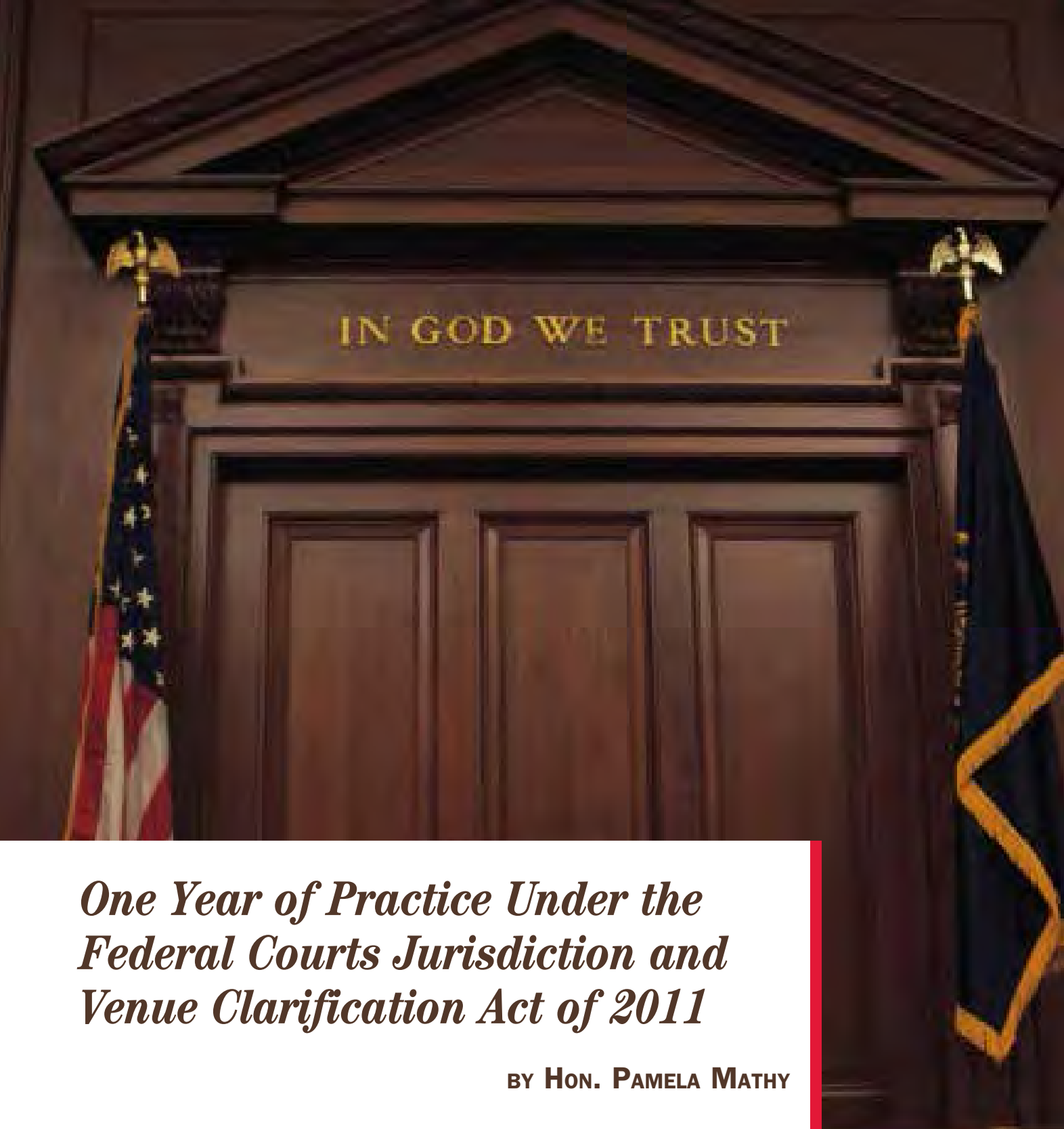
How Recent Changes in the Federal Removal, Jurisdiction, and Venue Statutes May Affect Your Practice

