





CROSSING THE (STATE) LINE
How Your Trial & Settlement Strategies can Change in Different States

Presented by

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Today's Presenters

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The Cast

- Plaintiff: Eileen Katract
- Mall Owner: Hometown Mall LLC
- Mall Maintenance Contractor: B-Reft
- Mall Security Contractor: C-Nothing
- Mall Tenant Restaurateur: Lobster Shack
- Lobster Shack's Contractor: Tanks-A-Lot, Inc.



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The Occurrence

- While working, server Eileen Katract tripped on a live lobster in the food court of the Hometown Mall just outside of the Lobster Shack restaurant.
- She fell on the floor on her right side, fracturing her right hip.
- She had had cataract surgery the previous day and was wearing a bandage.
- Tanks-A-Lot was replacing the leaking Lobster Shack lobster aquarium.
- Eight live lobsters were placed in bucket with water, expecting less than an hour to replace leaking tank.
- Only six live lobsters remained in the bucket after Katract's injury.



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Litigation

- Seeking damages arising from injuries sustained as a result of a dangerous condition in the food court and a failure to warn the plaintiff of that condition Katract sued in the Circuit Court of Cook County:
 - the mall owner
 - maintenance contractor
 - Tanks-A-Lot
- Additionally, the plaintiff sued security contractor C-Nothing for spoliation of evidence for failing to preserve the security footage she claims was material evidence supportive of her claims.



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Lease & Contracts – Condition for Maintenance Contract

- “11. Indemnity. (a) ... Contractor shall, at Contractor’s sole cost and expense, defend, indemnify, and hold harmless Owner, Owner’s managing agent, Mega Mall Group, Inc., Mega Mall Group, L.P., and any other affiliated or related entities, managers, agents, servants, employees, and Independent contractors of these persons or entities (“Owner Parties”) from and against any and all claims, liabilities, obligations, losses, penalties, actions, suits, damages, expenses, disbursements (including legal fees and expenses), or costs of any kind and nature whatsoever (“Claims”) for property damage, bodily injury and death brought by third-parties in any way relating to or resulting, in whole or in part, from Contractor’s (and its subcontractors’ and employees’) performance or alleged failure to perform the Services or any other breach of this Agreement.”

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Mall Security Contract

- C-Nothing's contract required it to continuously maintain video surveillance of the lavatories, entrances, parking lots and food court areas of the Hometown Mall during all hours of mall operations and for two hours before and after the mall was open.
- C-Nothing was required to preserve video footage upon receiving notice of any claim or incident until all such claims were finally resolved by settlement or final order.



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Lobster Shack's Mall Lease

- **"5.1. Common Areas.** All parking areas, access roads and facilities furnished made available or maintained by Landlord in or near the Mall, ... escalators, pedestrian sidewalks, **malls, including the enclosed mall and Food Court, if any,** courts and ramps, ... and **other areas and improvements provided by Landlord for the general use in common of tenants and their customers** and Major Tenants in the Mall "all herein called "Common Areas") **shall at all times be subject to the exclusive control and management of Landlord,** and Landlord shall have the right, from time to time, to establish, modify and enforce reasonable rules and regulations set forth in Section 8.9 and all reasonable amendments thereto."

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Lobster Shack's Contract with Tanks-A-Lot

- Tanks-A-Lot's construction contract with Lobster Shack provides that Lobster Shack shall defend, indemnify and hold contractor harmless from any and all claims, suits and demands for damages due to bodily injury, property damage or personal injury arising from or related to the work (expressly including replacement of the lobster tank).



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Additional Insured Endorsements

- Blanket additional insureds

“WHO IS AN INSURED (Section II) is amended to include as an insured the person or organization shown in the Schedule, but only with respect to liability arising out of “your work” for that insured by or for you.”



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Tenders of Defense

- Hometown has demanded that maintenance contractor B-Reft defend and indemnify Hometown and security contractor C-Nothing for the claims asserted in Katract’s lawsuit against them.
- Lobster Shack has tendered its defense to Tanks-A-Lot pursuant to the indemnity provisions of its construction contract.
- Lobster Shack has demanded that Hometown indemnify it for indemnity and medical expenses Katract has received and will in the future receive in worker’s compensation benefits.
- Hometown, in turn, has tendered Lobster Shack’s subrogation claim to B-Reft pursuant to the mall maintenance contract.



