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Avoiding removal and obtaining remand

KEEPING IT IN STATE COURT: AN OVERVIEW OF REMOVAL JURISDICTION

It's no secret that many plaintiff-side attorneys prefer to litigate their cases in state court. By contrast, counsel for defendants will often do everything they can to remove cases to federal court. Indeed, removal procedures were created specifically to give defendants an opportunity to evade state-court litigation. This article seeks to provide a general overview of removal jurisdiction followed by some pointers on avoiding removal and seeking remand.

Bases for removal and other general principles

Having a firm grasp of the bases for removal is an important foundation for keeping litigation in the plaintiff's state court forum of choice. As a general matter, cases can be removed when original jurisdiction lies in the federal district courts. (28 U.S.C. § 1441(a).) The intrigue lies in those cases that are nonremovable even if they could originally have been brought in federal court and some of the special exemptions to jurisdiction created by the Class Action Fairness Act. What follows is a non-exhaustive list that is intended to cover the most common bases for federal jurisdiction.

Diversity jurisdiction

Complaints that assert claims between diverse parties where more than $75,000 is in dispute within the meaning of title 28 United States Code section 1332 are generally removable. However, there is one important exception — the forum-defendant exception. An action is not removable on diversity grounds 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." (§ 1441(b)(2).)

Class Action Fairness Act diversity jurisdiction

In addition to general diversity jurisdiction, the Class Action Fairness Act of 2005 ("CAFA") created federal jurisdiction in minimally diverse class actions. CAFA jurisdiction extends to class-action cases where there are over 100 class members, the amount in controversy exceeds $5 million and, for domestic cases, any member of the class is a citizen of a state different from any defendant. (§ 1332(d)(2)(a), (5)(b).) Additionally, most class actions can be removed even when a defendant is a

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citizen of the state in which the action is brought. (§ 1453(b), (d).)

However, removal of class actions is not devoid of consideration of the local character of a controversy. Rather, CAFA jurisdiction has "local controversy" and "home state" exceptions. The home-state exception provides that a district court may not assert jurisdiction over a case in which two thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the state in which the action was originally filed. (§ 1332(d)(4)(B).)

The local-controversy exception provides that a district court may not assert jurisdiction over a case in which two thirds or more of the class are citizens of the state in which the suit was filed, at least one defendant whose alleged conduct forms a "significant basis" for the claims and from whom "significant relief " is sought is a citizen of the state in which the action was originally filed, and the principal injuries were incurred in the state in which the action was originally filed. (§ 1332(d)(4)(A).) The exception only applies when no other class action asserting the same or similar factual allegations against any of the defendants may have been filed in the three years prior to the filing of the case at issue. (§ 1332(d)(4)(A)(ii).)

Additionally, a district court may decline jurisdiction over cases in which greater than one third, but less than two thirds of the class and the primary defendants are citizens of the state in which the action was filed. (§ 1332(d)(3).)

Federal question jurisdiction

Complaints asserting claims that raise a federal question pursuant to title 28 United States Code section 1331 can be removed. If the claims in the case include both federal-question claims and nonremovable claims or claims over which the court cannot assert original or supplemental jurisdiction, the action is still removable, but the non-federal claims must be severed and remanded. (§ 1441(c).)

Nonremovable actions

There are several species of claims that are categorically nonremovable that are set out in title 28 United States Code section 1445. These nonremovable claims are certain civil claims against railroads, (§ 1445(a),(b)); suits under "workmen's compensation laws," (§ 1445(c)); and suits under a specific provision of the Violence Against Women Act, (§ 1445(d).)

Deadlines for filing of removal notices and remand motions

A defendant initiates removal by filing a notice of removal in federal court. This filing must be made within 30 days of the defendant's receipt of the initial pleading or receipt of an "amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable." (§ 446(b)(1),(3).) Removal based on diversity jurisdiction cannot be made more than one year after commencement of the action unless the plaintiff acted in bad faith to prevent removal. (§ 1446(c)(1).) However, this one-year limitation on diversity removal does not apply to most class actions. (§ 1453(b), (d).)

