

The Federal Courts Jurisdiction and Venue Clarification Act of 2011

THE FEDERAL COURTS Jurisdiction and Venue Clarification Act of 2011, as amended, is frequently used by civil litigators practicing in federal court. The act, which has taken effect and applies to complaints filed on or after Jan. 6, 2012, clarifies the rules regarding removal in cases

that have multiple defendants, determination of the amount in controversy, and the proper venue for various cases. The act also has an impact on narrower fields of practice, such as alienage jurisdiction, the removal of criminal cases to federal court, and admiralty venue.

Congress Has Adopted a “Later-Served Rule” for Removal in Cases with Multiple Defendants

This portion of the act will aid attorneys representing defendants in multidefendant cases by resolving the long-standing circuit split over 28 U.S.C. § 1441(e)(1), which gives “the defendant” 30 days to petition for removal to federal court after becoming a party to an action. The new § 1446 adopts what had been the majority rule in the federal circuit courts and is a direct change to Fourth and Fifth Circuit practice (which had only allowed removal in the first 30 days after the first defendant was served). Congress now gives each defendant 30 days to petition for removal, effectively adopting the later-served rule that was used in many circuits.

As a result, under new § 1446(c), first-served or earlier-served defendants—even if they initially choose not to be removed—are now allowed to join a petition for removal filed by later-served defendants or defendants added to the case with an amended complaint. Congress also codified the century-old rule of unanimity, adopted in *Chicago, Rock Island & Pac. Ry. v. Martin*, 178 U.S. 245 (1900), to cases removed under § 1441(a). Pursuant to new § 1446, all defendants must still join or consent to removal.

Independent State Law Claims, Removed Under Federal Question Jurisdiction, Must Now be Severed and Remanded to State Court if Supplemental Jurisdiction Does Not Apply

New § 1441(c) states that the district court “shall sever ... and shall remand the severed claims to State court” that are not within the original or supplemental jurisdiction of the federal court. This change to prior federal practice clarifies the “separate and independent” claim provision of § 1441. Former practice permitted a case with one claim under a federal statute or the federal Constitution and unlimited, unrelated state law claims to be removed and also permitted the district court to retain the entire case and rule on both federal and state law claims. Under the revised statute, district judges will not have the discretion to extend supplemental jurisdiction over these claims. The independent state law claims will have to be remanded to state court.

Congress Has Made Allowances for the Amount in Controversy

Section 1446 is further amended by adding new sections related to the calculation of the amount in controversy when local statutes do not require or allow the plaintiff to allege damages over a threshold amount. New § 1446(c)(2) allows a defendant, in the notice of removal, to assert that the actual or true amount in controversy exceeds \$75,000, even if the plaintiff’s pleadings are silent on the issue. If the district judge finds by a preponderance of the evidence that the amount in controversy exceeds the jurisdictional minimum, federal court jurisdiction will apply. In addition, under new § 1446(c)(3)(A) and § 1446(b)(3), if a defendant later finds that the amount in controversy is greater than \$75,000 because of discovery or an amended pleading, a new 30-day window for removal will open.

The legislative history encourages looking to *McPhail v. Deere & Co.*, 529 F.3d 947 (10th Cir. 2008), and *Meridian Security Ins. Co. v. Sadowski*, 411 F.3d 526 (7th Cir. 2006), for the correct application of what defendants must plead or allege in order to reach the jurisdictional threshold. In addition, removal to federal court can happen more than one year after the action was filed if the plaintiff acted in bad faith

by attempting to conceal the true amount of damages claimed. 28 U.S.C. § 1446(c)(3)(B).

Congress Has Extensively Amended Venue Statutes

Congress also comprehensively rewrote the venue provisions applicable in federal court. First, new § 1391(b) establishes a single set of venue rules governing both types of cases under the federal jurisdiction. Prior to this amendment, the venue slightly differed depending on whether jurisdiction was based on a federal question or diversity.

