

Do Twombly and Iqbal Apply to Affirmative Defenses?

By Leslie Paul Machado and C. Matthew Haynes



In the wake of the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly*¹ and *Asbcraft v. Iqbal*,² an interesting question has been perplexing judges in federal district courts around the country: Do the pleading requirements announced in those decisions apply to affirmative defenses? Because "[n]either *Twombly* nor *Iqbal* expressly addressed the pleading requirements applicable to affirmative defenses,"³ and neither the Supreme Court nor any federal appellate court has ruled on this question,⁴ district courts addressing it have reached contradictory conclusions—often in the same circuit and sometimes in the same district!

Using decisions from the district courts in the U.S. Court of Appeals for the Fourth Circuit⁵ as an example, this article will examine the developing split among the courts on this question⁶ and then provide recommendations for the practitioner.

Background

"Prior to the Supreme Court's decisions in *Twombly* and *Iqbal*, the United States Court of Appeals for the Fourth Circuit held that general statements of affirmative defenses were sufficient provided they gave plaintiffs fair notice of the defense."⁷

In *Twombly*, the Court held that, to survive a motion to dismiss, a complaint must contain facts sufficient to "state a claim to relief that is plausible on its face."⁸ Although the plaintiff need not include "detailed factual allegations" to satisfy Rule 8(a)(2), more than bald accusations or mere speculation is required to survive a motion to dismiss.⁹ Thus, a complaint that provides no more than "labels and conclusions" or "a formulaic recitation of the elements of a cause of action," is insufficient under Rule 8.¹⁰

The Court clarified *Twombly* in its *Iqbal* opinion, holding that "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" to plead a claim.¹¹ Instead, the Court held, the complaint must "plausibly give rise to an entitlement to relief" which requires "more than the mere possibility of misconduct."¹² "To date, neither the Supreme Court nor the Fourth Circuit has indicated whether the heightened pleading standard of *Twombly* and *Iqbal* applies to affirmative defenses."¹³

The Majority View

Most of the district courts in the Fourth Circuit have held that the pleading requirements of *Twombly* and *Iqbal* apply to affirmative defenses. These courts have generally relied on "considerations of fairness, common sense and litigation efficiency underlying *Twombly* and *Iqbal*."¹⁴

These courts have reasoned that "what is good for the goose is good for the gander,"¹⁵ because "it neither makes sense nor is it fair to require a plaintiff to provide the defendant with enough notice that there is a plausible, factual basis for her claim under one pleading standard and then permit a defendant under another pleading standard simply to suggest that some defense may apply in the case."¹⁶ Rather, they explain, "[p]leading requirements are intended to ensure that an opposing party receives

fair notice of the factual basis for an assertion contained a claim or defense."¹⁷ Thus, "the interests of consistency and fairness are furthered by holding defendants to the plausibility standard, and plaintiffs are entitled to receive proper notice of defenses in advance of the discovery process and trial."¹⁸

These courts also "cite the importance of litigation efficiency, explaining that boilerplate defenses serve only to 'clutter the docket and ... create unnecessary work' by requiring opposing counsel to conduct unnecessary discovery."¹⁹ As a district court in Maryland stated, "*Twombly* and *Iqbal* recognize the fairness and efficiency concerns highlighted by district courts that have subsequently applied those standards to affirmative defenses"²⁰ All pleading requirements exist to ensure that the opposing party receives fair notice of the nature of a claim or defense."²¹

Finally, at least two courts have relied on the fact that a sample affirmative defense form that is appended to the Federal Rules of Civil Procedure includes factual detail in support of a statute of limitations defense.²²

The Minority View

A minority of district courts in the Fourth Circuit considering the same issue, however, has held that the pleading requirements of *Twombly* and *Iqbal* do not apply to affirmative defenses. These courts primarily ground their decision in the different language in the Federal Rules of Civil Procedure describing affirmative defenses:

Federal Rule of Civil Procedure 8(a)(2) requires that "claims for relief," including complaints, contain "a short and plain statement of the claim showing that the pleader is entitled to relief." But Rule 8(b)(1)(A), governing affirmative defenses, merely requires that a responding party "state in short and plain terms its defenses to each claim asserted against it." Notably absent is a required "showing that the pleader is entitled to relief." Yet Plaintiffs' argument would have this Court read such a requirement in to Rule 8(b)(1)(A) on the basis of *Twombly* and *Iqbal*. Those opinions afford little reason for doing so.²³