The 30-day clock for each defendant starts upon their receipt of the pleading, except that a defendant may join in a removal notice filed by a co-defendant even after the first served defendant's 30-day period has elapsed. (§ 1446(b)(2)(B),(C).)

A motion for remand must be made within 30 days after the notice of removal is *filed*, with the exception of a remand motion based on lack of subject-matter jurisdiction which can be made at any time. (§ 1447(c).)

Requirement for unanimity among defendants

In any case that is removed solely on the basis that the district courts have original jurisdiction over the claims (i.e., based on § 1441(a)), all defendants who have been "properly joined and served" must join or agree to the removal of the action. (§ 1446(b)(2)(A).) However, such unanimity in the removal decision is not required in most class actions. (§ 1453(b), (d).)

Remand orders are often not appealable

An order remanding a case based on lack of subject-matter jurisdiction or defects in the removal procedure is not reviewable. (§ 1447(d).) However, a remand order in most class action cases may be appealed. (§ 1453(c)(1), (d).)

Additionally, if the remand order is based on a court's discretion to decline to hear claims under supplemental jurisdiction pursuant to title 28 United States Code section 1367 or abstention doctrines, the order is appealable. (See *Niehaus v. Greyhound Lines, Inc.* (9th Cir. 1999) 173 F.3d 1207, 1210; *Quackenbush v. Allstate Insurance Co.* (1996) 517 U.S. 706.)

Waiver of right to remove and right to remand

Although not found in the statutory language, the courts have developed doctrines of waiver that apply both to the right to removal and the right to remand. Waiver of the right to remove by litigation conduct is not lightly found and the waiver must be "clear and unequivocal." (*Resolution Tr. Corp. v. Bayside Developers* (9th Cir. 1994) 43 F.3d 1230, 1240.) "In general, 'the right of removal is not lost by action in state court short of proceeding to an adjudication on the merits.'" (*Ibid.*, quoting *Beighley v. FDIC* (5th Cir. 1989) 868 F.2d 776, 782.) Thus, most litigation conduct has not been found to waive the right to removal. (See, e.g., *Kenny v. Wal-Mart Stores, Inc.* (9th Cir. 2018) 881 F.3d 786, 791 [filing of demurrer did not waive right to remove]; *Foley v. Allied Interstate, Inc.* (C.D. Cal. 2004) 312 F. Supp. 2d 1279, 1284-85 [filing an answer, serving interrogatories and requesting an extension of time to respond to discovery did not constitute waiver].) Further, actions taken before the basis for removal was apparent are generally not deemed to waive the right of removal. (See *Taylor v. United Rd. Servs., Inc.* (E.D. Cal. 2018) 313 F. Supp. 3d 1161, 1173-74 [defendant's conduct did not waive right to remove because at the time of defendant's actions it was not apparent that removal jurisdiction existed].)

However, if a defendant manifests its assent to the jurisdiction by, for example,

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filing affirmative claims in the state court before filing a removal notice, it may be deemed a waiver. (See *Acosta v. Direct Merchs. Bank* (S.D. Cal. 2002) 207 F. Supp. 2d 1129, 1132-33 [holding that filing counterclaims and cross-claims waived the right to removal]; *Cf. Koch v. Medici Ermete & Figli S.R.L.* (C.D. Cal. May 6, 2013, No. CV 13-1411 CAS (PJWx)) 2013 WL 1898544, at *3 [filing of compulsory counterclaim did not waive right to remove].)

Waiver of the right to remand can occur only through "affirmative conduct or unequivocal assent of a sort which would render it offensive to fundamental principles of fairness to remand . . . ." (*Owens v. General Dynamics Corp.* (S.D. Cal. 1988) 686 F. Supp. 827, 830.) In practical terms, however, the doctrine surrounding waiver of the right to remand is murkier. In this regard, some courts have found that participation in minimal discovery, discovery required by court order or the federal rules, and filing motions to dismiss or for default do not constitute a waiver. (See *Cont'l Ins. v. Foss Mar. Co.* (N.D. Cal. Oct. 23, 2002, No. C 02-3936 MJJ) 2002 WL 31414315, at *7-8 [finding that plaintiff did not waive right to remand by moving to dismiss a counterclaim]; *Barahona v. Orkin* (C.D. Cal. Oct. 21, 2008, No. CV 08-04634-RGK (SHx)) 2008 WL 4724054, at *3 [finding that plaintiff did not waive right to remand by engaging in minimal federal discovery while timely seeking remand]; *Johnson v. USAA Cas. Ins.* (M.D. Fla. 2012) 900 F. Supp. 1310, 1313 [holding that plaintiff did not waive right to remand by filing case management report, seeking mediation, and taking steps toward deposition, where motion to remand was filed immediately and other actions were mandated by court order and compliance with federal rules]; *Innovacom, Inc. v. Haynes* (N.D. Cal. Mar. 17, 1998, No. C 98-0068 SI) 1998 WL 164933, at *2 [finding that plaintiff's requests for entries of default and a jury trial did not waive right to remand].)

