, whereas the availability of a bifurcated trial is not available in every state court legal system, Rule 42(b) of the Federal Rules of Civil Procedure allows the Court to order a separate trial of any issue when separation would promote convenience, avoid prejudice or be conducive to expedition and economy. Fed. R. Civ. P. 42(b).

While you probably already knew that Federal Court was a good alternative to state court for appropriate matters that meet jurisdictional guidelines, there are a number of other reasons affecting the ability to resolve or reach conclusion of the litigation, as well as affecting the overall cost of litigation, that may be in your interest *or your client's interest* such that Federal Court should be considered where available.