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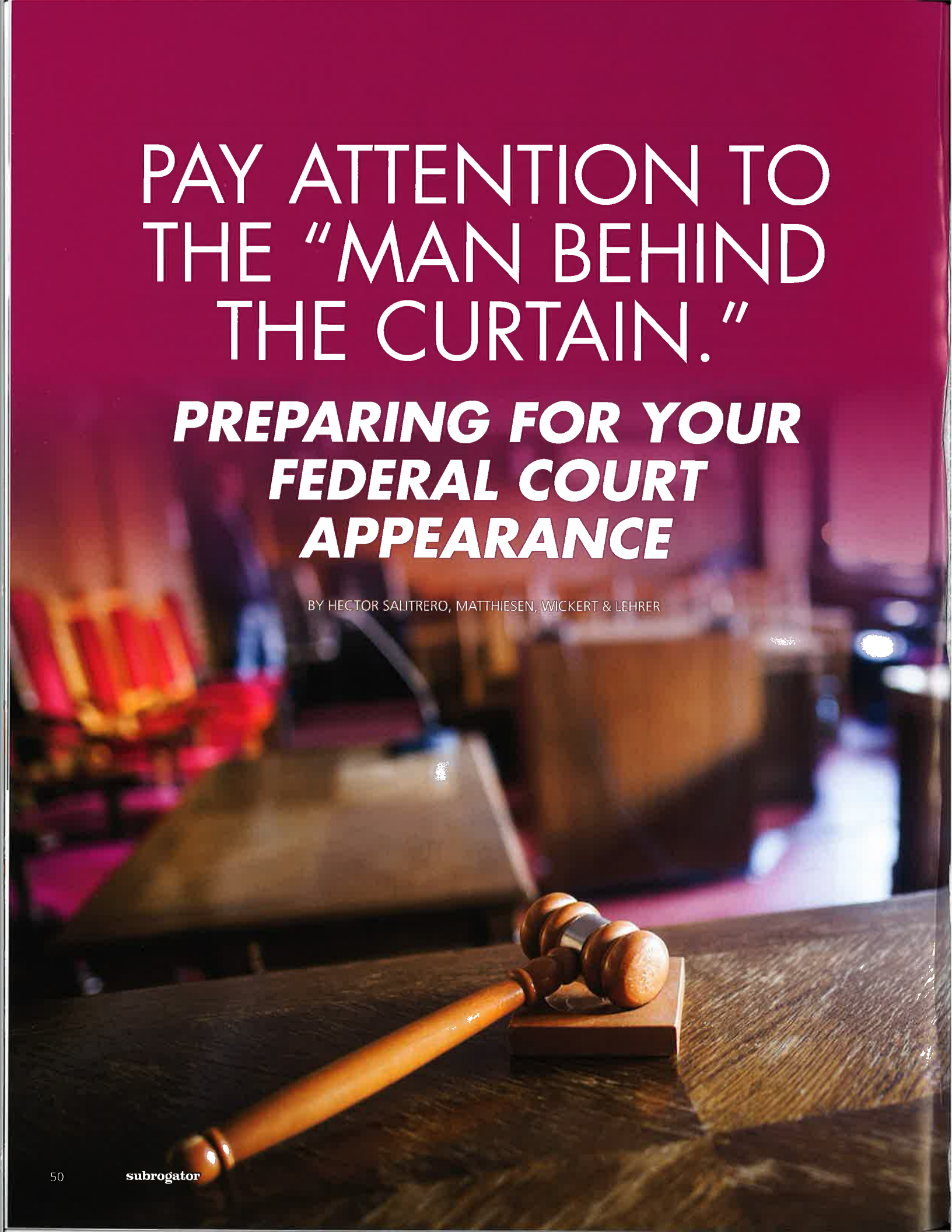
potpourri issue

PAY ATTENTION TO THE "MAN BEHIND THE CURTAIN."

PREPARING FOR YOUR FEDERAL COURT APPEARANCE

BY HECTOR SALITRERO, MATTHIESEN, WICKERT & LEHRER



IT IS NOT UNUSUAL FOR EVEN SEASONED LITIGATORS TO FEEL INTIMIDATED WHEN APPEARING BEFORE A FEDERAL JUDGE, MUCH LIKE THE COWARDLY LION VISITING THE WIZARD.