On the other hand, other courts have concluded that actions such as filing amendments to the complaint, participation in discovery, and filing motions for default can trigger a waiver. (See *Fletcher v. Solomon* (N.D. Cal. Nov. 13, 2006, No. C-06-05492 RMW) 2006 WL 3290399, at *3-4 [remanding based on principles of fairness but noting that plaintiffs' unsuccessful request to enter default might justify denial of motion to remand]; *Moffit v. Balt. Am. Mortg.* (D. Md. 2009) 665 F. Supp. 2d 515, 517 [holding that plaintiff waived the right to remand by filing an amended complaint alleging a federal question claim before moving to remand], *aff'd sub nom. Moffit v. Residential Funding Co.* (4th Cir. 2010) 604 F.3d 156; *Riggs v. Plaid Pantries Inc.* (D. Or. 2001) 233 F. Supp. 2d 1260, 1270-72 [denying motion to remand because of request for default judgment and based on certain other actions].)

Finally, a forum-selection agreement can waive a party's right to pick a forum and serve as a basis for removal or remand. (See, e.g., *Kamm v. ITEX Corp.* (9th Cir. 2009) 568 F.3d 752, 757 [affirming remand order that was based on forum selection clause].)

Presumption against removal and the burden of proof

Because federal courts are courts of limited jurisdiction and because of federalism concerns, there is a presumption against removal jurisdiction. (See *Kokkonen v. Guardian Life Ins. Co. of Am.* (1994) 511 U.S. 375, 377 [holding that presumption against jurisdiction exists because federal courts are courts of limited jurisdiction]; *Shamrock Oil & Gas Corp. v. Sheets* (1941) 313 U.S. 100, 108-09 [indicating that federalism concerns and Congressional intent mandate strict construction of removal statutes].)

This "strong presumption against removal jurisdiction means that the defendant always has the burden of establishing that removal is proper." (*Gaus v. Miles, Inc.* (9th Cir. 1992) 980 F.2d 564, 566.)

Costs and fees can be awarded to the plaintiff in connection with remand

A plaintiff may seek costs and attorneys' fees in connection with a motion to remand. (§ 1447(c).) (See *Martin v. Franklin Capital Corp.* (2005) 546 U.S. 132, 136.) Fees will not be awarded if the removal is based on reasonable or novel arguments. (See *Lussier v. Dollar Tree Stores, Inc.* (9th Cir. 2008) 518 F.3d 1062, 1066.)

While seeking fees may be appealing, caution should be exercised because an award of costs and fees is appealable and will render the underlying decision to remand reviewable even if appeal would otherwise be barred. (See *Grancare, LLC v. Thrower by & through Mills* (9th Cir. 2018) 889 F.3d 543, 548 ["we may consider the merits of a remand order when determining whether an award that flows from that order is proper"]; *Balcorta v. Twentieth Century-Fox Film Corp.* (9th Cir. 2000) 208 F.3d 1102, 1105.)

Tips on avoiding removal

Strategies to keep litigation in state court revolve around avoiding the aforementioned bases for federal jurisdiction and planting claims within the exceptions.

Counsel must be vigilant in all stages, starting with crafting the pleading, continuing through service, and extending through amendment of the complaint up to trial. Obviously, counsel should not outright plead a federal case and file in state court and hope to remain there. But beyond that, there are a variety of more subtle pleading issues and litigation tactics that can help keep a case in or bring it back to state court.