Thus, in *Lopez v. Asmar's Mediterranean Food Inc.*, the court held that, because *Twombly* and *Iqbal* interpreted "language that is not present in Rule 8(b)(1)(A)," it would "not import that language, nor *Twombly* and *Iqbal*'s interpretation of it, to a different rule that lacks that language."²⁴

Similarly, in *Odyssey Imaging LLC v. Cardiology Associates of Johnston LLC*, the court refused to apply *Twombly* and *Iqbal* to affirmative defenses, holding that "Rule 8's language governing the pleading of defenses does not track the language of Rule 8(a) governing the pleading of claims, the focus of those decisions."²⁵ Thus, "[b]ecause Rules 8(b) and 8(c) do not require a party to 'show' that it is entitled to a defense, the court decline[d] to hold affirmative defenses to the same pleading standards required by Rule 8(a)."²⁶

The *Lopez* court also responded to the fairness argument by noting that there “are countervailing considerations of whether it is fair to apply the same pleading standard to plaintiffs, who have far more time to develop factual support for their claims, as to defendants, who have 21 days to respond to a complaint, who did not initiate the lawsuit, and who risk waiving any defenses not raised.”²⁷ Similarly, the *Odyssey* court noted that “[k]nowledge at the pleading stage is often asymmetrical, disproportionately favoring the pleading of a claim by a plaintiff who has had the opportunity to time its filing.”²⁸ The *Odyssey* court further noted that “[w]hile the plaintiff often can conduct an investigation before filing the complaint to ensure its allegations are adequately supported, the defendant must respond quickly after being served.”²⁹

Recommendations

Until this issue is resolved by an appellate court, parties interposing affirmative defenses (whether in response to a complaint or a counterclaim) should make every effort to meet the *Twombly* and *Iqbal* pleading requirements. Although this may be a change for some, one court has noted that “*Twombly* and *Iqbal* require only minimal facts establishing plausibility, a standard that this Court presumes most litigants would apply when conducting the abbreviated factual investigation necessary before raising affirmative defenses in any event.”³⁰ As a district court in Maryland stated,

“a defense asserted in an answer will satisfy the elevated plausibility standard announced in those cases if it: (1) contains a brief narrative stating facts sufficient to give the plaintiff ‘fair notice of what the defense is and the grounds upon which it rests,’ *Twombly*, 550 U.S. at 555; and (2) the facts stated ‘plausibly suggest,’ *Iqbal*, 129 S.Ct. at 1951, cognizable defenses under applicable law.”³¹ Said another way, “[a]ffirmative defenses are insufficient under this standard if they are stated ‘in a conclusory manner and fail to provide fair notice to the plaintiff of the factual grounds upon which they rest.’”³²

Even though this will require more effort than simply listing affirmative defenses seriatim, “the heightened pleading standard does not require the assertion of all supporting evidentiary facts”³³ “At a minimum, however, some statement of the ultimate facts underlying the defense must be set forth, and both its non-conclusory factual content and the reasonable inferences from that content, must plausibly suggest a cognizable defense available to the defendant.”³⁴

Many courts applying *Twombly* and *Iqbal* to affirmative defenses have noted that a party can move to amend its pleading under Rule 15 if it learns of additional facts, and that this remedy protects parties who learn of information supporting an affirmative defense later in the case.³⁵ Attorneys should be aware of this rule and use it.

Finally, even if the practitioner is before a judge who has refused to apply the *Twombly* and *Iqbal* pleading

standard to affirmative defenses, counsel should take little solace in that fact, because affirmative defenses may nevertheless be subjected to extra scrutiny. For example, in *Odyssey*, the court, after refusing to apply the pleading standards of *Twombly* and *Iqbal* to affirmative defenses, nevertheless reviewed them to determine if they were “contextually comprehensible” and, under this standard, struck 17 out of 19 affirmative defenses.³⁶ For this reason, it is best to assume that the *Twombly* and *Iqbal* standard will be applied and proceed accordingly. **TFL**

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Endnotes

¹*Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

²*Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

³*Barry v. EMC Mortgage*, 2011 WL 4352104, at *3 (D. Md. Sept. 15, 2011).

⁴See, e.g., *J&J Sports Production Inc. v. Romero*, 2012 WL 1435004, at *2 (E.D. Cal. Apr. 25, 2012) (“to date, no circuit court has issued a decision regarding the applicability of the heightened pleading standard to affirmative defenses”) (citation omitted). In *Herrera v. Churchill McGee LLC*, 2012 WL 1700381 (6th Cir. May 16, 2012), the court acknowledged the disagreement but found that it did not need to decide this issue: “[b]ecause we find no unfair surprise, we need not address the sufficiency under Federal Rule of Civil Procedure 8(c) of Churchill McGee’s rather bare-bones pleading of the affirmative defense of preclusion. We therefore have no occasion to address, and express no view regarding, the impact of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), on affirmative defenses.” *Id.* at n.6.