Not only is there an impressive security-gauntlet to navigate through federal Marshals before you get to the judge's large- scale courtroom that makes you feel like you've just shrunk a few inches, but when your case is ceremoniously called, novices predictively, orally announce their appearances from wherever they happen to be, instead of one-attorney-at-a-time directly into the microphone at the single podium between defense and plaintiff's tables. Then a very stern clerk typically, loudly directs you to "go to the podium and speak into the microphone counsel!" Once you gather yourself, it can only get more intimidating from there, when the judge asks you to summarize your case at a level of specificity that feels more like an opening statement rather than an initial appearance.

WELCOME TO FEDERAL COURT!

The modest purpose of this article is not to convert you into a seasoned federal litigator – that can take years This is simply to demystify some of the more common of the many challenges of practicing in federal court so that you can better represent your client's interests. But you may ask: how often do subrogation cases make it into federal court? More often that you think. And, hopefully, after reading this article, more often in the future to maximize your client's subrogation recovery.

An excellent, and maybe to some, surprising barometer of how often subrogation cases "get into federal court" is impressively exemplified by NASP's filing of Amicus Briefs before the United States Supreme Court,[1] and Circuit Courts of Appeal,[2] and NASP members and their firms serving as primary party counsel in high-profile federal cases.[3]

The national consciousness of the assertiveness of federal judges has recently been highlighted by: 1) the contentious Supreme Court confirmation hearings of Justice Brett Kavanaugh; 2) the trial of Paul Manafort before District Judge T.S. Ellis, III, (known as a taskmaster who runs his court, as some describe as a "Rocket Docket"); 3) District Judge David O. Carter, who routinely summons mayors to his court to address the thorny issue of homelessness; and 4) District Judge Dana Sabraw who has

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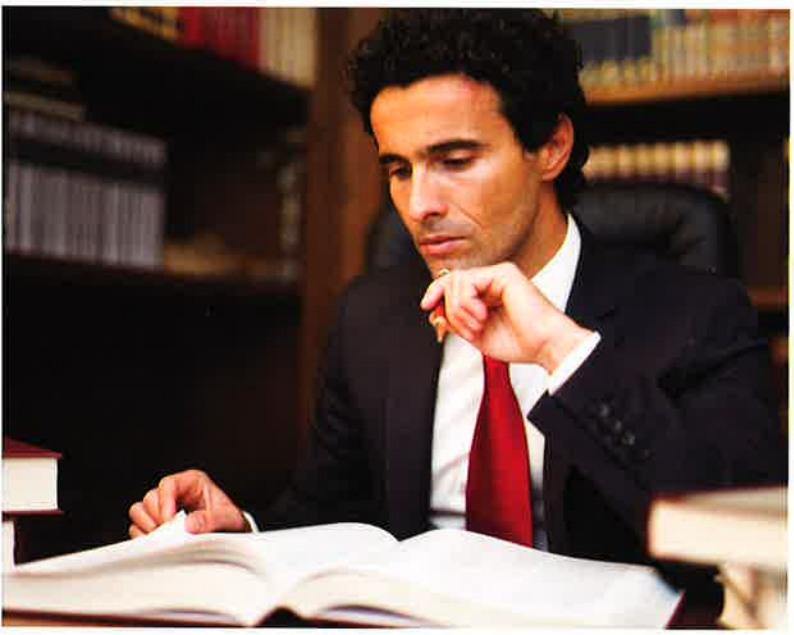

FEDERAL JUDGES OFTEN REQUIRE LAWYERS TO WORK HARD. COURT HEARINGS ARE SCHEDULED REGULARLY, REQUIRING COUNSEL TO REPORT ON THE STATUS OF THE CASE AS IT PROGRESSES AS OPPOSED TO THE TYPICALLY FEWER HEARINGS IN STATE COURTS.

been wrestling for months with the controversial "family separation" federal immigration policy. Not all judges are known for their constructive assertiveness. One in particular, A. Andrew Hauk, was frequently criticized for his arrogance, even in his obituary![4]

PRIMERS AVAILABLE:

Most state and local bar associations are mindful of the trepidation attorneys have about practicing in federal court and provide Continuing Legal Education courses on the subject. Examples include: 1) *Toolbox and Primer for Federal Court Practice, Nuts and Bolts,* Cont. Ed. Bar. CA., Kristen and Jongco, (2013); 2) *A First Prime on Federal Practice,* Michigan Bar Journal, Vol. 69, No. 10, 1990); and 3) *A Brief Comparison of New York and Federal Practice,* Siegel, N.Y. Prac. § 610 (6th Ed.).

