

# COURTHOUSE NEWS

A Summary of Topical Highlights from decisions of the  
U.S. District Court for the District of Oregon  
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## Jurisdiction

Judge Jelderks held that the Federal Employees Health Benefits Act (FEHBA) does not completely preempt the plaintiff's state law medical malpractice claims against an HMO. Only "complete preemption" confers removal jurisdiction. Ordinary preemption defenses do not confer federal jurisdiction and can be addressed by the state court. Consequently, the action was improperly removed from state court and must be remanded.

**Haller v. Kaiser Foundation Health Plan of the Northwest, 01-759-JE** (F&R dated August 1, 2001, adopted by Judge King on December 13, 2001). [Docket #11 for ECF users]

Plaintiff's Counsel: Angela Hart  
Defense Counsel: Troy Bundy

## Procedure

Judge Jelderks rejected the "first-served defendant rule" for determining whether a Notice of Removal is timely. The plaintiff served the first defendant's registered agent, who

unsuccessfully attempted to forward the complaint to his principal. The mailing never arrived because the agent had a stale address, and a default eventually was entered. Six weeks after service upon the first defendant's agent, the remaining defendants were served and promptly removed the action to federal court with the consent of all defendants. The plaintiff then moved to remand on the ground that the removal notice was untimely, coming more than 30 days after service upon the first defendant's agent.

Judge Jelderks noted that the statute is ambiguous, and there is a split within this district regarding the proper interpretation. Some judges have applied the first-serve defendant rule, by which the 30 day deadline for removal commences to run when the first defendant is served. Other judges, concerned that a plaintiff may try to thwart removal by manipulating the order and timing of service, have held that each defendant has 30 days from when it is served to effect removal and to persuade the other defendants

to join in the petition. Judge Jelderks adopted the latter interpretation, noting that the plaintiff can confine the removal period simply by ensuring prompt service upon all defendants.

Judge Jelderks also granted the defaulted defendant's motion to set aside a default "judgment" signed by the state court before it had notice that the action was removed. When a case is removed, the federal court takes it as though everything done in the state court had in fact been done in the federal court. Accordingly, Judge Jelderks concluded, he had the authority to set aside the default even though it was originally entered by another court. **United Traffic Consultants v. Premium Logistics, 01-1324-JE** (F&R issued on November 16, 2001 and converted to an Opinion and Order once full consents were received); [Docket #45 for ECF users].

Plaintiff's Counsel:

Dennis Liggett

Defense Counsel:

John Anderson,

Michael Ratoza

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### Practice Tip from Judge

**Jelderks Chambers** -- When removing an action to state court, be sure to immediately serve a copy of the removal notice upon opposing counsel and also file a copy with the state court. Not only is that required by 28 USC § 1446(d), but it may prevent jurisdictional complexities that can arise when the state court enters an order or judgment between the time the removal notice is filed with the federal court and when the state court is notified of the removal. Some decisions hold that the state court is not divested of jurisdiction until the latter event; during the interim the federal and state courts exercise concurrent jurisdiction. Spending twenty dollars to messenger (or overnight) a removal notice to the state court is a bargain compared to the cost in attorney time to unravel a jurisdictional conundrum.

## IRS

Plaintiff filed a petition to quash an IRS summons that had been issued to her bank. The IRS filed a cross-motion to enforce the summons against the bank. Defendant submitted prima facie evidence that the summons had been issued to determine the plaintiff's tax liability for years in which she had failed to file returns. Plaintiff claimed that the summons

was issued to harass her because she had assisted other taxpayers in an audit. Plaintiff also claimed a number of procedural deficiencies and that the summons was not sufficiently specific.

Judge Janice M. Stewart noted the very limited scope of judicial review available and found no evidence to support plaintiff's claim of harassment and determined that the defendant had, in fact, complied with all procedural regulations. Accordingly, the court denied plaintiff's motion to quash and granted the cross-motion to enforce the summons. Dutson v. U.S.A., CV 01-776-ST (Findings and Recommendation, Sept. 19, 2001; Adopted by Order of Judge Robert E. Jones, January, 2002).  
Plaintiff: Pro Se  
Defense Counsel: Jian Grant

## Employment

A Regional Manager filed an action against his former employer claiming that he was terminated because of his wife's pregnancy in violation of Title VII. The undisputed facts revealed that plaintiff's wife obtained health coverage from one of the defendant's biggest clients (Fortis). Plaintiff and his wife became embroiled in a

dispute with Fortis and threatened legal action to obtain benefits. Plaintiff told several people in his office that he intended to file an action against Fortis and he was terminated due to defendant's concerns that plaintiff's actions might threaten defendant's relationship with Fortis.

Judge Anna J. Brown assumed, for the purpose of the motion, that the Ninth Circuit would recognize a cause of action for pregnancy discrimination filed by a husband. The court found, however, that plaintiff failed to present any evidence that his wife's pregnancy was a motivating factor in his termination. Judge Brown reasoned that plaintiff was fired because of his adversarial efforts against one of the defendant's top clients; the fact that the underlying dispute between plaintiff's wife and the client involved her pregnancy did not convert the claim into one of pregnancy discrimination, since the result would have been the same had the plaintiff's wife had a dispute over auto coverage. Kruger v. Pacific Benefits Group Northwest, LLC, CV 01-912-BR (Opinion, Dec. 18, 2001).  
Plaintiff's Counsel:  
Martin C. Dolan  
Defense Counsel:  
Amy Joseph Pederson