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Forum Variations In Starting Out

Differences between state, federal practice are significant.

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LITIGATORS usually hold strong views about the selection of a forum for their case. From experience in different federal, state and arbitration forums emerges an instinct about which bench or arbitrator is most likely to be hospitable to a particular claim or client. Chastened by the knowledge that the initial choice of forum is sometimes the most important decision of the case, plaintiffs' counsel usually exploit fully the considerable latitude afforded them in deciding where to commence an action.

In some cases, of course, there is little choice. A dispute between New York residents under a contract without an arbitration clause, for example, can only be brought in state court unless a federal claim is identified. However, where diversity jurisdiction exists or there is a federal claim that can be brought in state court (concurrent jurisdiction over federal claims exists absent congressional preclusion), plaintiffs' counsel must evaluate the choice. Similarly, counsel to non-resident defendants[1] in a state court action between statutorily diverse parties (or entailing non-exclusive federal claims) must elect whether to remove the case to federal court.

Such choices, we submit, should not be informed by instinct alone. The topic considered here is procedural variations between state and federal practice that may be relevant to forum choice. Some states have sought to reduce or eliminate such variations by adopting, in whole or in part, the Federal Rules of Civil Procedure.[2] Although New York has repeatedly considered whether to do the same, the litigator in New York enjoys no such luxury of conformity, and the differences between state and federal practice here are manifold and consequential. These differences affect commencement and pleading, extraordinary relief before trial, motion practice, discovery, trial and evidence, and appeal. The focus of this article is only upon the first of these areas, commencement and pleading. The emphasis will be upon the practical consequences of variations between state and federal practice in commencement and pleading, rather than an exhaustive catalogue of all differences.

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The Forms of Action

All actions in federal court, and, since 1992, most actions in New York State Supreme Court, are commenced by the filing of a complaint.[3] While actions in New York state courts are ordinarily commenced by the filing of a summons and complaint,[4] the CPLR offers several other alternatives for starting litigation: (i) filing a summons with notice;[5] (ii) filing a petition in a "special proceeding" governed by Article 4;[6] (iii) filing a summary judgment motion in

lieu of a complaint "upon an instrument for the payment of money only;"[7] and (iv) commencing a "simplified procedure" under CPLR 3031 by filing a statement of all parties describing the dispute and a note of issue, both of which must be consented to by all parties.[8]

The alternatives available in state court to the filing of a complaint may offer some advantage to plaintiffs' counsel in unusual circumstances. The first alternative listed above, a summons with notice, permits an action to be commenced by adding to the summons a brief description of the "nature of the action and relief sought," including (except in malpractice actions) the "sum of money for which judgment may be taken in case of default."[9] This can be accomplished with as little as a sentence added to a standard form summons.[10] A defendant may then demand that a complaint be served within 20 days. This form of commencement may be useful where, for example, a statute of limitations is on the verge of expiring, but plaintiff's counsel has insufficient information to frame a full complaint. In the authors' experience, the procedure is rarely used in commercial litigation.[11]

The second state procedural alternative, a special proceeding under Article 4 of the CPLR, is designed to move a case directly from the filing of pleadings (a "petition," "answer," and "reply" are allowed) to a dispositive hearing, without discovery (except upon motion).[12] Special proceedings are only available where prescribed by state law.[13] For example, when a party to an arbitration wishes to confirm or vacate an award, or otherwise seek relief pertaining to an "arbitrable controversy," a special proceeding "shall be used" unless the question arises in a "pending action."[14] Similarly, the Business Corporation Law empowers shareholders of a New York corporation who seek dissolution, or resolution of a deadlock, to proceed by petition.[15]

In practice, a special proceeding affords little additional advantage for plaintiffs seeking expedition, since in an uncontroversial matter, a federal judge (or a state judge in a plenary action), can achieve the same result by granting a motion for judgment on the pleadings or summary judgment at the outset of the case; and where there are material factual disputes in a matter brought by special proceeding, motion practice and discovery may become as extensive as in an ordinary action.

> In federal court, a judge is assigned to the case upon the filing of the complaint. In state court, a justice is assigned at the point when any party files a request for judicial intervention.