Second, new § 1391(a)(2) abolishes the separate provisions for “local” and “transitory” actions, repealing § 1392. Abolishing the old distinction between “local” and “transitory” actions now allows the plaintiff to file certain actions—such as charges of trespassing on real property—anywhere personal jurisdiction over the defendant can be found, even if that is not the same venue where the property is located and the trespass occurred.

Third, new § 1391(c) will establish universal residency rules for the purpose of determining venue for natural persons, incorporated entities, unincorporated entities, and nonresident defendants with regard to all venue statutes in the U.S. code. Formerly, this section applied only to corporations and only for purposes of venue under Chapter 87. New § 1391(c)(1) also clarifies that, for venue purposes, the residence of natural persons is the same as their domicile. Thus, venue would not be proper in the location of an individual’s summer or vacation home.

Fourth, Congress amended 28 U.S.C. § 1404(a) to legislatively overrule *Hoffman v. Blaski*, 363 U.S. 335 (1960). The result is that district courts are now permitted to transfer a case to a venue where the action could not have originally been brought, as long as all parties to the action consent.

Fifth, the new amendments abolish the old fallback venue provisions, previously codified at 28 U.S.C. § 1391(a)(3) and § 1391(b)(3), which differed, depending on whether federal jurisdiction was claimed based on diversity or a federal question. In keeping with the other revisions, new § 1391(b)(3) is uniform in application to diversity and federal question cases and states that, when § 1391(b)(1) or § 1391(b)(2) do not apply, venue is proper in “any judicial district in which any defendant is subject to the court’s personal jurisdiction with respect to such action.”

Sixth, new § 1390(b) makes clear that the general provisions of venue do not apply to admiralty cases and codifies *Continental Grain Co. v. Barge FBL-585*, 364 U.S. 19 (1960).

Congress Has Created a Federal Criminal Removal Statute

The new amendments also strike criminal removal proceedings from 28 U.S.C. § 1446,

which had applied to both civil and criminal cases, and create a new removal statute (28 U.S.C. § 1455) solely for the removal of appropriate criminal cases to federal court. *See also* 28 U.S.C. § 1442 (removal of certain state law criminal cases brought against federal officers, agents, and agencies to federal court).

Congress Has Altered Alienage Jurisdiction

Congress enacted numerous changes to alienage jurisdiction. Most of these relate to resident alien individuals. In summary, the resident alien provision of old 28 U.S.C. § 1332(a) and its deeming feature have been eliminated. New § 1332(a)(2) prohibits a district court from having diversity of citizenship jurisdiction between a citizen of the United States and a resident alien (and thus, a foreign citizen) who are domiciled in the same state. Under the new statute, the inquiry shifts from national citizenship to permanent residence and actual domicile.

New § 1391(c)(3) would also permit a permanent resident alien who had established a domicile in the United States to raise a venue defense under Rule 12(b)(3). This defense was not permitted under old § 1391(d) because the statute focused on national citizenship and not the residence of the alien.

Conclusion

For civil litigators, the Federal Courts Jurisdiction and Venue Clarification Act of 2011 will soon become a mainstay of practice in federal courts. The act clarifies removal procedures by resolving a circuit split on timely removal, limits federal jurisdiction by mandating severance of unrelated state law claims, and provides new guidance for defendants on pleading the amount in controversy. In addition, the law completely reshapes venue rules, codifies a separate removal procedure for criminal cases, and amends alienage jurisdiction. Familiarity with these new rules and procedures is essential for any federal civil litigator. **TFL**

Jonathan Reich is an attorney at Womle Carlyle Sandridge & Rice LLP, where his diverse litigation practice ranges from complex commercial litigation involving fraud and unfair business practices to defending products liability, personal injury, and negligence actions. He also represents defendants in 42 U.S.C. § 1983 cases. He is a graduate of Duke University School of Law.