

Oregon State Bar Product Liability Newsletter,

“Filing in State or Federal Court,” Fall 2001

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I. INTRODUCTION

Thoughtful litigators develop a strategy to guide their efforts toward a successful outcome. One key tactic in any such strategy is a judicious choice of forum. Sometimes, for various reasons, the skillful litigator wants to be in state court; at other times, she wants to be in federal court. Some of the advantages and disadvantages of these competing forums are highlighted in what follows--differences that all litigators should comprehend before deciding on a forum.

II. DIFFERENCES BETWEEN STATE AND FEDERAL COURT

1. PRETRIAL

- a) *Service of Summons.* Unlike in state court, in federal court a defendant who does not waive service of summons when asked to do so, may have to pay plaintiff's costs in serving the defendant, including reasonable attorneys fees incurred to collect those costs. FRCP 4(d) This rule is a powerful incentive for defendants to accept service (assuming the case has been filed well within the statute of limitations).
- b) *Pleading Damages.* Unlike in federal court, in state court, “if recovery of money or damages is demanded, the amount thereof shall be stated.” Compare FRCP 10(b) with ORCP 18B. The federal rule favors plaintiffs who might otherwise appear greedy by including a huge prayer in their complaint. Instead, a plaintiff’s attorney

can pose a dollar amount at the end of the case after developing a feel for how well her case is being received by the jury.

- c) *Interrogatories*. Unlike in state court, in federal court, a party has recourse to written interrogatories. FRCP 33. When an opposing party is in a distant state or country, carefully constructed and searching interrogatories may save time and money.
- d) *Summary of Expert Witnesses*. In federal court, both sides must disclose the identity of their testimonial experts and provide both their experts' written reports and a written summary of the expert's anticipated testimony. FRCP 26(a)(2). By contrast, in state court, an attorney may proceed to trial without knowing whether the opposing party intends to introduce an expert, the identity of the expert, or the substance of the expert's testimony. To the plaintiff, this element of surprise—"trial by ambush"—is a priceless advantage.
- e) *Depositions of Experts*. Unlike in state court, in federal court, a party may depose the other side's experts, even (in exceptional circumstances) non-testimonial experts. FRCP 26(b)(4). Deposing the other side's expert is likely to flesh out the relative strengths and weaknesses of the case, and so increases the chance of settlement. Yet these depositions do increase fees and costs. (Often such depositions are not needed if both sides have made full and fair disclosures of what their experts will say at trial.)
- f) *Pretrial Conference*. Federal courts have the power to impose time and scheduling deadlines. FRCP 16. Although state courts also have the power to impose similar deadlines, most do not.

- g) *Pretrial Order*. Unlike in state court, in federal court, the court issues a "Pretrial Order." It is initiated by the plaintiff, amended by the defense, and eventually jointly signed and submitted to the court. The pretrial order absorbs all prior pleadings and stipulations of the parties and tightly controls the conduct of the trial. In many ways it is like a contractor's "punch list" marking all significant things that have been done and highlighting those things that still need to be done at trial. This order, when done properly, reduces a massive set of allegations and counter-allegations to those points of fact and law actually in dispute. Once again, however, the pretrial order, like discovery and deposition of experts, is a double-edged sword. Although the pretrial order saves time in trial, it takes time to prepare, thereby increasing expenses.
- h) *Substitution of Parties at Time of Death*. In federal court, a motion for substitution of a deceased party must be made "not later than 90 days after the death is suggested upon the record." FRCP 25(a)(1). In state court, by contrast, substitution of a deceased party's personal representative must occur within four months after the date of first publication of notice to interested persons, but not more than one year after such party's death. ORCP 34B. The federal law requires an attorney to advise the court and adverse counsel of the death of a party, but shortens the time for an amendment, whereas state law ties notice to the date of first publication, but allows more time to amend.
- i) *Interpleader*. Interpleader is available in both state and federal court. FRCP 22; ORCP 31. The state rule allows a party filing an interpleader action to recover attorney fees; the federal rule does not. Most interpleader actions involve modest

attorney fees on the plaintiff's part (who often can simply deposit the money in court, serve the necessary parties, and then get out of the case). However, if identifying the various potential claimants and seeing that they are properly notified and served involves a substantial investment in time or money, state court is preferred.