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Jurisdictional Issues

- Hometown Mall is a Single Purpose Entity organized in Delaware with its principal place of business in Hometown, Michigan. It is a wholly owned operating subsidiary of Mega Mall Corp., also domiciled in Delaware.
- Plaintiff Katract is an Indiana resident. She works in Hometown, Michigan where her injury occurred. She filed suit in Cook County, Illinois.
- B-Reft is an Ohio corporation having its principal place of business in Ohio, but operating on a national scope.

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Jurisdictional Issues

- Lobster Shack is an Illinois corporation, having its principal place of business in Cook County, Illinois, with operations throughout the Midwest, including in Michigan.
- C-Nothing is an Indiana corporation having its principal place of business in Indianapolis, Indiana that also operates throughout the Midwest.
- Tanks-A-Lot Inc. is a Michigan corporation having its principal place of business in Michigan. It has never conducted business in Illinois.

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Comparative Fault


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Comparative Fault – Reduction/Bar of Recovery

- Illinois
 - Modified comparative fault
 - Recovery reduced by % of comparative negligence
 - Property owner/occupier owes duty to warn unless open/obvious
 - If plaintiff's comparative fault exceeds 50%, plaintiff is barred from any recovery.



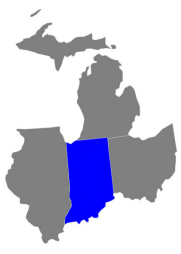
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Comparative Fault – Reduction/Bar of Recovery

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Comparative Fault – Reduction/Bar of Recovery

- 50% Bar Rule
 - Economic damages are \$100,000 but plaintiff is 60% at fault, they can recover \$40,000 in economic damages.
 - Noneconomic damages are \$1,000,000 but they are 50% at fault, they cannot recover.
 - Noneconomic damages are \$1,000,000 but they are 49% at fault, they can recover \$510,000
- Open/obvious no longer a complete defense
- Open/obvious is factor in determining breach and/or comparative fault.




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Comparative Fault – Reduction/Bar of Recovery

- Ohio
 - Recovery reduced by % of comparative negligence
 - Unless % exceeds 50%, which bars plaintiff from any recovery
 - No duty to warn for open/obvious dangers
 - Attendant circumstances



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Comparative Fault Takeaways – Settlements & Trials






- All four jurisdictions have similar comparative fault standards.
- Applying Illinois, Ohio or Indiana law with no duty to warn of open and obvious conditions would provide a better chance for obtaining summary judgment than applying Michigan law.
- The distraction and attendant circumstances doctrines in Illinois and Ohio might preclude summary judgment on the facts presented.





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Allocation of Fault

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Allocation of Fault to Nonparties

- Defendants have right to rebut evidence.
- Right to establish another causative factor is sole proximate cause of injury
- Defendant who enters into good-faith settlement discharged from any contribution liability to non-settling defendant
- Nonparties and settling defendants cannot be apportioned fault, so they cannot appear on verdict form for allocating liability.





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Allocation of Fault to Nonparties



- Nonparty is person who caused or contributed to alleged injury, death or property damage but who has not been named a defendant.
- Defendants have limits on filing nonparty defense pleas.
- Defendants required to name nonparties under state's comparative fault statute.




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Allocation of Fault to Nonparties



"It's not whether you win or lose, it's how you place the blame."
– Oscar Wilde


- Fair-Share Liability – trier of fact must allocate damages based on direct proportion of person's % of fault.
- Notice of Non-Party at Fault – 91 days after first responsive pleading – not required to argue defendant was not a proximate cause of damages but required for trier of fact to assess % of fault to a nonparty. Non-party does NOT need to be named.

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Allocation of Fault to Nonparties



- "Empty Chair" defense allows defendant to seek allocation of fault to one or more parties that are not a part of the lawsuit.
- This includes immune parties or parties that have previously settled with the plaintiff and have been dismissed from the suit.
- To plead "empty chair" defense procedural and substantive requirements must be followed.
- Defendant must provide further evidence demonstrating tortious conduct by "empty chair" defendants.

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Allocation of Fault
Takeaways – Settlements & Trials

- Inability to allocate fault to nonparties or settled parties in Illinois significantly increases exposure.
- Good faith finding would cut off contribution claims against settled parties in Illinois.
- Applying Michigan, Indiana or Ohio substantive law would allow defendants to mitigate exposure through allocation.