⁵The Fourth Circuit covers Maryland, North Carolina, South Carolina, Virginia, and West Virginia.

⁶The split among the district courts in the Fourth Circuit is by no means unique. Rather, a survey of the other circuits shows a similar split, including in the Second Circuit: compare *Whitserve LLC v. GoDaddy.com Inc.*, 2011 WL 5825712, at *2 (D. Conn. Nov. 17, 2011) (“the heightened pleading standard set forth in *Twombly* and *Iqbal* does not apply to a Motion to Strike affirmative defenses”) with *Tracy v. NVR Inc.*, 2009 WL 3153150, at *7 (W.D.N.Y. Sept. 30, 2009) (“the *Twombly* plausibility standard applies with

equal force to a motion to strike an affirmative defense under Rule 12(f)"); Fifth Circuit: compare *EEOC v. Courtesy Bldg. Servs. Inc.*, 2011 WL 208408, at *2 (N.D. Tex. Jan. 21, 2011) (declining "in the absence of complete briefing and guidance from the Fifth Circuit or the Supreme Court, to extend the *Iqbal* and *Twombly* plausibility standard to the pleading of affirmative defenses") with *Burns v. Dodeka LLC*, 2010 WL 1903987, at *1 (N.D. Tex. May 11, 2010) ("the Court concludes the defendant's affirmative defenses of proximate cause and failure to mitigate are wholly con-

Circuit: compare *Tiscareno v. Frasier*, 2012 WL 1377886, at *14 (D. Utah. April 19, 2012) ("The court, however, finds the reasoning of those courts that have declined to apply a heightened pleading standard to affirmative defenses persuasive") with *Smith v. Mustang, Independent School Dist. No. I-69*, 2012 WL 10848, at *2 (W.D. Okla. Jan. 3, 2012) ("the Court finds that the affirmative defenses at issue in this case must satisfy the pleading standards set forth in *Twombly* and *Iqbal*"); and Eleventh Circuit: compare *In re Checking Account Overdraft Litigation*, 2012 WL 1134483,

Many courts applying Twombly and Iqbal to affirmative defenses have noted that a party can move to amend its pleading under Rule 15 if it learns of additional facts, and that this remedy protects parties who learn of information supporting an affirmative defense later in the case. Attorneys should be aware of this rule and use it.

clusory and fail to plead any facts that demonstrate the plausibility of such defenses as required by *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and its progeny"); Sixth Circuit: compare *Swift v. City of Detroit*, 2012 WL 32683, at *2 (E.D. Mich. Jan. 6, 2012) (declining to "apply the more demanding *Iqbal/Twombly* standard in determining the viability of Defendant's affirmative defenses") with *Microsoft Corp. v. Lutian*, 2011 WL 4496531, at *2 (N.D. Ohio Sept. 27, 2011) ("the court finds that the heightened pleading standards required by *Twombly* and *Iqbal* apply to affirmative defenses"); Seventh Circuit: compare *Louisiana Firefighters' Retirement System v. Northern Trust Investments N.A.*, 2012 WL 601861, at *5 (N.D. Ill. Feb. 23, 2012) ("This court, like most district courts, applies *Twombly*'s standards to motions to strike affirmative defenses") with *Cottle v. Falcon Holdings Management LLC*, 2012 WL 266968, at *2 (N.D. Ind. Jan. 30, 2012) ("This Court agrees with those cases declining to apply the 'plausibility' standard of *Iqbal* and *Twombly* to affirmative defenses"); Eighth Circuit: compare *Smithville 169 v. Citizens Bank & Trust Co.*, 2012 WL 13677, at *1 (W.D. Mo. Jan. 4, 2012) ("This Court, like a majority of district courts, has held that the *Iqbal* standard applies to affirmative defenses") with *U.S. Bank Nat. Ass'n v. Education Loans Inc.*, 2011 WL 5520437, at *6 (D. Minn. Nov. 14, 2011) ("The undersigned agrees with the cases holding that *Twombly* and *Iqbal* do not apply to affirmative defenses"); Ninth Circuit: compare *Trustmark Ins. Co. v. C&K Market Inc.*, 2011 WL 587574, at *2 (D. Ore. Feb. 10, 2011) (declining to extend *Twombly*'s pleading requirements to affirmative defenses) with *Barnes v. AT&T Pension Benefit Plan-Nonbargained Program*, 718 F. Supp. 2d 1167, 1172 (N.D. Cal. 2010) (holding the heightened pleading standard of *Twombly* and *Iqbal* applies to affirmative defenses); Tenth

at *9 (S.D. Fla. April 3, 2012) ("Affirmative defenses must meet the pleading standards in *Iqbal* and *Twombly*") with *Security Life of Denver Ins. Co. v. Shab*, 2011 WL 3300320, at *1 (S.D. Ga. Aug. 1, 2011) (holding that 'heightened' 'plausibility' standards simply cannot apply to affirmative defenses).