j) *Summary Judgment Motions.* The procedure governing summary judgment is set forth in FRCP 56 and in ORCP 47. Under state law, these motions must be filed at least 45 days before trial. A party resisting the motion can protect against disclosure of expert witnesses by verifying that such experts have been retained and, if called to testify, would be able to controvert the alleged facts in the motion. No similar protection against disclosure of experts is available in federal court. FRCP 56.

k) *Offers of Compromise.* In both federal and state court are provisions for offers of compromise: FRCP 68; ORCP 54E. Defendant can make an offer for judgment to be entered for a sum certain, and thereby shield itself from additional court costs, including attorney fees, if the plaintiff fails to obtain a verdict higher than what was offered. However, the federal and state procedures do differ. In state court, the plaintiff has three days to decide what to do with the offer, during which time the offer cannot be withdrawn. If the offer of compromise is mailed, as it often is, an additional three days are added, and if the final day occurs on a weekend or holiday, a few additional days are again added. ORCP 10. Since offers of compromise usually occur when negotiations are actively being pursued, this three-day period, which may in fact stretch to more than a week, arguably presents a safe

haven during which the plaintiff may actively make counteroffers without fear that the original offer will be withdrawn. In federal court, by contrast, there is no golden three-day period. Instead, “an offer not accepted shall be deemed withdrawn.” Plaintiffs prefer the state law.

- l) *Judicial Management.* Both state and federal judges are highly qualified and experienced, and both sets of judges handle a variety of cases. However, state judges generally have larger case loads and fewer resources than federal judges. This inequity often means that in federal court a case is likely to get more time from the judge and law clerks than a similar case in state court. This is not a criticism of state court judges, but simply a statement of economic reality.
- m) *Time to Trial.* The length of the docket in state and federal court may dramatically affect how soon a case goes to trial and if on a date certain. The choice between federal and state court may also affect the place of trial. For instance, in state court, the forum might be a very small rural community. If the same case were filed in federal court, trial might be held in Portland or Eugene or Medford, thereby eliminating the hometown advantage the litigant might have otherwise enjoyed.
- n) *Substantive Law.* At times, case law may be different in federal and state court. These differences that may lead to dramatically different results. For example, federal cases hold that a breach of warranty claim has a two-year statute of limitations, whereas state court cases interpret a four-year statute of limitations. Many employment cases can be brought in either state or federal court but the prerequisites, remedies, and right to attorney fees may differ subtly and even dramatically.

2) TRIAL

- a) *Waiver of Medical Privilege.* In federal court, a doctor employed by the opposing side may examine a plaintiff who places his mental or physical condition at issue. FRCP 35. The doctor must then prepare a report of the examination. As soon as the plaintiff requests and obtains the report, or takes the doctor's deposition, the plaintiff "waives any privilege [she] may have... regarding the testimony of every other person who has examined or may thereafter examine [her] in respect to the same mental or physical condition." So, as soon as the plaintiff requests a copy of the defendant's expert report, the defense may contact plaintiff's doctors to discuss plaintiff's medical condition. In state court, by contrast, the physician-patient privilege is not waived until the plaintiff's own doctor testifies in court. OEC511. At times, this important difference between federal and state court may not have significant consequences, given that most doctors refuse to talk to adverse counsel. Additionally, the plaintiff can guard against this risk by instructing the doctor to talk to the defense only in the presence of the plaintiff's attorney (i.e. a deposition, or at least a joint conference).
- b) *Criminal Convictions.* In both federal and state court, a party or witness may be impeached by evidence of a felony conviction. FRE 609; OEC 609. But the two rules differ significantly. Under the federal rule, a conviction is admissible only if less than 10 years old and not unduly prejudicial. FRE 403. Also, in federal court, the proponent of the conviction must give the adverse party "sufficient advance written notice of the intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence." By contrast, the state rule

provides that impeachment by evidence of conviction of crime *shall* be admitted (no Rule 403 balancing test is permitted), and any felony conviction less than 15 years old comes into evidence. So, if a party has a felony conviction of any kind, he or she has a far better chance of keeping it from the jury in federal court. Because a past criminal conviction can be absolutely devastating impeachment, this fact alone might justify filing in or removing a case to federal court.