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Joint & Several Liability



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Joint & Several Liability Among Tortfeasors

- With certain restrictions, defendants found liable are jointly and severally liable for plaintiff's past and future medical and related expenses.
- Defendants with less than 25% of the attributable fault of the plaintiff, the defendant sued by the plaintiff and any third-party defendant (except the plaintiff's employer) are severally liable for all other damages.
- Defendants with more than 25% of the attributable fault of the plaintiff, the defendant sued by the plaintiff and any third-party defendant (except the plaintiff's employer) jointly and severally liable for all other damages.





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Joint & Several Liability Among Tortfeasors

- Pure, several liability
- Jury to determine % of fault attributable to each party and nonparty
- % then multiplied by the amount of damages



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Joint & Several Liability Among Tortfeasors

- Generally, several liability or only liability for % of fault
- Special circumstances to establish joint liability
 - Involves medical malpractice claim
 - Defendant's act was a crime with an element of gross negligence or use of alcohol or controlled substances for which defendant convicted
- Jury verdict form considerations



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Joint & Several Liability Among Tortfeasors

- Joint and several liability applies to plaintiff's economic damages if defendant found more than 50% responsible for injury or loss.
- Defendant only responsible for their share of noneconomic damages.






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Joint & Several Liability Takeaways – Settlements & Trials


- Illinois joint and several liability can exponentially increase exposure compared to pure several liability.
- The place where the injury occurred (Michigan) is generally the most significant factor in a choice of law analysis.
- If Michigan law is applied to Kattract's complaint, defendant's potential exposure would be decreased significantly.

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Contribution Among Tortfeasors




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Contribution Among Joint Tortfeasors


- Right to contribution
- Right only exists for tortfeasor who paid more than pro rata share of common liability
- Releases and covenants not to sue
- Settlement and discharge
- Subrogation
- Contribution claims among joint tortfeasors are mandatory and waived if not asserted.

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Contribution Among Joint Tortfeasors

- Common law
- Comparative Fault Act
- Prohibit contribution among joint tortfeasors




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Contribution Among Joint Tortfeasors

- Contribution claims based on tort/other legal theories no longer viable in Michigan
- By statute, defendants cannot be held liable for damages beyond pro rata share of responsibility.
- Jury decides fault/liability of parties based on subject incident and roles.
- M.C.L. §§ 600.2925a, 600.6304



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Contribution Among Joint Tortfeasors

- Ohio law provides for contribution among joint tortfeasors.
- Right of contribution exists only in favor of a tortfeasor who has paid more than his proportionate share of common liability.
- Ohio Rev. Code §2307.31(A)
- Settlement must specifically release the settling party from any future liability.
- Ohio Rev. Code. §2307.32(F)



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**Contribution Among Tortfeasors
Takeaways – Settlements & Trials**


- This goes hand-in-hand with avoiding joint and several liability by applying Michigan law.
- Contribution claims would be obviated if Michigan law is applied.



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Workers' Compensation

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**Workers' Compensation
as Exclusive Remedy & Exceptions**

- Illinois Workers' Compensation Act - exclusive remedy for employees injured in the course and scope of employment.
- Three exceptions if employee establishes injury:
 - Was not accidental
 - Didn't arise from employment
 - Was not received during course of employment
- Was not compensable under Workers' Compensation Act



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Workers' Compensation as Exclusive Remedy & Exceptions

- Rights and remedies granted to an employee subject to I.C. § 22-32 through 22-3-6.
- Exclusions extend to employee's personal representatives, dependents, or next of kin.
- Some compensation for victims of violent crimes provided under I.C. § 5-2-6.1.

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Workers' Compensation as Exclusive Remedy & Exceptions

- Exclusive remedy against employer. MCL 418.131(1)
- Only exception is an intentional tort:
 - Deliberate act of the employer specifically intended to injure or
 - Employer had actual knowledge injury was certain to occur and willfully disregarded knowledge.