The next alternative in New York state court, a motion for summary judgment in lieu of complaint, permits a state plaintiff to skip the filing of a complaint and begin the case with papers showing that judgment on an "instrument for the payment of money only" should be immediately granted. The only temporal advantage of such a proceeding is elimination of the 20 or 30 days usually necessary to join issue (after which a motion for summary judgment in an action commenced by an ordinary complaint would be permitted). In view of extensive case law on what constitutes an "instrument for the payment of money only," an action under CPLR 3213 can become a trap for the unwary that has the perverse effect of delaying the case to resolve an issue that would not otherwise exist, namely whether the paper upon which plaintiff proceeds is "an instrument for the payment of money only."[16]

The final alternative form of action under state practice (the "simplified procedure" under CPLR 3031) is designed to emulate arbitration and move a dispute between consenting parties directly from the statement of their positions to trial. This would assure the parties the opportunity to have the law applicable to their case enunciated by a court, and become part of the public record. But, as Professor David D. Siegel notes, the "simplified procedure has languished at the brink of atrophy," and there is virtually no case law concerning it.[17]

Service

The federal rules permit service upon individuals, corporations and associations "pursuant to the law of the state in which the district is located, or in which service is effected."[18] Federal Rule 4 also sets forth specific federal standards under which individuals, corporations and associations may be served. In addition, some federal statutes, including the Securities Act of 1933, the Securities Exchange Act of 1934, and RICO, authorize nationwide service of process.[19]

New York state courts will exercise personal jurisdiction over any person served within its borders, or any person outside who is subject to jurisdiction under the long-arm statute[20] or pre-existing case law.[21] Whether the defendant in a state court action is served in or outside New York, service must be effected in a manner satisfying one of the provisions of Article 3 of the CPLR.[22] New York's long-arm statute has been the subject of voluminous, and, many practitioners believe, inconsistent case law, but there is no doubt that New York has not traveled to the constitutionally permitted limit for the exercise of jurisdiction over out-of-state defendants.[23]

Since the federal rules subsume all of the means available under state law to exercise personal jurisdiction and service, and then offer alternative options under FRCP 4 and certain federal statutes, they are, by definition, more expansive on jurisdiction and service than state rules. In some instances, the federal rules may provide only a marginal advantage. For example, service upon an individual to whom the summons and complaint are not delivered by hand may be effected under federal practice "by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein."[24] Service under CPLR 308(2) in this manner would not be com-

plete until 10 days after filing proof of a supplemental mailing to the defendant's "last known address" or "actual place of business." In other instances, such as claims that may be pursued under the federal securities laws, the expanded reach of federal practice may be dispositive of whether a crucial defendant can be joined, and thus effectively determine the forum.

Venue

Federal law orients venue toward the residence of defendants. Under 28 U.S.C. §1391, venue is generally set in either the district where any defendant resides (if all defendants are from the same state), or "a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred." Under the CPLR, a plaintiff may initiate a proceeding in any county "in which one of the parties resided when it was commenced," or if "none of the parties resided in the state, in any county designated by the plaintiff."[25]

A federal court also has discretion to make a forum non conveniens transfer to any other federal district in the country when a defendant demonstrates that the alternative forum maximizes the convenience of the parties, considered as a whole, and otherwise serves the interests of justice (including appropriate deference to plaintiff's choice of forum).[26] While the CPLR permits a transfer of the place of trial when "the convenience of material witnesses and the ends of justice will be promoted by the change,"[27] there is of course no authority in the CPLR to move a case outside the state.

State venue provisions are more plaintiff friendly, while the federal counterparts are more defendant friendly. A "forum non" transfer presents a risk in federal court not present in state practice. For example, a New York corporation that sues a California corporation in diversity in the U.S. District Court for the Southern District of New York (on a venue basis that a substantial part of the events giving rise to the claim occurred here) may face a transfer motion if the California defendant can argue that most of the party and non-party witnesses, business records, etc., are found in California, especially if a potential additional party is amenable to jurisdiction in California but not in New York. If the New York corporation files in state court, no such risk of transfer arises.

Judge Assignment, Jury Election

In federal court, a judge is assigned to the case upon the filing of the complaint.[28] In state court, a justice is assigned at the point when any party files a request for judicial intervention (RJI).[29] State litigants ordinarily file an RJI with the first motion in the case, or to initiate a preliminary conference for the purpose of scheduling discovery. In some instances, this may occur well after the commencement of the action. State courts, unlike federal courts, also have specialized "parts" to which cases of specified subject matters are assigned, such as the Commercial Division that sits in seven counties.

Both federal and state courts use an "individual assignment system" in which a judge is randomly selected "off the wheel" to preside throughout the duration of a case (although subsequent transfer for various administrative reasons is possible in both systems). Both systems also require plaintiffs to identify any other civil cases to which a newly filed matter is related, and, thereafter, the judge presiding over the preexisting matter reviews the "contention of relatedness"[30] and decides whether to accept the case.