EXCELLENT NATIONAL TREATISE:

As is true of many of its publications, The Rutter Group publishes a nationwide treatise entitled Federal Civil Procedure Before Trial, National Edition (The Rutter Group Practice Guide); Federal Civil Trials & Evidence (The Rutter Group Practice Guide); Federal Motions in Limine (The Rutter Group, Civil Litigation Series). This series contains very helpful "Practice Pointers" which as the name indicates are practical advice to avoid the many snares for unwary. What follows are selected highlights from this series (without section references due to the space limitations of this article), as well the author's experience as a former Assistant United States Attorney having handled a full spectrum of federal civil practice, including numerous motions for summary judgment and jury trials.

SOME COMMON PERCEPTIONS OF FEDERAL JUDGES AND THE FEDERAL SYSTEM:

In federal court your case is typically assigned to a District Judge and a Magistrate Judge. You can consent to the jurisdiction of the Magistrate Judge to serve as your judge for all purposes. As such, consent must be unanimous, typically a case is assigned to a District Judge for major matters: trial, etc. and to a Magistrate for minor matters: discovery, settlement conferences, etc. With this exception, there is no preemptory challenge (except for cause) that there

typically is in state courts.

Federal judges are commonly perceived as being more willing to grant summary judgments and dismissals than their state counterparts.

Federal judges often require lawyers to work hard. Court hearings are scheduled regularly, requiring counsel to report on the status of the case. Dismissal for lack of prosecution is a real threat in federal court. A signed order may be required even for routine matters (e.g., extensions of time to plead or answer discovery) and despite the fact that all parties have so stipulated. Continuances may be hard to obtain; declarations showing good cause are required. And federal judges do not hesitate to impose sanctions against counsel who abuse federal procedures. Trial hours may be longer as well.

There are published decisions of particular judges (either in F. Supp. or Federal Rules Decisions, or perhaps in some local reporters), as well as unpublished decisions in an electronic database such as Thomson Reuters Westlaw. Attorneys in state courts generally have no similar way of predicting how the judge will rule in their case. An example of the typical comprehensive nature of federal judges' decisions is the lengthy decision issued by Judge Lucy Koh in *Evanston v. Atain Insurance,* 254 F. Supp. 3d 1150 (N.D. CA. 2017).

Typically, federal judges have more resources than state judges (including two law clerks, the power to appoint Special Masters and authority to transfer complex cases to a single Multi-District Litigation forum. This, plus the fact that they may have had more experience with complex litigation, leads some attorneys to believe that the federal court system is better able to handle complex cases (particularly where multidistrict litigation may be involved).

TYPICALLY, FEDERAL JUDGES HAVE MORE RESOURCES THAN STATE JUDGES, (INCLUDING TWO LAW CLERKS, TYPICALLY FROM TOP-TIER LAW SCHOOLS, THE POWER TO APPOINT SPECIAL MASTERS AND AUTHORITY TO TRANSFER COMPLEX CASES TO A SINGLE MULTI-DISTRICT LITIGATION FORUM.

SOME OBSERVATIONS OF SALIENT SUBSTANTIVE DIFFERENCES FROM STATE COURTS:

1) Many states permit naming "Doe" defendants in the complaint where their true identity is not known at the time of filing; and allow amending the complaint to show their true names, even after the statute of limitations has run.; The Federal Rules do not expressly provide for "Doe" defendants (although some districts by local rule allow "Does" in federal question cases). The issue arises most particularly in diversity cases where the existence of a "Doe" defendant might defeat the court's jurisdiction. This difference in state and federal practice has important ramifications in removal cases;

3) There is an important difference as to the effect of the attorney's signature on a pleading or motion. Under federal practice (and in many states), counsel's signature amounts to a certificate that there is "good cause" for the pleading or motion, and counsel may be exposed to sanctions if this proves incorrect. In other states, there is no

such significance to the attorney's signature on state court pleadings or motions.