Include a legitimate, even if unnecessary, in-state defendant in diversity cases

As discussed, removal based on diversity grounds is improper when a forum defendant is included in the suit. (§ 1441(b)(2).) The claims asserted against the forum defendant must be legitimate and not against a sham defendant. (See *Hamilton Materials, Inc. v. Dow Chem. Corp.* (9th Cir. 2007) 494 F.3d 1203, 1206, quoting *McCabe v. General Foods Corp.* (9th Cir. 1987) 811 F.2d 1336,

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1339: "If the plaintiff fails to state a cause of action against a resident defendant, and the failure is obvious according to the settled rules of the state, the joinder of the resident defendant is deemed fraudulent.")

However, as long as the claims are colorable, a plaintiff need not ultimately intend to recover from that defendant, because the courts do not make piercing inquiries into the plaintiff's intentions. (See *Kyle v. Envoy Mortg., LLC* (S.D. Cal. Dec. 17, 2018, No. 18-CV-2396-BAS-WVG) 2018 WL 6600105, at *2 [instructing against "undertaking a searching inquiry into a plaintiff's subjective motives"]; *Gebran v. Wells Fargo Bank, N.A.* (C.D. Cal. Dec. 28, 2016, No. CV 16-07616 BRO (MRWx)) 2016 WL 7471292, at *7 ["the defendant must convince the court that . . . the plaintiff could not possibly recover against the party whose joinder is questioned"]; *Selman v. Pfizer, Inc*. (D. Or. Dec. 16, 2011, No. 11-CV-1400-HU) 2011 WL 6655354 [analyzing and rejecting subjective intent test].)

Act quickly to avoid snap removal in diversity cases

Due to a quirk in language meant to prevent inclusion of sham in-state defendants by plaintiffs, defendants have succeeded in removing cases even where a proper in-state defendant is named in a practice that is called "snap removal." In this regard, the statutory language indicates that the forum defendant must be "properly joined and served." (*Ibid*.) Defendants have taken to acting instantly upon receiving courtesy copies or using docket monitoring services to discover suits and file notices of removal before the forum defendant is served. The Second and Third Circuits have recently blessed this practice based on a strict reading of the statutory language. (See *Gibbons v. Bristol-Myers Squibb Co.* (2d Cir. 2019) 919 F.3d 699, 705-706, and *Encompass Ins. Co. v. Stone Mansion Rest., Inc.* (3d Cir. 2018) 902 F.3d 147, 150-152.)

In the Ninth Circuit, some district courts have taken a practical approach that seeks to effectuate the purpose of the forum-defendant rule. (See *Vallejo v. Amgen, Inc.* (C.D. Cal. Aug. 30, 2013, No. CV 13-03666 BRO (MANx)) 2013 WL 12147584, at *3 [ordering remand because the notice of removal was filed before the summons had even been in issued]; *Massachusetts Mut. Life Ins. Co. v. Mozilo* (C.D. Cal. Jun. 28, 2012, No. CV 03613(MRP)(MAN)) 2012 WL 11047336.) Others have adopted the strict construction approach that favors defendants. (See, e.g., *Dechow v. Gilead Scis., Inc.* (C.D. Cal. 2019) 358 F. Supp. 3d 1051, 1054-55 [denying remand where plaintiff had time to serve defendant prior to filing of notice of removal but failed to do so]; *May v. Haas* (E.D. Cal. Oct. 16, 2012, No. 12 CV 01791(MCE) (DAD)) 2012 WL 4961235, at *2 [holding removal proper where served non-forum defendants removed action before forum defendant was served].)

Hardman v. Bristol-Myers Squibb Co. (S.D.N.Y. Apr. 17, 2019, No. 18-CV-11223 (ALC)) 2019 WL 1714600, provides another possibility for avoiding snap removal – procedural failures by defendants. There, the defendants attempted a snap removal, but the plaintiff was able to effectuate service before the defendants had complied with each of the requirements of section 1446(d), which requires defendants to file a notice of removal with the federal court, provide notice to adverse parties, and file a copy of the notice of removal with the state court. The Court remanded. (*Id*. at *3.)