The election of a jury occurs at opposite ends of the time line in the two systems: in federal court, within 10 days of the "last pleading" under FRCP 38(a) (typically on the face of the pleading), or, in a removed action, within "10 days after petition for removal is filed" under FRCP 81(c); and in New York State Supreme Court, in a note of issue filed at the conclusion of pretrial proceedings under CPLR 4102(a).

State courts, unlike federal courts, enable litigants to channel their case to a discrete part of the local bench. In Manhattan, the Supreme Court includes approximately 50 justices. But the Commercial Division of the Supreme Court consists of only seven justices, meaning that a qualifying commercial case[31] will be assigned to one of these judges. In the other seven counties in which the Commercial Division sits,[32] the bench consists typically of one justice, and at most three (Nassau). Hence, plaintiffs considering filing commercial matters in those courts can assess with greater certainty the jurisprudential record of the justices who will preside on a case.

The same dynamic applies for other specialty parts of the Supreme Court maintained in many counties, such as for medical malpractice, matrimonial disputes and claims against New York City. In federal court, in contrast, there are no specialty parts, although in some districts cases may be divided on a geographical basis between separate divisions within the district, such as Foley Square and White Plains within the Southern District of New York.[33] Thus, apart from related case designations, the plaintiff must assume that any judge within a federal district (or division thereof) may be assigned to a federal case.

The rules applicable in New York State Supreme Court also afford greater flexibility in deciding whether to elect to demand a jury trial, since that decision need not be made until the conclusion of all pretrial proceedings.[34] In a commercial dispute between two institutional clients in federal court, for example, neither party may demand a jury trial at the outset, thereby assuring that the case will be tried to a judge. Such a litigant who later perceives that a judge's pretrial rulings are hostile to the merits of its position is left with no choice but to try the case to the court. In state court, such a litigant could elect a jury trial in a note of issue filed at the conclusion of discovery. To many litigators, however, the difference is not substantial because they almost always demand a jury at the outset of a federal case, unless restricted by substantive law, on the theory that while a demand for a jury may be waived, the failure timely to demand a jury is ordinarily irreversible.[35] In other words, a demand for a jury does not preclude a bench trial, but the absence of a demand for a jury does preclude a jury trial.

'Foreign' Corporations

An out-of-state corporation doing busi-

ness in New York that is not registered with the New York Department of State "shall not maintain any action or special proceeding in this state unless and until such corporation has been authorized to do business in this state..."[36] There is some authority for the proposition that forum state "door-closing" statutes are inapplicable in federal courts.[37]

BCL §1312 can only become an issue, in either state or federal court, when a foreign corporation that does business in New York is unwilling to register. Although plaintiffs' counsel are well advised to resolve this issue in advance by insisting upon registration before starting a lawsuit, failure to do so can be cured subsequent to commencement of the lawsuit, without dismissal (or only conditional dismissal) of the complaint, by filing the appropriate application (and fee) with the New York Secretary of State. A foreign corporation doing business in New York that is unwilling to register (presumably to avoid service via the Secretary of State in actions where the corporation may be a defendant) is less likely to encounter an issue under BCL §1312 in federal court.[38]

Conclusion

Litigants who enjoy the luxury of a choice of New York forums should consider the variations in state and federal procedure that may significantly affect their case. We have explored here procedural variations at the commencement and pleading stage, but the practitioner should also consider differences affecting extraordinary relief before trial, motion practice, discovery, trial and evidence, and appeal.