Removal is the procedure whereby a defendant can transfer a case from state court to federal court. Generally, any civil action brought in state court is removable by a defendant if the federal district court has original jurisdiction over the case. The right to remove a case from state to federal court is a creation of statute and is governed by federal law.[1] The controlling removal statutes are 28 U.S.C. § 1441 (governing removal for diversity cases, most federal questions and non-diverse claims joined with federal questions) and 28 U.S.C. § 1446 (establishing the procedure for accomplishing removal). A defendant may remove a case that could have been brought in federal district court originally under 28 U.S.C. § 1441, that is: (1) if the action arises under federal law, (2) if diversity jurisdiction exists, or (3) because a statute confers jurisdiction upon a federal court.[2]

In the 1990s, the Judicial Conference Committee on Federal-States Jurisdiction began to identify recurring problems encountered by litigants and judges in applying certain jurisdictional and venue statues. The Federal Courts Jurisdiction and Venue Clarification Act of 2011 (act) implemented 17 proposals recommended by the Committee on Federal-State Jurisdiction and Judicial Conference.[3]

The act modified removal procedures in several situations, including but not limited to removal when: (1) federal claims are joined with non-removable claims, (2) there are multiple defendants, (3) removal is sought after one year and the plaintiff acted in bad faith, and (4) the amount in controversy is not specified in the complaint.[4] The act also amended statutes on jurisdiction over



One Year of Practice Under the Federal Courts Jurisdiction and Venue Clarification Act of 2011

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certain cases involving resident aliens and corporations.[5]

For removed cases, the act is effective for any suit commenced—within the meaning of state law—in state court on or after Jan. 6, 2012.[6] Some suits may be governed by the former statutes. Practitioners should first reference the act when addressing any removal/remand issue for any suit commenced on or after Jan. 6, 2012. There is limited case law addressing the act.

Summary of Selected Changes

Timing of Removal

Each Defendant Has 30 Days After Service to File a Petition to Remove

For Actions Commenced *Before* Jan. 6, 2012. The statute formerly referenced only a single defendant and courts disagreed on how to interpret the time for removal in multiple defendant cases—was it 30 days from the date on which the first defendant was served (the Fifth Circuit rule) or on which the last defendant was served with effective service of process? Under the Fifth Circuit rule, a state court plaintiff could first serve the defendant least likely to remove and hold off serving the other defendants for 30 days.

For Actions Commenced *On and After* Jan. 6, 2012. Each defendant has 30 days to file for removal after being served no matter when the defendant is added to the case through effective service of process.[7]

One-Year Limit On Removal of Diversity Actions

For Actions Commenced *Before* Jan. 6, 2012. The statute set a one-year limit to remove a state case based on diversity of citizenship, as measured from the commencement of the state action.

For Actions Commenced *On and After* Jan. 6, 2012. The act preserves the one-year limit to remove a state case based on diversity, but codifies a bad-faith exception such that courts must accept an otherwise untimely removal when a plaintiff has prevented the earlier removal through bad-faith concealment of federal jurisdiction, including concealment of the amount in controversy or naming as a state court defendant a non-diverse party only to dismiss that party after the one-year period has expired. The House Report provides as an example of "bad faith" the failure of a plaintiff to disclose the amount in controversy to prevent removal.[8]

Each Defendant Must Consent to Removal

For Actions Commenced *Before* Jan. 6, 2012. The statute was silent.

For Actions Commenced *On and After* Jan. 6, 2012. The act codifies the judicially created rule of unanimity under which all defendants who have been properly joined and served must join in, or consent to, the removal of the action. The rule of unanimity applies solely in cases under § 1441(a) and does not apply to removals governed by the federal officer removal statute, §1442.

Amount in Controversy and Removal Based on Diversity Jurisdiction

For diversity jurisdiction to exist, the amount in controversy must exceed $75,000, exclusive of interest and costs.[9] The only exception to this rule is federal statutory interpleader suits which require an amount in controversy of $500.[10] Once diversity jurisdiction is acquired, subsequent events (including an attempt by the plaintiff to reduce the amount claimed) cannot destroy jurisdiction.[11] The amount ultimately recovered by the plaintiff is immaterial to the existence of jurisdiction.[12] But, a plaintiff who ultimately recovers less than the jurisdictional amount may be assessed costs by statute if the plaintiff originally filed the action in federal court.[13]

The amount in controversy is determined at the time the action is filed in federal court.[14] Courts generally determine the amount in controversy from the face of the complaint.[15]

