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NEW YORK STATE - FEDERAL JUDICIAL COUNCIL
ADVISORY COMMITTEE

WHICH COURT? STATE OR FEDERAL AND WHY?
SELECTING YOUR JURISDICTION

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NEW YORK STATE – FEDERAL JUDICIAL COUNCIL ADVISORY COMMITTEE

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I. Some Key Differences Between Federal and State Courts

TOPIC	IN FEDERAL COURT	IN STATE COURT
Commencement of action	By filing a Complaint (Fed. R. Civ. P. 3)	<u>Three options:</u> 1) filing a summons with Notice (CPLR 304); 2) filing a petition in a special proceeding governed by Article 4 (CPLR 304); or 3) filing a summary judgment motion in lieu of a complaint upon an instrument for the payment of money only (CPLR 3213)
Venue	1) The district where any defendant resides (if all defendants are from the same state); or 2) a district where a substantial part of the events or omissions giving rise to the claim occurred (28 U.S.C. § 1391)	1) In any county in which one of the parties resided when it the action was commenced; or 2) If none of the parties resided in the state, in any count designated by the plaintiff (CPLR 503[a])
Assignment of Judge	Upon filing of complaint, randomly assigned	Upon filing a Request for Judicial Intervention ("RJI"), randomly assigned Note: ability to bring commercial cases in the Commercial Division in New York (smaller judge pool, only hear commercial cases)
Initial Disclosures	Required, pursuant to Fed. R. Civ. P. 26, at or within 14 days of the Rule 26[f] Conference)	Not required Preliminary Conference is to establish a timetable for the completion of discovery

TOPIC	IN FEDERAL COURT	IN STATE COURT
Priority of Disclosure	No rule	Defendant's priority of deposition or interrogatory discovery is preserved if he serves a notice of deposition with his answer (CPLR 3106[a]; 3132)
Out-of-State Discovery	Readily available pursuant to Fed. R. Civ. P. 45	More difficult to obtain, may also need permission from sister state
Expert Disclosure	Allows for broad expert disclosure, including: depositions; detailed expert reports (which are required [see Fed. R. Civ. P. 26(a)(2)(B)])	Significantly narrower than in Federal Court; need only make CPLR 3101 disclosure. No depositions unless court ordered.
E-Discovery	Specifically addressed by the Federal Rules and by case law (<i>see Zubulake v. UBS Warburg LLC</i> , 217 F.R.D. 309 [S.D. N.Y. 2003], and its progeny)	CPLR has no specific statute(s) that address e-discovery; may be addressed at Preliminary Conference pursuant to the amended Uniform Rules of the New York State Trial Courts. <i>See also Voom HD Holdings LLC v. EchoStar Satellite</i> (1 st Dep't 2012)

TOPIC	IN FEDERAL COURT	IN STATE COURT
Cost-sharing in Discovery	Rebuttable presumption that the responding party bears the costs of discovery; rebuttable when e-discovery imposes an undue burden or expense	Presumption that party seeking discovery should bear the costs
Number of Depositions Permitted	10 per party; leave of court required for additional depositions; 7-hour limit	No express limitation under the CPLR
Number of Interrogatories Permitted	Leave of court required to take more than 25	No limit
Stay of Discovery via Dispositive Motions	Not expressly provided for in the Federal Rules	Discovery is stayed pending the determination of motions to dismiss or for summary judgment, except where the motion is based solely on improper service (CPLR 3214[b])
Jury Demand	Must be made no later than 10 days after serving the last pleading directed to the issue on which a jury is demanded (Fed. R. Civ. P. 38[b])	Made in the Note of Issue
Jury Selection	<p>Judge controlled</p> <p>Voir dire may be , and almost always ism conducted by the court itself</p> <p>Peremptory Challenges: 3 per. party, subject to the discretion of the court</p>	<p>Judges play a far less active role</p> <p>Voir dire is largely attorney run</p> <p>Judge has discretion as to whether supervision of voir dire is necessary for the entire process (22 NYCRR § 202.33[e])</p> <p>Peremptory Challenges: an equal amount per. "side" (i.e., all defendants or all plaintiffs)</p>
Jury Composition	May be composed of 6-12 jurors (Fed. R. Civ. P. 48[a]) Verdict must be unanimous	Civil juries in New York are composed of 6 jurors, plus alternates (CPLR 4104) 5 of 6 jurors must agree to verdict
Expert Testimony	<i>Daubert</i> "reliability" standard	<i>Frye</i> "general acceptance" standard