- c) *Learned Treatises.* Use of learned treatises differs in state and federal court. Compare FRE 803(18) with OEC 706. The federal rule allows an authoritative treatise to be read into evidence, either on direct or cross-examination. By contrast, the state rule only permits a learned treatise to be used only in cross-examination to impeach, without introduction into evidence.
- d) *Quality of Expert Testimony.* Both the federal and state courts are in a continuous state of flux about the admissibility of expert testimony. The most significant federal case is Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993). In state court, Jennings v. Baxter Healthcare Corp., 331 Or. 285 (2000) is nearly the latest but by no means the only word on the issue. In a nutshell, federal judges are more likely to root out “junk science.”
- e) *Live Testimony by Telephone, Internet, or Video Conferencing.* Unlike in state court, in federal court, the judge “may, for good cause shown in compelling circumstances and on appropriate safeguards, permit presentation of testimony in open court by contemporaneous transmission from a different location.” FRCP 43(a). In state court, absent a stipulation, a judge would be on safe ground in refusing such testimony. The closest substantial equivalent of FRCP 43(a) is

ORCP 39 I, which allows for perpetuation testimony of witnesses expected to be absent from the trial.

- f) *Jury Trial.* In federal court, to avoid waiver of trial by jury, a party should request a jury trial in that party's initial pleadings. FRCP 38(d). By contrast, in state court, both sides must affirmatively stipulate to waive a jury. ORCP 50.
- g) *Jury Selection.* In federal court, the attorneys may be permitted to examine prospective jurors, or the court itself may do so. FRCP 47. If the court conducts the examination, it must permit the attorneys to supplement the examination with additional questions, propounded either directly to the jurors or filtered through the judge. In state court, jurors shall be examined "first by the court, then by the plaintiff, and then by the defendant." ORCP 57C. The court is, of course, able to regulate the examination to avoid unnecessary delay. Attorneys capable of bonding with the jury during jury selection prefer the state procedure.
- h) *Jury Verdict.* In federal court, a jury may consist of between six and twelve members. FRCP 48. By contrast, in state court, a jury consists of twelve jurors in all cases over \$10,000, unless the parties stipulate otherwise. ORCP 56. In federal court, the verdict must be unanimous, unless the parties stipulate otherwise. But in state court, a verdict can be supported by only a three-fourths majority in civil cases, unless the parties stipulate to some other stated majority. ORCP 59G(2).

3) *POST TRIAL*

- i) *Court Costs.* In federal and state court, costs are handled differently. In federal court, costs "shall be allowed as of course to the prevailing party unless the court otherwise directs." FRCP 54(d)1). Essentially, *all* costs can be taxed to the losing

party. By contrast, in state court “costs and disbursements” are limited to a carefully defined set of costs, specifically excluding the expense of taking depositions. ORCP 68. So, in a case involving many depositions, the difference in costs can be enormous. Moreover, any attorney representing an out-of-state plaintiff should carefully consider this: an Oregon attorney representing an out-of-state plaintiff is *personally* liable for the defendant’s costs if the defendant prevails! ORS 20.160. In state court, an attorney representing an out-of-state plaintiff might be at risk for a cost bill of several hundred dollars. But in federal court, that same cost bill might be several thousand dollars.

III. CONCLUSION

All in all, the savvy litigator will carefully consider these distinctions between the state and federal court when choosing a forum. In that calculus, the litigator will weigh the burdens and benefits of those differences along with the needs of the kind of case he or she has. For example, in product liability cases, federal court is generally preferred because it provides more liberal discovery with the use of interrogatories. Or, for plaintiffs with claims dependant on complex expert testimony, such as in toxic tort or medical malpractice litigation, state court is generally preferred because the plaintiff can sequester its experts. In cases involving inexperienced or abusive counsel, inclined to employ a naïve or abusive strategy of filing needless motions or raising a host of irrelevant issues, federal court may be preferred because of greater judicial control. In cases such as motor vehicle accidents, where economics are critically important, state court is generally preferred. But a concern for economics may be sacrificed when the attorney believes that the grand trappings of and larger courtrooms in federal court will spur the jury to award

larger verdicts. In cases involving complex legal issues, such as certain business and commercial cases, federal court is preferred because of the availability of keen law clerks eager to thoroughly research and analyze such issues. In all events, the choice between state and federal court should never be made by default.