If the state court plaintiff demands an amount that exceeds the minimum jurisdictional amount of $75,000, excluding interest and costs, the defendant can rely on that demand to meet the jurisdictional requirement for removal, even if the defendant has a complete or partial defense to the suit.[16] The amount in controversy in an action seeking injunctive relief is measured by the value of the object of the litigation, by the value of the right to be protected, or by the extent of the injury to be prevented.[17] The amount in controversy in an action seeking declaratory relief is measured by the value of the object of the litigation.[18]

For Actions Commenced *Before* Jan. 6, 2012. If the amount in controversy exceeds $75,000 at the time of the removal, plaintiff cannot obtain a remand simply by agreeing to reduce the claim.[19] But, where the amount is unclear and the plaintiff binds itself in the state court to seek less than $75,000, the case is not removable.[20] Post-removal stipulations by the plaintiff that the amount in controversy will not exceed $75,000 are only effective if the court has not yet ruled on remand and the stipulation clarifies, but does not amend, the pleading and requires that plaintiff's recovery must be less than $75,000.[21]

A case can be removable even if plaintiff has pleaded less than $75,000 in damages, but defendant must prove, as a matter of legal certainty, that the amount is potentially more than $75,000 and plaintiff can recover more.[22] If plaintiff makes a bald claim the amount in controversy is less than $75,000, then a defendant might respond by suggesting a stipulation that (1) plaintiff will not ever seek more than $75,000 and releases defendant for all excess amounts, (2) if plaintiff ever is allowed to revoke its agreement, plaintiff waives the one-year limit on removability, (3) if a judgment is ever entered in excess of $75,000, plaintiff will join with defendant in seeking a remittitur to that amount, (4) the agreement is a material inducement to defendant agreeing to a remand (or not to remove the case), and (5) the agreement is filed in the federal and state courts as an enforceable contract.

For Actions Commenced *On and After* Jan. 6, 2012. A state court plaintiff's "good-faith" demand will be deemed the amount in controversy. Defendant must rebut the presumption that the plaintiff pleaded in good faith. "If the case stated by the initial pleading is not removable solely because the amount in controversy does not exceed the amount specified in § 1332(a), information relating to the amount in controversy in the record of the State proceeding, or in responses to discovery, shall be treated as 'other paper' under subsection (b)(3),"[23] starting the 30-day removal period anew.

If the state court plaintiff did not allege the amount in controversy in the state court petition and plaintiff seeks either (1) "nonmonetary relief" or (2) "a money judgment, but the state practice either does not permit demand for a specific sum or permits recovery of damages in excess of the amount demanded," then defendant may specify the amount in controversy in the notice of removal and establish it exceeds $75,000 by a preponderance of the evidence (resolving a split in the circuits as to the burden of proof).[24]

Permanent Resident Aliens; Diversity Jurisdiction; Venue

For Actions Commenced *Before* Jan. 6, 2012. Federal courts do not have jurisdiction over a dispute that involved only aliens.[25] But, "an alien admitted to the United States for permanent residence shall be deemed a citizen of the state in which such alien is domiciled."[26] Therefore, before the act, there would be no federal diversity jurisdiction over a claim between a citizen of a state and an alien who permanently resided in the same state, but two resident aliens domiciled in different states could be "deemed" a resident of the state of domicile and invoke federal diversity jurisdiction. With respect to venue, a person could sue an alien defendant under § 1391(d) in any district, which meant that aliens could not raise a venue defense to the place of litigation.

For Actions Commenced *On and After* Jan. 6, 2012. The act removes the "resident alien proviso" and the "deeming language" (that is, "an alien admitted to the United States for permanent residence shall be *deemed* a citizen of the State in which such alien is domiciled"). The act revises § 1332(a)(2) to provide that federal courts do not have jurisdiction over an action "between citizens of a State and citizens or subjects of a foreign state who are lawfully admitted for permanent residence in the United States and are domiciled in the same state."

The Supreme Court stated that the "nerve center" is the place where a corporation's officers direct, control, and coordinate the corporation's activities. [I]n practice it should normally be the place where the corporation maintains its headquarters—provided that the headquarters is the actual center of direction, control, and coordination, and not simply an office where the corporation holds its board meetings.

Thus, the act restricts diversity jurisdiction to citizens, not aliens. At the same time, a citizen or subject of a foreign state may continue to appear as additional parties to disputes between citizens of different states.