1. Under 28 U.S.C. §1441(b), a home state defendant may not remove a case from state court even where diversity exists.
2. At least one commentator has concluded that, of the 33 states that originally adopted a version of the Federal Rules of Civil Procedure, only Utah's procedure is still a replica of the federal rules, and the trend is moving away from conformity. John B. Oakley, "A Fresh Look at the Federal Rules in State Courts," 3 NEV. L.J. 354 (Winter 2003/2004).
3. Fed. R. Civ. P. 3; CPLR 304. Prior to 1992, state court actions were commenced by service and then filed. This sometimes gave rise to issues over accrual, which were addressed by the change to commencement by filing.
4. CPLR 304.
5. CPLR 304.
6. CPLR 304.
7. CPLR 3213.
8. CPLR 3031.
9. CPLR 305(b).
10. David D. Siegel, New York Practice §60.
11. Indeed, given the liberal pleading and amendment requirements generally applicable in federal court, in most cases the summons with notice procedure provides little, if any, advantage. See Fed. R.Civ. P. 8; see also Official Forms 3 et seq.
12. CPLR 402, 408 and 409.
13. See CPLR 103(b) (stating that all proceedings must be by action "except where prosecution in the form of a special proceeding is authorized.").
14. CPLR 7502(a).
15. BCL 1102, 1104.
16. *East New York Savings Bank v. Baccaray*, 214 A.D.2d 601, 602, 625 N.Y.S.2d 88, 89 (2d Dept. 1995) ("It is well settled that an instrument qualifies for CPLR 3213 treatment if a prima facie case would be made out by the instrument and a failure to make the payments called for by its terms.") (internal quotations omitted); *Hirsch v. Rifkin*, 166 A.D.2d 293, 294, 564 N.Y.S.2d 120, 121 (1st Dept. 1990) ("Where an instrument sued upon is subject to terms and conditions in a separate document, the accelerated procedure for judgment under CPLR 3213...may not be employed.").
17. Siegel, New York Practice, §609; CPLR 3031, comment 1.
18. Fed. R. Civ. P. 4(e)(1).
19. 15 U.S.C. §77v(a) (Securities Act); 15 U.S.C. §78aa (Exchange Act); 18 U.S.C. §§1965(b) & (d).
20. New York's long-arm statute is codified at CPLR 302.
21. CPLR 301; see also Advisory Committee Note to that section.
22. See CPLR 313.
23. *Intermeat, Inc. v. American Poultry, Inc.*, 575 F.2d 1017, 1022 (2d Cir. 1978) (stating that constitutional due process standard may be met by fewer contacts than required under New York's "doing business" (§301) and "transacting business" (§302) standards.
24. Fed. R.Civ. P. 4(e)(2).
25. CPLR 503(a).
26. 28 U.S.C. §1404. See *Van Dusen v. Barrack*, 376 U.S. 612, 616 (1964); *Lurie v. Norwegian Cruise Lines, Ltd.*, 305 F.Supp.2d 352, 365 (S.D.N.Y. 2004).
27. CPLR 510.
28. E.g., Rule 4(b) of the Rules for Division of Business Among District Judges for the Southern District of New York.
29. Uniform Civil Rules for the Supreme Court and the County Court, §202.6.
30. Rule 15 of the Rules for Division of Business Among District Judges for the Southern District of New York; Uniform Rules for the Supreme Court and County Court §202.6 (setting forth the form for Request for Judicial Intervention).
31. See Uniform Rules for the Supreme Court and County Court, §202.70.
32. Albany, Erie, Kings, Nassau, Suffolk, Westchester and the Seventh Judicial District (Rochester).
33. See, e.g., Rule 21 of the Rules for Division of Business Among District Judges for the Southern District of New York.
34. In actions commenced in New York State Surrogate's Court, a jury demand must be made at or shortly after service of a responsive pleading. Surrogate's Court Practice Act §502(2)(a). When an action is transferred from Supreme Court to Surrogate's Court, a common occurrence, a jury demand must be made shortly after the transfer, unless a jury demand was already made in Supreme Court. Id. §502(2)(b).
35. Fed. R.Civ. P. 38(d). But see Fed. R.Civ. P. 39(b) (providing for jury trial upon motion at court's discretion, where jury demand could have been made as of right).
36. BCL §1312 (McKinney 2006).
37. Compare *Woods. v. Interstate Realty*, 337 U.S. 535 (1948) with *Hanna v. Plumer*, 380 U.S. 460 (1965). See also *Domino Media v. Kranis*, 9 F.Supp.2d 374 (S.D.N.Y. 1998) (discussing the "apparent inconsistency" between *Hanna* and *Woods*).
38. See *Lisle Mills v. Arkay Infants Wear*, 90 F.Supp. 676 (E.D.N.Y. 1950) (permitting unlicensed foreign corporation to sue under federal question in New York federal court); *Bamberger Broadcasting Service, Inc. v. William Irving Hamilton, Inc.*, 33 F.Supp. 273 (S.D.N.Y. 1940) (permitting unlicensed foreign corporation to sue in New York federal court on contract executed, delivered, and partly performed in New York). But see *Netherlands Shipmortgage Corp., Ltd. v. Madias*, 717 F.2d 731, 735 (2d Cir. 1983) (holding that BCL §1312 precludes unlicensed foreign corporation from maintaining action in federal courts in New York); *Maquesten General Contracting, Inc. v. HCE, Inc.*, 296 F.Supp.2d 437, 448 (S.D.N.Y. 2003) (same).

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