Accordingly, where a plaintiff seeks to defeat removal jurisdiction in a diversity suit based on inclusion of a forum plaintiff, service should be effectuated upon the forum defendant(s) as soon as possible so that it can be completed before the defendants can act or to set up the strongest argument for remand. (Compare *Vallejo* with *Dechow*.) Counsel should also confirm that the defendant(s) exactingly followed removal procedure.

Avoid pleading an unnecessary federal theory

While the question of whether a complaint pleads a federal questions can be complex and is beyond the scope of this article, the general principle is that courts look to the allegations in the "well-pleaded complaint" and ignore the implications of the complaint such as the fact that a federal defense may be asserted. (See, e.g., *Oklahoma Tax Comm'n v. Graham* (1989) 489 U.S. 838, 841 ["The possible existence of a tribal immunity defense, then, did not convert Oklahoma tax claims into federal questions."].)

For purposes of removal, the theory that is pled can make all the difference. For example, in *Noel v. J.P. Morgan Chase Bank N.A.* (E.D.N.Y. 2013) 918 F. Supp. 2d 123, the plaintiff was able to achieve remand because his retaliation claim based on conduct after filing of an EEOC complaint was couched entirely on state grounds and did not invoke Title VII. (*Id*. at 125.)

Avoid ambiguity in the complaint

While it may sometimes be tempting to limit information in the complaint, ambiguity is not a plaintiff's friend when it comes to removal jurisdiction.

For example, in a diversity action, the good-faith amount of damages demanded in the complaint is deemed to be the amount in controversy. (§ 1446(c)(2).) If the basis for jurisdiction is not clear from the complaint, e.g., because plaintiff failed to specify the amount in controversy, the 30-day period for removal is not triggered. (See *Harris v. Bankers Life & Cas. Co.* (9th Cir. 2005) 425 F.3d 689, 694 [holding that basis for removal must appear within the four corners of a complaint to trigger 30-day removal period and that a defendant has no duty of inquiry to determine if removal is possible].) Similarly, in an action that may be subject to CAFA, the amount in controversy may be unclear and only revealed once litigation has long been underway. (See *Jordan v. Nationstar Mortg. LLC* (9th Cir. 2015) 781 F.3d 1178, 1184 [affirming removal over two years after filing of complaint and after class certification when interrogatory responses revealed amount in controversy to exceed $25 million].)

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Accordingly, if the plaintiff does not put the amount in controversy or citizenship of the parties in the complaint, it may result in an open-ended invitation for removal. (See *Roth v. CHA Hollywood Med. Ctr., L.P.* (9th Cir. 2013) 720 F.3d 1121, 1126 [advising that "plaintiffs are in a position to protect themselves" from a defendant delaying a notice of removal "by provid[ing] to the defendant a document from which removability may be ascertained"].) Additionally, arguments for waiver will fall flat if a defendant is never put on notice that removal is possible. (See *Kenny v. Wal-Mart Stores, Inc.* (9th Cir. 2018) 881 F.3d 786, 790 [holding that "[t]he district court erred in concluding that Wal–Mart waived its right to remove this case when the FAC did not reveal a basis for removal pursuant to CAFA"].)

Seek out the CAFA exceptions if possible

In drafting a class-action complaint, it may be tempting to include a nationwide class claim. But, if certification on a nationwide basis is in question, counsel may be better served by framing a more limited class case that fits within the home state or local controversy exceptions to CAFA and allows the claims to be litigated in a preferable forum.

Be cautious when amending the complaint

Amending the complaint may trigger an opportunity for removal. Indeed, even if a defendant has already attempted unsuccessfully to remove a case, the inclusion of new facts or claims can trigger a new opportunity to remove. (*Fritsch v. Swift Transportation Co. of Arizona, LLC* (9th Cir. 2018) 899 F.3d 785, 789 ["a defendant who fails in an attempt to remove on the initial pleadings can file a removal petition when subsequent pleadings or events reveal a new and different ground for removal."].)

Thus, plaintiffs who seek to avoid removal should be cautious not to file an amendment that adds federal claims or creates diversity jurisdiction at any time during the proceedings.