In its venue provisions, the act also clarifies the appropriate venue for nonresident defendants. The act focuses on defendants "not resident of the United States," such that persons domiciled abroad, whether an alien or a United States citizen, cannot raise a venue defense to the location of the litigation and may be sued in any district.[27]

"Citizenship" of Corporations

For Actions Commenced *Before* Jan. 6, 2012. A corporation is a citizen of any state in which it had been incorporated and the state in which it had its principal place of business.[28]

For Actions Commenced *On and After* Jan. 6, 2012.A corporation and an insurance company (whether incorporated or unincorporated) which is named as a party in a direct action lawsuit[29] is a citizen both of (1) "every state and foreign state by which it has been incorporated" and (2) "the states or foreign state where it has its principal place of business."[30] By broadening the deemed citizenship of corporations (and, in direct actions, insurance companies) the act may slightly reduce the frequency with which these entities will appear before federal courts in diversity jurisdiction cases, but, as noted by the House Report, will not affect the availability of state courts of general jurisdiction.

Thus, for diversity to exist, no adversary of the corporation may be a citizen of the state in which the corporation is incorporated or of the state in which it has its principal place of business.[31] It has been held that the following allegation is insufficient to establish that diversity jurisdiction exists: "Plaintiff is a citizen of South Dakota. Defendants are corporations incorporated and having their principal place of business in states other than South Dakota."[32] In February 2010, the U.S. Supreme Court interpreted the meaning of a corporation's "principal place of business" in a diversity case.[33] In *Hertz*, a unanimous Supreme Court resolved conflict among the circuits by rejecting the "place of activities" test and adopting the "nerve center" principle, that is, a test that "points courts in a single direction, toward the center of [the corporation's] overall direction, control, and coordination. In *Hertz*, the Supreme Court stated that "the 'nerve center' is the place where a corporation's officers direct, control, and coordinate the corporation's activities. [I]n practice it should normally be the place where the corporation maintains its headquarters—provided that the headquarters is the actual center of direction, control, and coordination, *i.e.*, the 'nerve center,' and not simply an office where the corporation holds its board meetings."[34]

The act also provides, in its venue provisions, that if a state has more than one federal district, and a corporation is subject to personal jurisdiction in that state at the time the action is commenced, the corporation is deemed to reside in any district in that state within which its contacts would be sufficient to subject it to personal jurisdiction if that district were a separate state and, if there is no such district, to be deemed to reside in the district within which it has the most significant prospects.[35]

Federal Subject Matter Jurisdiction and Removal and Practice Under the Act

A threshold question in any effective removal is the establishment of federal subject matter jurisdiction over some or all of the claims. Federal courts are courts of limited jurisdiction. If, at any time, federal subject matter jurisdiction is absent, a case can be dismissed.[36] Further, a court, *sua sponte*, can take up the question of subject matter jurisdiction at any time.

Federal Question

When removing a case to federal court, the removal petition must clearly state the basis of federal subject matter jurisdiction. If the removal petition asserts federal subject matter jurisdiction based on a federal question and plaintiff's "live" state court petition does not identify a federal law as a basis of the claim, the removal petition should contain sufficient information to identify a federal claim asserted in the petition sufficient to support removal. Even if

no party raises an objection to removal or all the parties stipulate to federal jurisdiction, the court must consider whether federal jurisdiction exists.[37] There typically are three grounds for federal question jurisdiction: (1) plaintiff's petition asserts a federal claim, that is, that federal law creates the cause of action asserted; (2) under the artful pleading doctrine, one of more of plaintiff's state-law claims should be re-characterized as a federal claim; and (3) one of more of plaintiff's state-law claims necessarily turn on the construction of a substantial, disputed federal question.[38]

Federal Law Creates the Cause of Action Asserted: "Jurisdiction" or "Element of Offense"

It is important to distinguish between issues relating to subject matter jurisdiction and elements of the pleaded federal offense. Stated differently, elements of the cause of action are not necessarily jurisdictional prerequisites.