⁷*Francisco v. Verizon South Inc.*, 2010 WL 2990159, at *6 (E.D. Va. July 29, 2010) (citing *Clem v. Corbeau*, 98 Fed. Appx. 197, 203 (4th Cir. 2004); *Ferguson v. Guyan Mack Co.*, 1995 WL 20793, at *5 (4th Cir. Jan. 20, 1995)).

⁸*Twombly*, 550 U.S. at 570.

⁹*Id.* at 555.

¹⁰*Id.*

¹¹*Iqbal*, 129 S. Ct. at 1949.

¹²*Id.* at 1950. In July 2009, then Sen. Arlen Specter (R-Pa.) introduced legislation to revert to the former "notice" pleading standard of *Conley v. Gibson*, 355 U.S. 41 (1957). In November 2009, Rep. Jerrold Nadler (D-N.Y.) introduced a similar bill. Both bills failed in committee.

¹³*Ulyssix Technologies Inc. v. Orbital Network Engineering Inc.*, 2011 WL 631145, at *14 (D. Md. Feb. 11, 2011).

¹⁴*Racick v. Dominion Law Associates*, 270 F.R.D. 228, 234 (E.D.N.C. 2010) (citation omitted). See also *Topline Solutions Inc. v. Sandler Systems Inc.*, 2010 WL 2998836, at *1 (D. Md. July 27, 2010) ("the considerations of common sense and efficiency that underlie *Twombly* and *Iqbal* suggest that their heightened pleading standards should apply to affirmative defenses").

¹⁵*Racick*, 270 F.R.D. at 233.

¹⁶*Palmer v. Oakland Farms Inc.*, 2010 WL 2605179, at *4 (W.D. Va. June 24, 2010). See also *Topline Solutions*, 2010 WL 2998836, at *1 ("it would be incongruous and unfair to require a plaintiff to operate under one standard and to permit the defendant to operate under a different, less

stringent standard”).

¹⁷*Bradshaw v. Hilco Receivables LLC*, 725 F. Supp. 2d 532, 536 (D. Md. 2010) (emphasis added). See also *Haley Paint Co. v. E.I. DuPont de Nemours & Co.*, 2012 WL 380107, *3 (D. Md. Feb. 3, 2012) (holding that *Twombly* and *Iqbal* “requires that affirmative defenses be pled in such a way as to ‘ensure that an opposing party receives fair notice of the factual basis for an assertion contained in a defense’” (citation omitted)).

¹⁸*Bradshaw*, 725 F. Supp. 2d at 536.

¹⁹*Barry*, 2011 WL 4352104, at *3 (citation omitted). See also *Racick*, 270 F.R.D. at 233 (“boilerplate defenses clutter the docket and ... create unnecessary work and extend discovery”); *Bradshaw*, 725 F. Supp. 2d at 536 (“The application of the *Twombly* and *Iqbal* standard to defenses will also promote litigation efficiency and will discourage defendants from asserting boilerplate affirmative defenses that are based on nothing more than ‘some conjecture that they may somehow apply’” (citation omitted)); *Monster Daddy LLC v. Monster Cable Products Inc.*, 2010 WL 4853661, at *7 (D.S.C. Nov. 23, 2010) (holding that the *Twombly/Iqbal* pleading standard applied to affirmative defenses because “subjecting affirmative defenses to the plausibility standard of pleading preserves judicial economy and efficiency by discouraging defendants from raising a myriad of boilerplate affirmative defenses”); but see *Odyssey Imaging LLC v. Cardiology Associates of Johnston LLC*, 752 F. Supp. 2d 721, 727 n.6 (W.D. Va. 2010) (“the fact that the plausibility of these defenses has not been briefed illustrates the court’s concern with applying the stringent pleading standards that apply to claims under Rule 8(a) to defenses pleaded under Rules 8(b) or 8(c). Requiring the intermittent briefing of all comprehensible and conceivable affirmative defenses would add the type of unnecessary delay and cost to the pretrial litigation process that *Iqbal* and *Twombly* sought to minimize”).