Attacking defendant's removal notice

After a notice of removal is filed, a motion for remand can of course focus on a lack of jurisdiction or the existence of non-removable claims. Other fruitful areas to pursue include procedural failures by the defendants. Obviously, plaintiffs should determine whether the removal was timely, and whether there was unanimity amongst the defendant in those cases where it is required.

Seek remand of non-federal claims in federal question cases and reject efforts to achieve partial removal of a diversity case

Where federal and state-law claims are joined, a defendant can remove the case in its entirety and the court has the power to retain the federal claims and remand the state-law claim. (See *Emrich v. Touche Ross & Co.* (9th Cir. 1988) 846 F.2d 1190, 1196.) Factors that district court considers when deciding whether to retain jurisdiction over supplemental state claims following dismissal of federal claims from a removed action include judicial economy, convenience, fairness, and comity. (See *Millar v. Bay Area Rapid Transit Dist.* (N.D. Cal. 2002), 236 F. Supp. 2d 1110, 1119.) Thus, when the removal is based on federal-question jurisdiction, plaintiffs can fight to keep the court from asserting supplemental jurisdiction over the other claims.

On the other hand, in a case involving only state-law claims, where even a single valid non-diverse cause of action exists, remand of the entire case is appropriate. (See *Gray ex rel. Rudd v. Beverly Enterprises-Mississippi, Inc.* (5th Cir. 2004) 390 F.3d 400, 411 [emphasizing that a single valid cause of action against a nondiverse defendant requires remand of the entire case]; *Christ v. Staples, Inc.* (C.D. Cal. Jan. 20, 2015, No. CV 14-07784 MMM JEMX) 2015 WL 248075, at *4 (citing *Gray*).)

Consider post-removal amendments to eliminate jurisdiction

Even if removal jurisdiction exists at the time the notice of removal is filed, post-removal amendments may lead the court to remand the case. Under 28 U.S.C. section 1447(e), if after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject-matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the state court.

Likewise, if removal was based on a federal question, the elimination of the federal question creates discretion in the court to retain, remand or dismiss supplemental state claims. (See, e.g., *Glover v. Borelli's Pizza, Inc.* (S.D. Cal. 2012) 886 F. Supp. 2d 1200 [remanding to state court after plaintiff eliminated federal claim through amendment]; *Markham v. Home Depot USA, Inc.* (C.D. Cal. Jan. 10, 2014, No. CV 13-8431-GHK (JCGx)) 2014 WL 117102, at *1 [noting prior remand after non-diverse defendants had been added].)

Courts may consider, however, whether the intention of the amendment is to defeat jurisdiction, or if there are legitimate reasons why the amendment could not have been made earlier. (See, e.g., *Anzures v. Prologis Texas I LLC* (W.D. Tex. 2012) 886 F. Supp. 2d 555, 562 (enumerating factors to consider in allowing amendment that will destroy diversity jurisdiction after removal).)

Attack waivers of removal

As discussed above, although the doctrine is fairly limited in its utility, there are circumstances where a defendant may knowingly accede to state court litigation and remand can be sought of the basis of the defendant's litigation conduct.

Avoid waiver

As noted above, the doctrine surrounding waiver of the right to remand does not offer an entirely clear picture as to what conduct will constitute a waiver. Accordingly, counsel should exercise caution in engaging in discovery, amendments, and motion practice that may constitute a waiver, and where possible, only conduct those actions that are required by discovery rules or court order.

Seek discovery to the extent it may be helpful

Jurisdictional discovery may be appropriate prior to a determination

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on a motion for remand. (See *Abrego Abrego v. Dow Chem. Co.* (9th Cir. 2006) 443 F.3d 676, 691 [concluding that district court had not abused its discretion in denying defendant's request for jurisdictional discovery].) To the extent it may be helpful in proving that, e.g., complete diversity does not exist, or that a CAFA exception applies, or that the amount in controversy does not exceed $5 million, plaintiffs should petition the court for an opportunity to take discovery.

Conclusion

Removal jurisdiction is a complex topic involving several nested issues with their own intricacies such as subject matter jurisdiction and abstention doctrine. However, with a firm grounding in the general principles and careful planning, counsel can maximize the chances of litigating in their forum of choice.

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