For example, a plaintiff may sue his former employer in state court for discrimination under Title VII and state law. Employer may remove the suit to federal court. Even after a jury verdict was entered for plaintiff, defendant filed a motion in the trial court to dismiss for lack of jurisdiction because defendant had fewer than 15 employees, the threshold to be covered by Title VII. Under current case law, defendant's motion would be denied because the 15-employee limit is an element of a Title VII offense and is not jurisdictional.[39]

Well-Pleaded Complaint; Artful Pleading

Federal question removal jurisdiction is determined by the face of the complaint at the time of removal under the "well-pleaded compliant" rule.[40] Under the "artful pleading" doctrine, a plaintiff may not avoid federal jurisdiction by "omitting from the complaint federal law essential to his claim, or by casting in state law terms a claim that can be made only under federal law."[41]

The prior version of § 1441(c) gave federal courts the authority to remand, not only the "separate and independent [state-law] claim(s)" over which they lacked original jurisdiction, but also other claims that might have been within their original jurisdiction. At the minimum, this created uncertainty as to whether a federal court would exercise original jurisdiction over a federal question claim.

For example, a pharmaceutical company removed a products liability action asserting California state-law claims of strict liability, negligence, breach of express warranty, breach of implied warranty, fraud, fraudulent concealment, and loss of consortium, each relating to the alleged side effects of a cholesterol-lowering medication.[42] The court granted plaintiffs' motion to remand on the ground no federal cause of action was asserted in plaintiff's well-pleaded complaint.[43] The Court held that plaintiff's "state-law claims are not *preempt*ed by federal law even if approved for sale by the FDA and potentially implicate the FDA's drug labeling regulations" and the asserted federal question based on FBA regulations is not "'basic' and 'necessary' as opposed to 'collateral' and 'merely possible.'"[44] Accordingly, the court lacked federal question jurisdiction over the action.[45]

Substantial Federal Question

When state law creates the cause of action, and no federal law completely *preempt*s it, federal jurisdiction may still exist "if it appears that some substantial, disputed question of federal law is a *necessary* element of one of the well-pleaded state claims."[46] Simply because state law independently espouses the same public policy as expressed in a federal law does not mean that the federal law is a necessary element of the state law.

For example, a plaintiff sued his former employer and others in state court for wrongful termination in violation of public policy, referring to Title VII as one of the bases for the public policy, and intentional interference with contractual obligations, indirectly referencing Title VII. Defendants remove the suit to federal court.[47] Plaintiff did not contest the removal and no party challenged the federal court's subject matter jurisdiction.[48] The trial court entered summary judgment in favor of defendants.[49] On appeal, the court vacated the judgment for lack of jurisdiction and remanded plaintiff's complaint to the trial court with instructions to remand the complaint and case to state court.[50] The appellate court held that plaintiff had pleaded only state claims, as the references to Title VII were only to assert an alternative basis for establishing one of the elements of plaintiff's claims, thus the doctrine of artful pleading did not apply.[51] Further, the court held that Title VII did not completely preempt the area of employment discrimination and was "not a 'necessary element' of the state law claim because state law independently espouses the same public policy established by Title VII."[52]

Diversity

Federal diversity jurisdiction generally requires complete diversity between plaintiffs and defendants. The act makes some important changes to citizenship rules. In sum, corporations are citizens of all states of incorporation and the state encompassing the principal place of business.[53] Noncorporate entities are citizens of each of the states of all of its members.[54] Permanent resident aliens are not "citizens" for purposes of diversity jurisdiction.[55]

If removal is based on diversity jurisdiction, the best practice is for the removal petition to address the citizenship between the parties to demonstrate any complete diversity that may be required. For example, a limited liability company investment fund filed a suit in state court against the investment fund manager alleging fraud.[56] Defendant manager removed the case to federal court based on diversity.[57] The removal petition stated plaintiff "'is a Delaware limited liability company with a principal place of business in New York, New York'" and defendant manager "is a citizen of the State of Rhode Island."[58] The trial court granted defendant's motion to dismiss as time-barred under the applicable statute of limitations.[59] On appeal, the court questioned jurisdiction and instructed the limited liability company to file "an affidavit of jurisdictional facts describing the identities and place of citizenship of each and all of

the [members]."[60] The limited liability company filed an affidavit stating that at the date of the removal, according to its records, "there were no members of the limited liability company who were citizens of Rhode Island."[61] Defendant manager did not contest the allegations and even 'assented to the constructive amendment of the pleadings to reflect them," again asserting diversity jurisdiction had been established.[62] Finding the allegations regarding citizenship of the parties to be inadequate, the court again required the limited liability company to file "a statement ... identify[ing] its members and their respective citizenship, but also . . . trac[ing] the citizenship of any member that is an unincorporated association through however many layers of members there may be."[63]