²⁰*Barry*, 2011 WL 4352104, at *4.

²¹*Id.*

²²See, e.g., *Aguilar v. City Lights of China Restaurant Inc.*, 2011 WL 5118325, at *3 (D. Md. Oct. 24, 2011) (“Additionally, Form 30, appended to the Federal Rules pursuant to Rule 84, strongly suggests that bare-bones assertions of at least some affirmative defenses will not suffice, as the Form’s illustration of a statute of limitations’ defense sets forth not only the name of the affirmative defense, but also facts in support of it”); *Francisco v. Verizon South Inc.*, 2010 WL 2990159, at *8 (E.D. Va. July 29, 2010) (“Finally, Form 30, appended to the Federal Rules of Civil Procedure pursuant to Rule 84, underscores the notion that a defendant’s pleading of affirmative defenses should be subject to the same pleading standard as a plaintiff’s complaint because it includes factual assertions in the example it provides”).

²³*Lopez v. Asmar’s Mediterranean Food Inc.*, 2011 WL 98573, at *2 (E.D. Va. Jan. 20, 2011) (emphasis removed). Another judge in the same court, although observing that “the language of the Federal Rules of Civil Procedure differs, suggesting requirements as to pleadings that may differ as well,” *Francisco*, 2010 WL 2990159, at *8, held

that the *Twombly/Iqbal* requirements applied to affirmative defenses for fairness reasons. *Id.* at *7–8. Other courts applying *Twombly/Iqbal* to affirmative defenses have also acknowledged the differences in the language of the Rules. See, e.g., *Ulyssix Technologies Inc.*, 2011 WL 631145, at *14 (recognizing “that there are differences in the language of Rule 8(a), Rule 8(b), and Rule 8(c), which could suggest that the plausibility standard is inapplicable to affirmative defenses,” but holding that “these differences do not persuade me to reject the plaintiff’s position” that *Twombly* and *Iqbal* applied to affirmative defenses); *Barry*, 2011 WL 4352104, at *3 (applying *Twombly/Iqbal* to affirmative defenses because, “[w]hile the language of Rules 8(a) and 8(b) is certainly not identical, those sections contain important textual overlap, with both subsections requiring a ‘short and plain’ statement of the claim or defense”); *Aguilar*, 2011 WL 5118325, at *3 (same).

²⁴*Lopez*, 2011 WL 98573, at *2.

²⁵*Odyssey Imaging* at 725.

²⁶*Id.*

²⁷*Lopez* at *2 n.5 (E.D. Va. Jan. 20, 2011).

²⁸*Odyssey Imaging*, 752 F. Supp. 2d at 726 (citing Fed. R. Civ. P. 12(a)(1)(A)).

²⁹*Id.*

³⁰*Francisco v. Verizon South Inc.*, 2010 WL 2990159, at *8 (E.D. Va. July 29, 2010).

³¹*Piontek v. Service Centers Corp.*, 2010 WL 4449419, at *3 (D. Md. Nov. 5, 2010).

³²*Barnett v. Uniformed Services University of the Health Sciences*, 2011 WL 3511049, at *12 (D. Md. Aug. 9, 2011).

³³*Ulyssix Technologies Inc.*, 2011 WL 631145, at *15; see also *Palmer*, 2010 WL 2605179, at *5 (“A defense may be stated simply and briefly”).

³⁴*Id.* (citation omitted).

³⁵See, e.g., *Bradshaw*, 725 F. Supp. 2d at 536–537 (“Under Rule 15(a), a defendant may seek leave to amend its answers to assert any viable defenses that may become apparent during the discovery process. Trial courts liberally grant such leave in the absence of a showing that an amendment would result in unfair prejudice to the opposing party”); *Palmer*, 2010 WL 2605179, at *5 (“By way of caveat it must be noted that litigants do not always know all the facts relevant to their claims or to their defenses until discovery has occurred. Rule 15 of the Federal Rules of Civil Procedure contemplates that motions to amend pleadings on the basis of relevant facts learned during discovery, and such motions should be liberally granted”); *Racick*, 270 F.R.D. at 234 (“The court also notes that applying the same pleading requirements to defendants should not stymie the presentation of a vigorous defense, because under Rule 15(a) of the Federal Rules of Civil Procedure, a defendant may seek leave to amend its answers to assert defenses based on facts that become known during discovery”); *Haley Paint Co.*, 2012 WL 380107, at *3 (“when affirmative defenses are stricken, the defendant should normally be granted leave to amend”) (citations omitted).

³⁶*Odyssey Imaging*, 752 F. Supp. 2d at 727.

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**

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