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Workers' Compensation as Exclusive Remedy & Exceptions

- Common Work Area Doctrine
 - General contractors and owners liable for subcontractor's negligence if:
 1. Failed to take reasonable steps in supervisory authority
 2. To guard against observable and avoidable dangers
 3. That created high right to significant number of workmen
 4. In a common work area

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Workers' Compensation as Exclusive Remedy & Exceptions



- Workplace injuries typically compensated by workers' compensation system.
- To participate in the workers' compensation fund, employees are deemed to have waived their right to sue their employer in negligence.
- For vast majority of workplace injuries, a workers' compensation claim is an employee's exclusive remedy.
- Exception to exclusivity rule for employers whose conduct goes beyond mere negligence or even wanton behavior.

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Waiver, Setoff or Release of Employer if Workers' Compensation Lien Asserted



- Employer's liability for contribution to third parties capped at statutory liability amount under Workers' Compensation Act.
- Cap may be waived if an employer enters indemnification agreement prior to litigation, and employer agrees to assume full liability of damages.

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Waiver, Setoff or Release of Employer if Workers' Compensation Lien Asserted

- I.C. § 22-3-2-13 governs employer/carrier's right to reimbursement of workers' compensation benefits paid to employee from proceeds of any settlement or judgment resulting from a third-party action.
- Employer/carrier shall pay pro rata share of costs associated with employee bringing lawsuit.
- Recovery on lien can also be reduced by the comparative fault of employee, which would reduce his ultimate recovery against third party.
- Failure to obtain consent from employer/carrier to settle third-party liability case

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Waiver, Setoff or Release of Employer if Workers' Compensation Lien Asserted

- Not applicable in Michigan and Ohio




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Workers' Compensation Takeaways – Settlements & Trials


- Katract was employed in Michigan and the injury occurred there.
- Katract's worker compensation claim will be subject to Michigan law.
- Lobster Shack is immune from liability sounding in negligence for Katract's claims.



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Indemnification

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Contractual Indemnification

- Contracts of indemnity against one's own negligence are generally valid and enforceable.
- Statutory Exception: Illinois Construction Contract Indemnification for Negligence Act
- Indemnification for one's own negligence in construction contracts is against public policy.


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Contractual Indemnification

- Agreement to indemnify another for other's own negligence valid only if undertaken knowingly and willingly.
- Agreements must be clear and unequivocal and will be strictly construed.
- Validity and enforceability of indemnity agreements can be affected by statutes or public policy.



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Contractual Indemnification

- Social benefit
 - Allocation of costs
 - Risk mitigation
- Broad discretion in negotiating scope of indemnity clauses
- Parties' intent over statutory construction against the indemnitee

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Contractual Indemnification



- Restriction in subcontractor context, i.e. unenforceable for construction contract to require a party to indemnify another for damages caused by that party's sole negligence
- Contractual alternatives:
 - Limitation of liability – cap damages one party can recover from another
 - Disclaimers and waivers – shift certain risks
 - Insurance coverage requirements

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Contractual Indemnification



- Contractual indemnification is legal arrangement where one party agrees to compensate another for certain costs and expenses, usually related to third-party claims.
- Anti-indemnity statute: Ohio Revised Code §2305.31
- Indemnification in public works design: Ohio Senate Bill 56
- Common law indemnity principles: In *Wildcat Drilling v. Discovery Oil and Gas*
- Companies seeking to enforce indemnity provisions should include notice requirements in indemnity provisions.


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Implied Indemnity

- Implied indemnity obligations
- To state a cause of action for implied indemnity, a party must allege:
 - Pre-tort relationship between third-party plaintiff and third-party defendant
 - Qualitative distinction between conduct of third-party plaintiff and third-party defendant




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Implied Indemnity

- Right to indemnity may be implied at common law.
- Only in favor of one whose liability to third person is derivative or constructive
- Only against one, who has by his wrongful act, caused such derivative or constructive liability to be imposed upon the indemnitee



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Implied Indemnity

- Special relationship or course of conduct where one party undertakes to perform certain services and impliedly assures indemnification by conduct
- Example: Plaintiff was injured when arm stuck on conveyor. Plaintiff sued manufacturer that designed and installed conveyor.
- Manufacturer sued employer that rejected proposed protective cover and advised conveyor would be inaccessible. Court found implied indemnity.

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Implied Indemnity

- Difficult to guarantee
- **Common Law Indemnity** (equitable theory) - wrongful act of a party results in another party's liability, the latter is entitled to restitution.
- Intended to make whole a party held vicariously liable through no fault of his own. Only 'passive' negligence. No claim if party was even .01% percent actively at fault.