Joinder of Federal Law and State-Law Claims;"Separate and Independent Claim"

Prior to the effective date of the act, Jan. 6, 2012, § 1441(c) authorized a defendant to remove an entire case whenever a "separate and independent" *federal question* is joined with one or more non-removable state-law claims and, following removal, the court may retain the entire case or remand all matters in which state law predominates.[64] To be clear, the concept of "separate and independent claim" was not applicable to establish *diversity* jurisdiction, but could be used to remove the case on the basis of *federal question* jurisdiction.[65]

The removal provision in the prior version of § 1441(c) played a limited role in federal question cases because of the narrow definition of "separate and independent claim,"[66] the breadth of the doctrine of pendent or supplemental jurisdiction, and questions about the constitutionality of allowing the removal of state-law claims that do not meet the constitutional test for pendent or supplemental jurisdiction. Stated differently, under § 1441(c), federal courts arguably were able to allow the removal of a limited group of cases containing claims over which they lacked both original and supplemental jurisdiction. Not surprisingly, some courts raised concerns that § 1441(c) was not constitutional because it purported to give federal courts the authority to decide claims over which they did not have original jurisdiction.[67]

Further, the prior version of § 1441(c) gave district courts the power to remand "all matters in which State law predominates."[68] Stated differently, § 1441(c) gave federal courts the authority to remand, not only the "separate and independent [state-law] claim(s)" over which they lacked original jurisdiction, but also other claims that might have been within their original jurisdiction, including federal question claims in which state law predominated. At the minimum, this created uncertainty as to whether a federal court would exercise original jurisdiction over a federal question claim.

Under the act, if a suit involves an otherwise non-removable claim and a *federal question* and the suit is removed, the court *must* sever all "separate and independent" claims that *are not within its original or supplemental jurisdiction* and are statutorily barred from being removed.[69] The court *must* sever such state claims and remand them to state court. Only defendant(s) named in the federal question claim must consent to removal.[70] The mandatory remand of state-law claims addresses the constitutional problem posed by the possibility that an otherwise unsupported state-law claim would be insufficiently related to the federal claim such that it would not be part of a "case or controversy" for Article III purposes. Stated differently, the state-law claim might be so "independent" that it also is unrelated to the federal claims for the purpose of determining supplemental jurisdiction under 28 U.S.C. § 1367. The act preserves the right of a defendant to remove a state case that involves a federal question claim, but cures any constitutional problem by requiring the federal court to remand any unrelated state-law claims. The act also eliminates the federal court's discretion to remand otherwise removable federal claims when state law predominated.

In sum, notwithstanding arguable inefficiencies when causes of action are "split" between federal and state courts, federal statutory law now addresses a constitutionally based concern if a federal court exercises jurisdiction over a unrelated, that is, "separate and independent" state-law claim. Although the parties may be able to consent to the remand of the case to state court, the parties' consent to federal subject matter jurisdiction will not be sufficient to overcome jurisdictional deficiencies.

Summary

After removal, a plaintiff may seek remand on various grounds, including that there is not complete diversity between the parties, no federal cause of action has been asserted, the removal was not timely, all defendants did not join in the removal,[71] and the allegation of the amount in controversy was vague. Each of these grounds for possible remand are points to address when seeking removal.

When removing a case, defendants should clearly state the basis of federal subject matter jurisdiction in the removal petition. If there is federal subject matter jurisdiction, the federal court may vacate, annul, or modify rulings entered by the state court prior to the removal. For example, after defendants removed a state court action asserting breach of an insurance contract, insurance bad faith, and violations of New Mexico's unfair insurance practices act on the ground ERISA *preempt*ed and converted the state claims to federal claims, certain of the companies moved to set aside default judgments entered against them in state court on the ground they had not been served with effective service of process. The Court found the removal was proper, even though it was accomplished after the entry of judgment in state court and set aside the default judgments based on plaintiff's failure to accomplish effective service of process on them.[72]

Venue and Practice Under the Act

As partially noted above, the act accomplishes five key revisions to the law of venue. First, the act re-defines the term "venue" to denote a geographic specification of the appropriate forum for litigation of a civil action that is within the subject matter jurisdiction of the district courts in general and does not refer to any grant or restriction of subject matter jurisdiction providing for a civil action to be adjudicated only by the district court for a particular district(s).[73] The act also codifies the exclusion of admiralty cases from the general venue statutes that formerly only appeared in the scope of venue provisions set out in Rule 82 of the Federal Rules of Civil Procedure.[74]