6) There is an incentive-driven procedure for waiver of service in federal actions. Absent such waiver, there is no difference in the methods by which summons may be served in federal and state court actions. This is because a federal summons may be served either as provided in FRCP 4 or under the rules in effect in the state where the district court is located (or under the rules of the state where service is effected).

9) The Federal Rules require each party to a federal action to make certain disclosures shortly after suit is filed, and without necessity of discovery requests from the opposing party. The disclosures include identity of relevant witnesses and documents, computation of damages and insurance coverage.

10) the Federal Rules require each party to supplement its own disclosures and discovery upon learning that earlier responses are incorrect or incomplete.

11) The federal discovery rules are helpful to plaintiffs because defendants usually possess most of the crucial information at the outset of the case.

HOWEVER, A WORKERS' COMPENSATION SUBROGATION CASE CAN BE INITIATED IN FEDERAL COURT (ASSUMING IT IS OTHERWISE ELIGIBLE, I.E. DIVERSITY JURISDICTION AND AMOUNT IN CONTROVERSY).

Defendants may be less inclined to remove cases from state court knowing that such disclosures must be made. On the other hand, the cost of discovery may be reduced in federal court because documents must be voluntarily produced or identified and presumably there should be less of a need for follow-up written discovery. Early disclosures put each side's "cards on the table" and thus may facilitate early settlements.

12) There is a presumptive limit of 10 depositions for each side in federal court, with each deposition limited to one day of seven hours unless otherwise ordered or stipulated. The number and duration are not so limited in most state courts.

13) Unless the court orders otherwise, only 25 interrogatories may be served by any party.

14) There's a counter-intuitive aspect of the federal rule regarding Requests for Admission, that an otherwise hapless litigator will be relieved to know. When a party serves Requests for Admission and the responding party fails to respond in a timely fashion, the rule has a nasty feature that there's no need to request that the court "deem the response admitted.' They're automatically admitted. However, "the court may permit withdrawal or amendment if it would promote the presentation of the merits of the action and if the court is not

persuaded that it would prejudice the requesting party in maintaining or defending the action on the merits." So, there's a "get-out-of-jail-free" provision.

14) Unless otherwise provided by stipulation or court order, parties must designate their expert witnesses at least 90 days before trial and provide copies of a written report and extensive disclosures regarding the expert's compensation, testimony in other cases, etc.

15) Many attorneys believe the federal expert disclosure requirements are much more burdensome than the state requirements. First of all, they are due 90 days before trial (which means you cannot postpone preparing your experts until the eve of trial). In addition, instead of the simple expert witness declaration by counsel allowed in state courts, federal practice requires a full, written report disclosing all opinions, the bases for those opinions, and all supporting reports and documentation.

16) Payment of expert deposition fees: Under the Federal Rules, a party seeking to depose the other side's expert must pay a reasonable fee that can include the time spent traveling to the deposition as well as in preparing for the deposition (e.g., reading records, depositions, etc.). In many states, those payment obligations for experts are limited to the time spent actually testifying at the deposition itself.

17) Under FRCP 11, anyone signing a pleading or motion certifies that the matters stated have evidentiary and legal support, and sanctions may be imposed for violation thereof. But

THE UPSHOT IS THAT, IN LARGER CASES AGAINST OUT-OF-STATE LARGER DEFENDANTS, INSTEAD OF A MAJOR DEFENSE LAW FIRM (THAT MAY LOVE TO INTIMIDATE PLAINTIFF'S ATTORNEYS BY HAULING THEM INTO FEDERAL COURT), INSTEAD, COUNSEL FOR A WORKERS' COMPENSATION CARRIER CAN "TURN-THE-TABLES" AND TAKE THE INITIATIVE BY FILING IN FEDERAL COURT, DEMONSTRATING THAT COUNSEL FOR THE SUBROGEE CARRIER IS COMFORTABLE IN FEDERAL COURT AND WILL NOT BE INTIMIDATED.

there is a "safe harbor": i.e., a party accused of violating Rule 11 can escape sanctions by withdrawing or correcting the challenged action within 21 days.