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Implied Indemnity

- Implied indemnification can occur when law requires party to be held responsible for a loss, even though they didn't actually cause it.
- Most common situation is where one party is vicariously liable.
- Party seeking indemnity



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Indemnification Takeaways – Settlements & Trials


- Tanks-a-Lot's contract will be deemed a construction contract under Illinois law.
- Tanks-a-Lot's indemnity clause is arguably void under Illinois' anti-indemnity law.
- Michigan is the place of performance and Tank-a-Lot could move for application of Michigan law to avoid the Illinois anti-indemnity law in a choice of law analysis.



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Formal Offer of Judgment

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Formal Offer of Judgment Available

- No state court corollary to Fed. R. Civ. P. 68 for making formal offers of judgment and shifting costs.





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Formal Offer of Judgment Available

- Timing parameters for formal offers of judgment
- Offers not accepted deemed withdrawn and evidence, thereof, not admissible except in proceeding to determine costs
- If judgment is not more favorable than offer, plaintiff must pay costs incurred after making of the offer.
- Partially determined liability by verdict or order of judgment




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Formal Offer of Judgment Available

- MCR 2.405 provides for offers of judgment.
- Rule imposes costs in favor of the party to whom the adjusted verdict is more favorable.
- Courts may refuse to award an attorney fees as part of such a judgment, if the interests of justice so require.







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Formal Offer of Judgment Available

- No state court corollary to Fed. R. Civ. P. 68 for making formal offers of judgment and shifting costs.

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Choice of Law

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Choice of Law

- Illinois choice of law rules control since it is the forum state.
- There is actual conflict between Illinois and Michigan tort law.
- Need to assess which state has most significant relationship to dispute.
- Presumption that Michigan law should apply because injury occurred there.
- Plaintiff has burden of overcoming presumption.

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Removal to Federal Court

- Complete diversity exists and amount in controversy exceeds jurisdictional limit.
- All other served defendants must consent to removal and notice of removal must be filed within 30 days of service or, if the case stated by the initial pleading is not removable, a notice of removal may be filed within 30 days after receipt by defendant of a copy of an amended pleading, motion or other paper from which it may first be ascertained that the case is removable.

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Removal to Federal Court

- Removal problems:
 - If citizenship of all parties is unknown:
 - Example: Identities and citizenship of all LLC members or trust beneficiaries unknown.



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Intrastate Forum *Non Conveniens* (If not Removed to Federal Court)

- Balance of private interest factors and public interest factors to see which forum is most convenient.
 - Private interest factors include: convenience of the parties; the relative ease of access to sources of testimonial, documentary, and real evidence; the availability of compulsory process to secure attendance of unwilling witnesses; the cost to obtain attendance of willing witnesses; the possibility of viewing the premises, if appropriate; and all other practical considerations that make a trial easy, expeditious, and inexpensive.

Continued



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Intrastate Forum *Non Conveniens* (If not Removed to Federal Court)

- Public interest factors include: administrative difficulties caused when litigation is handled in congested venues instead of being handled at its origin; the unfairness of imposing jury duty upon residents of a community with no connection to the litigation; and the interest in having local controversies decided locally.
- Plaintiff's choice of forum is entitled to substantial deference unless plaintiff, like Kattract, does not reside in the chosen forum, and the injury did not occur in the chosen forum.
- On these facts, Kattract's lawsuit would likely be dismissed in favor of Michigan as the more convenient forum.



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Motion for Change of Venue 28 U.S.C. § 1404(a) (if case removed to District Court)

- (a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.
 - Burden on Movant to prove a different district is more convenient.
 - Venue must be proper in either Illinois or Michigan.
 - Kattract's injury happened in Michigan.
 - Tank-a-Lot's contract performance was in Michigan.
 - Most fact witnesses located in Michigan.



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Questions?



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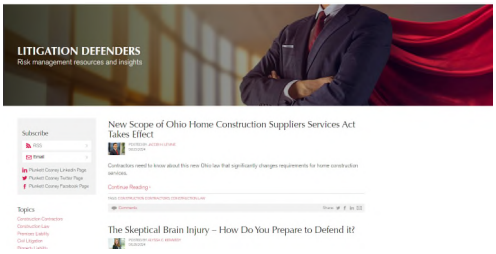


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