Second, the act establishes a "unitary approach" to venue requirements that removes distinctions between federal question and diversity jurisdiction.[75] Section 1391(b)(1) sets out venue rules for venue based on residency of defendants; § 1391(b)(2) explains venue rules for venue based on where the events leading to an action took place; and § 1391(c) sets out a "fallback venue" when there is no appropriate district in which an action may otherwise be brought (that is, any

district in which any defendant is subject to personal jurisdiction).[76] In general, instead of allowing venue in any district of the state in which *any* defendant resides, the act limits venue in multiple defendant cases to a district of the state in which *all* defendants reside. Further, if there is no venue in which defendants reside or where a substantial part of the events or omissions giving rise to the claims occurred, then, under "fallback venue," venue is proper in "any judicial district in which any defendant is subject to the court's personal jurisdiction *with respect to such action*." [77]

Third, the act clarifies that, consistent with current case law, the removal statute—not the venue statute—governs the proper venue for cases removed from state to federal courts.[78] The amended § 1391(c) defines "residency" for all venue purposes in the U.S. Code; formerly, the section defined residence for certain venue purposes and as applied to corporations; the amended section defines residency for natural persons, incorporated entities, unincorporated entities, and nonresident defendants. An individual is deemed to reside in the judicial district in which that person is domiciled.[79] Unincorporated associations are treated the same as corporations for determining venue such that they will be regarded as residents of any district in which they are subject to personal jurisdiction.[80]

Fourth, the act eliminates a venue defense for persons residing outside the United States such that they can be sued in any district and their joinder will be disregarded for the purpose of determining venue with respect to other defendants. The act also grants a venue defense for permanent resident aliens with a domicile in the United States.[81]

Fifth, the act's revisions to § 1404(a) will permit a federal district court to transfer a civil action to *any* district or division[82] to which all parties have consented, if convenient for the parties and witnesses and in the interest of justice. Previously, in accordance with U.S. Supreme Court precedent, transfer was permitted only to another district or division in which the case might have been brought, that is, to a district proper in terms of both venue and subject matter jurisdiction.

Conclusion

Key provisions of the act modified key standards for removal jurisdiction, venue clarification, and transfer. Especially until more case law develops under the act, pre-act case law remains important. Understanding the changes implemented through the act will allow the correct application of pre-act case law to post-act removal issues until more case law develops under the act. ⊙

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Endnotes

[1]*Grubbs v. General Elec. Credit Corp.*, 405 U.S. 699, 705, 92 S. Ct. 1344, 1348-49 (1972).

[2]*See* 28 U.S.C. § 1441 (2005); *Powers v. South Cent. United Food & Comm. Workers Union & Employers Health & Welfare Trust*, 719 F.2d 760, 763 (5th Cir. 1983). All defendants must consent to the removal of plaintiff's state case to federal court. *Grigsby v. Kansas City S. Ry. Co.*, No. 12-CV-776, 2012 WL 3526903, at *3 (W.D. La. Aug. 13, 2012).

[3]*See* Lamar Smith, Federal Courts Jurisdiction and Venue Clarification Act of 2011, H.R. Rep. No. 112-10 (Feb.11, 2011).

[4]*See id.* at 11-17.

[5]*See id.* at 4.

[6]*See* Federal Courts Jurisdiction & Venue Clarification Act of 2011, Pub. L. No. 112-63, § 105, 125 Stat. 758, 762 (2011).

[7]If the notice of removal needs to be amended, a defendant may amend its notice of removal within the original 30-day time limit for removal. After that time period expires, the amended notice may cure a defect but may not add a new ground for removal. *O'Halloran v. University of Washington*, 856 F.2d 1375, 1381 (9th Cir. 1988). Procedural defects may be waived if they are not objected to within the requisite period of time.

[8]H.R. Rep. No. 112-10, at 16.

[9]28 U.S.C. §1332(a) (2005).

[10]*Id*. § 1335(a).

[11]*Klepper v. First Am. Bank*, 916 F.2d 337, 340 (6th Cir. 1990); *Worthams v. Atlanta Life Ins. Co.*, 533 F.2d 994 (6th Cir. 1976).