18) Jurors are supposedly chosen randomly from a cross-section of the community in both state and federal courts. However, the "community" from which federal jurors are chosen may be a much larger area, resulting in a more diverse jury panel. Therefore, federal jury panels may be drawn from a wider geographic base. Some practitioners feel this tends to make federal jury panels more conservative. This fact, coupled with the unanimous verdict requirement in federal jury trials, may discourage plaintiffs from filing in federal court. On the other hand, it may encourage defendants to remove state court actions to federal court.

19) ADR programs vary from district to district but may include "early neutral evaluation," mediation, nonbinding arbitration, court approved panel mediators and traditional settlement conferences. Many districts routinely provide the services of magistrate judges for settlement purposes.

WORKERS' COMPENSATION SUBROGATION CASES TYPICALLY DO NOT END UP IN FEDERAL COURT. THAT'S BECAUSE THE REMOVAL STATUTE SPECIFICALLY PROHIBITS REMOVAL OF WORKERS' COMPENSATION CASES.

WORKERS' COMPENSATION SUBROGATION CASES:

Workers' Compensation subrogation cases typically do not end up in federal court. That's because the Removal Statute specifically prohibits removal of workers' compensation cases. United States Code section 1445 (c) ("A civil action in any State court arising under the workmen's compensation laws of such State may not be removed to any district court of the United States.") However, a Workers' Compensation subrogation case can be initiated in federal court (assuming it is otherwise eligible, i.e. diversity jurisdiction and amount in controversy). (*Horton v. Liberty Mut. Ins. Co.* (1961) 367 U.S. 348, 352.) The upshot is that, in larger cases against out-of-state larger defendants, instead a major defense law firm that may love to intimidate plaintiff's attorneys by hauling them into federal court, instead, counsel for a workers' compensation carrier can "turn-the-tables" and take the initiative by filing in federal court, demonstrating that counsel for the subrogee carrier is comfortable in federal court and will not be intimidated.

A variation of this theme is that if, for whatever reason, a Workers' Compensation subrogation case is filed in state court

and removed to federal court, the subrogee-carrier's attorney can point out that while under USC 1445(c) the subrogee-carrier could remand the case to state court as he/she is aware that the statute is not "jurisdictional" and can and will be waived, the subrogee-carrier is "just fine" in federal court. (*Williams v. AC Spark Plugs Div. of Gen. Motors Corp.* 985 F.2d 783, 786 (5th Cir. 1993)).

In *Camacho v. JLG Industries,* 2017 WL 38994981, Judge Carter (our famous judge who orders mayors to appear in his court on short notice) held:

> "The Court notes … this outcome is … [consistent with]… the policy goals of 28 U.S.C. § 1445(c), which include (1) preserving the plaintiff's forum choice in workers' compensation cases, (2) protecting the state's interest in administering their own workers' affairs, and (3) reducing federal courts' workload. Zurich, 242 F. Supp. 2d at 739." (Emphasis added.)

PARTING THOUGHT:

Get your "witch's broom" before walking down the ominous "Wizard's hallway."

Endnotes:

1. *Great-West Life & Annuity Insurance Company v. Knudson,* 121 S.Ct. 1954 (2001).
2. *Humana Medical Plan, Inc. v. Western Heritage Insurance Company,* 880 F.3d 1284 (11th Cir. 2018); *Rhea v. Alan Rictchey, Inc. Welfare Benefit Fund,* 858 F.3d 340 (5th Cir. 2017);
3. *Montanile v. Board of Trustees of the National Elevator Ind. Health Ben. Plan,* 136 S.Ct. 651 (2016).
4. "A. Andrew Hauk, a controversial federal judge who during his years of decision-making in the Central District repeatedly made comments from the bench that were widely viewed as intemperate, has died. He was 91. …Hauk earned a reputation for making insensitive or demeaning remarks about women, homosexuals, environmentalists and others. Using a derogatory term for homosexuals, he complained about the immigration of gays from Cuba. He once opined during a sex discrimination lawsuit brought by a woman that 'probably a man wouldn't do these crazy things' and went on to say that women 'have different problems. They have their monthly problem, which upsets them emotionally, and we all know that, at least any of us who have wives and daughters.'"

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