TOPIC	IN FEDERAL COURT	IN STATE COURT
<p>Interlocutory Appeals</p>	<p>General rule is that only "final decisions" are appealable (<i>see</i> 28 U.S.C. § 1291)</p> <p>Interlocutory appeal requires court approval; must show that the decision involved :(1) “a controlling question of law”; (2) as to which there is a “substantial ground for difference of opinion”; and (3) “an immediate appeal” may “materially advance the ultimate termination of the litigation.” (<i>se</i> 28 U.S.C. § 1292[b])</p>	<p>Interlocutory appeals (<i>see</i> CPLR 5701[a][2], providing for 8 types of appealable orders)</p>

II. ARTICLES AND SECONDARY SOURCES

- Michael S. Oberman, *The Choice of Forum for a Commercial Litigation*, 65-JUN N.Y. St. B.J. 28, (1993)
- Frank X. Altimari, *Foreword: Evidence Symposium: A Comparative Study of Federal and New York Evidence Law*, 11 Touro L. Rev. 1 (1994)
 - o This edition of the Touro Law Review was devoted to a symposium put on by Touro Law School, the goal of which was comparing the Federal Rules of Evidence with New York's evidence law, and included multiple articles on the topic.
- Randi M. Simanoff, *Distinctions Between the Public Records Exception to the Hearsay Rule in Federal and New York Practice*, 11 Touro L. Rev. 195 (1994)
- Charles J. Walsh and Beth S. Rose, *Increasing the useful information provided by experts in the courtroom: a comparison of Federal Rules of Evidence 703 and 803 (18) with the evidence rules in Illinois, Ohio, and New York*, 26 Seton Hall L. Rev 183 (1995)
- Siegel's Practice Review, *Comparing New York and Federal Rules on Awarding Prejudgment Interest*, 77 Siegels' Prac. Rev. 4 (1998)
- Steven J. Phillips, *The Use of Expert Proofs in Complex Product Liability Litigation in New York: A Preliminary Consideration of Varying Federal and New York State Approaches to Disclosure and Admissibility*, 15 Touro L. Rev. 699 (1998)
- Kenneth A. Manning and Kevin M. Hogan, *State or Federal Court? The Commencement or Removal of Civil Cases in New York*, 1999 Fed. Cts. L. Rev. 5, (1999)
- Thomas H. Cohen, *Do Federal and State Courts Differ in How They Handle Civil Trial Litigation: A Portrait of Civil Trials in State and Federal District Courts*, 2nd Annual Conference on Empirical Legal Studies Paper, (2006).
- Robert A. Baker and Vincent C. Alexander, *New York Practice Series, Evidence in New York State and Federal Courts*, Database, www.westlaw.com
- Robert L. Haig, *Commercial Litigation in New York State Courts* § 6:3 (West 3d ed 2010)
- Robert L. Haig, *Commercial Litigation in New York State Courts* § 10:11 (West 3d ed 2010)
- Robert L. Haig, *Commercial Litigation in New York State Courts* §§ 11:1 et seq (West 3d ed 2010)

- This is an entire chapter titled “Comparison with Commercial Litigation in Federal Court”, which provides a broad examination of the differences between New York State and Federal procedure,
- David D. Siegel, New York Practice Ch. 23 et seq., Database, www.westlaw.com
 - Much like Haig’s version, this chapter, titled “Federal Practice Reviewed and Compared: Parallels and Pitfalls” offers a comprehensive comparison of New York and Federal civil practice

III. FEDERAL STATUTES WITH CONCURRENT STATE JURISDICTION

RICO

State courts have concurrent jurisdiction over civil RICO claims

- *Tafflin v. Levitt*, 493 U.S. 455 (1990)

CIVIL RIGHTS / TORT CLAIMS

Generally, state courts have concurrent jurisdiction over civil rights actions and constitutional tort claims asserted under the procedures authorized by the federal civil rights statutes

- *See e.g., Brown v. State*, 89 N.Y.2d 172 (1996)

Discrimination claims brought pursuant to Civil Rights Act, 42 U.S.C. § 1983

- *See e.g., Felder v. Casey*, 487 U.S.131, 147 (1988)
- *Mulcahy v. New York City Dept. of Educ.*, 99 A.D.3d 535 (1st Dept 2012).

Americans with Disabilities Act, 42 U.S.C. § 12182

42 U.S.C. § 13981, which provides a federal civil remedy for the victims of gender-motivated violence

- *U.S. v. Morrison*, 529 US 598, 606 (2013)

Federal Consumer Product Safety Act

- *See e.g., Howard v. Poseidon Pools, Inc.*, 133 Misc.2d 43 (Sup Ct, Allegany County 1986), rev'd on other grounds, 134 A.D.2d 926 (4th Dept 1987)

EMINENT DOMAIN PROCEEDINGS

When brought under the Federal Power Act

- *Erie Blvd. Hydropower, L.P. v. Stuyvesant Falls Hydro Corp.*, 30 A.D.3d 641, (3d Dept 2006)

TRADEMARK INFRINGEMENT

Claims brought under the Lanham Act (5 U.S.C. § 1121; 28 U.S.C. § 1338[a])

- *See Ryan v. Volpone Stamp Co., Inc.*, 107 F. Supp. 2d 369, 375 n. 3 (S.D. N.Y. 2000) (“Although federal courts are granted exclusive jurisdiction with respect to patent, plant variety protection and copyright cases, the state courts enjoy concurrent jurisdiction with the federal courts over trademark, i.e. Lanham Act, claims.”)

