

**WHICH COURT? STATE OR FEDERAL AND WHY?/SELECTING YOUR JURISDICTION**  
**Federal Judicial Council Advisory Committee**

**Discussion Hypotheticals**

**Hypothetical No. 1**

You have just been retained by Acme Investments Group, Inc. and its principal, Joseph Dunham, to defend an action that has been filed against Acme, Dunham, and Acme's outside counsel, David Smith, in New York State Supreme Court for the County of Albany. Plaintiff John Paine is a former investment services client of Acme, which managed a discretionary investment account for Paine. Paine alleges federal securities fraud, state common law fraud and breach of fiduciary duty against all three defendants, in connection with Acme's management of his investment account, and claims damages in excess of \$5 million. In addition, Paine has asserted a separate \$500,000 breach of contract claim against Dunham individually – that claim relates to a business partnership/investment deal between Paine and Dunham. The Complaint does not make clear whether and to what extent the facts of the breach of contract claim will overlap with the facts of the fraud and breach of fiduciary duty claims.

You have reviewed the Complaint and believe that there is at least a reasonable chance of getting the federal securities fraud, state common law fraud and fiduciary duty claims against Acme and Dunham dismissed based on failure to plead the claims with sufficient particularity. If that motion were to succeed, it would significantly reduce the value of the case and increase the potential for a quick settlement. If that motion does not succeed, the factual complexity of the claims will result in a costly and extended discovery process, including extensive electronic discovery. The nature of Paine's causation and damage claims for his securities losses will certainly require expert witnesses, both with respect to the reasonableness of the investments in question and the claimed losses.

For jurisdictional purpose, all parties are citizens of New York. Co-defendant David Smith was served with the State court Summons and Complaint 25 days ago. Acme and Dunham were served 5 days ago. You have contacted Paine's counsel and obtained a 30-day extension on your time to answer or move against the Complaint. You need to advise your client on the practical and strategic implications of removing the case to the U.S. District Court for the Northern District of New York.

**Practical questions:**

- (1) How much time do Acme and Dunham have to file their removal papers
- (2) Do you need to get co-defendant David Smith's consent if your clients decide to remove?

**Strategic questions** – How do the following aspects of the case weigh in the removal decision?

- (1) The desire to file a motion to dismiss for failure to plead federal securities fraud, common law fraud and breach of fiduciary duty with adequate specificity, and the impact on settlement prospects if such a motion were to succeed;
- (2) The anticipated complexity of the disclosure process, including potentially extensive electronic discovery;
- (3) The likely importance of expert witnesses in the case;
- (4) The separate common law breach of contract claim against Dunham;

## **Hypothetical No. 2**

You represent an Illinois corporation (incorporated in Delaware, principle place of business in Illinois) being sued by Syracuse company (incorporated in New York, principal place of business in Syracuse) under the New York Uniform Commercial Code for damages and lost profits associated with sale and installation of an allegedly defective automated manufacturing assembly line. The equipment was originally sold for \$800,000, is complicated to operate, and utilizes a proprietary computer program sold as part of the system automation. The action is filed in New York State Supreme Court, Onondaga County. Plaintiff's manufacturing facility is located in the City of Syracuse and employs 250 workers from Onondaga County. The dispute in the action will turn on the operating rate and performance characteristics of the equipment based on its computer programing, as well as the plaintiff's calculation and forecast of its lost profits. Both issues will rely heavily on expert opinion evidence. In terms of relative resources, your client is much larger and has a greater ability to absorb attorney's fees and costs.

You need to make a decision on whether to remove the case, what considerations drive your decision?

## **Hypothetical No. 3**

You represent a small Upstate, New York company in the Adirondacks who bottles and sells sparkling spring water under a distinctive trade name, that has strong regional sales and more limited national sales. Recently, a multi-national beverage company has started selling a flavored water brand, including sales occurring throughout New York State, that utilizes a derivation of your client's trade name. Your client has a federal registration for its trademark and has been using its trade name in commerce for the last 30 years. Your client wants to bring an action to enjoin the national beverage company from infringing on its trademark.

There is concurrent jurisdiction over your client's claims for trademark infringement, so you can choose between federal and state court. The potential defendant, because of its size, has unlimited resources to defend the litigation. Your client, on the other hand, while solvent, is cash strapped and is operating on thin margins based on its aging bottling and packaging equipment

and its antiquated distribution system. However, in the rural Adirondack county in which your client's facility is located, your client is the second largest employer in the county.

You need to make a recommendation to your client on how to proceed, and specifically whether to sue the action in Supreme Court of your home county, or to sue in federal court in the Northern District of New York, which will likely be assigned to a judge in Utica or Albany. What considerations drive your decision?

#### **Hypothetical No. 4**

Your client ABC Corp, is a North Carolina manufacturer of packaging machines that are custom designed to provide assembly line packaging for various manufacturing concerns. The plaintiff, an employee of a New York sauerkraut company, fell asleep during the third production shift and accidentally thrust his arm into a pinch point in the conveyer belt system of one of ABC's custom-designed packaging machines resulting in de-gloving and multiple fractures to his dominant arm. Plaintiff has sued ABC for negligence and strict product liability in New York State Supreme Court alleging that his injuries were caused by a defect in the design of the conveyer system of the ABC packaging machine.

The Complaint does not indicate the amount of the damages sought. Plaintiff is a citizen of New York. ABC is a citizen of North Carolina and Delaware. There are no other non-diverse co-defendants. You are considering your options with respect to removal, and must provide a recommendation to your client in that regard. What factors should you be considering with respect to choosing the forum? What are the relevant issues, if any, with respect to effecting removal?