EMPLOYMENT LAW

Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e to 2000e3-17)

- *See Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820 (1990)

The Federal Employers' Liability Act ("FELA") (45 U.S.C.A. § 56)

- *Mondou v. New York, New Haven & Hartford R.R. Co.*, 223 U.S. 1, 57-58 (1912)

State courts have concurrent jurisdiction over individual benefit claims under ERISA

- *See Iacona v. JP Morgan Chase Bank NA*, 12 Civ. 2330 (BMC) (E.D. N.Y. Jul. 13, 2012)
- Under Section 502(e)(1) of ERISA, "the district courts of the United States. . . have exclusive jurisdiction of civil actions" brought under ERISA, except that "[s]tate courts of competent jurisdiction and district courts of the United States shall have concurrent of actions under paragraphs (1)(B) and (7) of subsection (a) of . . . section [502]"
 - o Federal courts have exclusive jurisdiction in civil actions for *breach of fiduciary duty* brought by a participant or beneficiary of an employee benefit plan covered by ERISA when brought against the plan fiduciary

LABOR

Claims brought under the Fair Labor Standards Act, 29 U.S.C. § 216(b)

Claims brought by and against labor organizations under 29 U.S.C. § 1985

- *Dowd Box Co. v. Courtney*, 368 U.S. 502, 508 (1962)
 - o State courts have concurrent jurisdiction with federal courts to compel arbitration of collective bargaining agreements.
 - *Milk Drivers and Dairy Emp. Union Local No. 338 v. Dairymen's League Co-op. Ass'n*, 304 F.2d 913 (2d Cir 1962)
 - o State courts have concurrent jurisdiction over breach of collective bargaining agreement claims; however, the state court is obligated to apply federal law in those cases.
 - *Moralez v. Meat Cutters Local 539*, 778 F.Supp. 368 (E.D. Mich 1991)
 - o State courts have concurrent jurisdiction over all actions under this chapter for suits for violations of contract between an employer and a labor organization, and will apply federal substantive law in such proceedings.
 - *District No. 1-Pacific Coast Dist., Marine Engineers' Beneficial Ass'n, AFL-CIO v. Trinidad Corp.*, 583 F.Supp. 262 (S.D.N.Y.1984)

Claims under Labor Management Relations Act (29 USC § 301), for breaches of collective bargaining agreements.

- *See Charles Dowd Box v. Courtney* 368 U.S. 502 (1962); *see also Livadas v. Bradshaw*, 512 US 107 (1994)
 - o Note, however, that claims under the National Labor Relations Act (29 U.S.C. §157) are within the exclusive jurisdiction of federal courts

SECURITIES ACT OF 1933 (15 USC § 77v)

- If these actions are commenced in state court, they are *not removable* to federal court

- Note that state courts **do not** have concurrent jurisdiction over actions brought under the Securities Exchange Act of 1934

BANKING

Claims for “Tying Arrangements” pursuant to 12 U.S.C § 1972

ADMIRALTY AND MARITIME LAWS

State courts have concurrent jurisdiction over admiralty action under “saving to suitors” statute, pursuant to 28 U.S.C. § 1333

- *Sinclair v. Soniform, Inc.*, 935 F.2d 599 (3d Cir. 1991)

State courts have concurrent jurisdiction to try *in personam* admiralty actions.

- *Bergeron v. Quality Shipyards, Inc.*, 765 F.Supp. 321 (E.D. La. 1991)

State and federal courts have concurrent jurisdiction in admiralty and maritime cases.

- *American Mfrs. Mut. Ins. Co. v. Manor Inv. Co.*, 286 F.Supp. 1007 (S.D.N.Y. 1968)

OTHER

Claims for violations of the Perishable Agricultural Commodities Act (“PACA”), pursuant to 7 U.S.C. §§ 499a–499s

Truth in Lending Act (“TILA”)

- *See Reliable Credit Service, Inc. v. Bernard*, 339 So.2d 952 (La. App. 4th Cir. 1976)

Claims arising under the **Telephone Consumer Protection Act** (47 U.S.C. § 227).

- *See Mims v. Arrow Financial Services, LLC*, 132 S.Ct. 740 (2012)