[12]*See Rosado v. Wyman*, 397 U.S. 397, 405 n.6, 90 S. Ct. 1207, 1214 n.6, 25 L. Ed. 2d 442 (1970).

[13]28 U.S.C. §1332(b) (2005).

[14]*White v. FCI USA, Inc.*, 319 F.3d 672, 676 (5th Cir. 2003); *see also Suber v. Chrysler Corp.*, 104 F.3d 578, 584 (3d Cir. 1997).

[15]*St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 289, 59 S. Ct. 586, 590-91, 82 L. Ed. 845 (1938); *White*, 319 F.3d at 675.

[16]28 U.S.C. § 1446(c)(2); *St. Paul Mercury Indem. Co.*, 303 U.S. at 292, 58 S. Ct. at 591-92.

[17]*Mississippi & M. R.R. v. Ward*, 67 U.S. 485, 2 Black 485, 17 L. Ed. 311 (1862).

[18]*Leininger v. Leininger*, 705 F.2d 727, 729 (5th Cir. 1983); *Freeland v. Liberty Mut. Fire Ins.*, 632 F.3d 250, 252-53 (6th Cir. 2011).

[19]*St. Paul Mercury Indem. Co.*, 303 U.S. at 289, 59 S. Ct. at 591-92.

[20]*Cross v. Bell Helmets USA*, 927 F. Supp. 209 (E.D. Tex. 1996).

[21]*Id.*

[22]*Cf. DeAguilar v. Boeing Co.*, 47 F.3d 1404 (5th Cir. 1995).

[23]28 U.S.C. § 1446(c)(3)(A).

[24]28 U.S.C. 1446 (c)(2)(A). *Before* the act, the Fifth Circuit had prescribed a procedure for determining the amount in controversy under these circumstances. *White*, 319 F.3d 672, 675. A removing defendant would show "[b]y a preponderance of the evidence that the amount in controversy is greater than the jurisdictional amount. The district court must first examine the complaint to determine whether it is 'facially apparent' that the claims exceed

the jurisdictional amount. If it is not thus apparent, the court may rely on 'summary judgment-type' evidence to ascertain the amount in controversy." *Id.*; *see also Menendez v. Wal-Mart Stores*, 2010 WL 445470 (5th Cir. Feb 1, 2010); *De Aguilar v. Boeing Co.*, 47 F.3d 1404 (5th Cir. 1995). A defendant may make this showing by either: (1) demonstrating that it is facially apparent that the claims are likely above $75,000, or (2) by setting forth facts in controversy (by affidavit or other evidence) that support a finding of the requisite amount. *Simon v. Wal Mart Stores, Inc.*, 193 F.3d 848 (5th Cir. 1999) ; *see also García v. Koch Oil Co. of Texas, Inc*., 351 F.3d 636 (5th Cir. 2003). The court may consider affidavit testimony attempting to clarify the demand. *Association National De Pescadores a Pequena Escala O Artensales de Colombia (ANPAC) v. Dow Quimica de Colombia S.A.*, 988 F.2d 559 (5th Cir. 1993). Once the removing party shows the amount in controversy exceeds the jurisdictional amount, the plaintiff, to avoid removal, was required to show that it is legally certain that his recovery will not exceed that amount. *De Aguilar v. Boeing Co*., 47 F.3d 1404, 1412 (5th Cir. 1995). If the plaintiff fails to present substantive evidence to support remand, the motion to remand will be denied. *White*, 319 F.3d at 676. If the plaintiff does present evidence, then the evidence can be rebutted. *De Aguilar v. Boeing Co.*, 11 F.3d 55 (5th Cir. 1993).

[25]*See Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303 (1809).

[26]28 U.S.C. § 1332(a).

[27]*Id.* § 1332(a)(2); H.R. Rep. No. 112-10, at 22. Objecting to personal jurisdiction in U.S. courts remains available to aliens as well as to U.S. citizens domiciled abroad. 28 U.S.C. § 1391(c)(3). The act also requires courts to disregard the citizenship of a U.S. citizen who resides abroad when determining the proper venue in actions with multiple defendants. 28 U.S.C. §§ 1332(a)(2), (3). A permanent resident alien domiciled in the United States is treated as a "natural person" for residency purposes can raise a venue defense under § 1391(c)(1).

[28]28 U.S.C. § 1332(c)(1) (2011). According to the House Report, this provision was added in 1958 to "expand the concept of corporate citizenship ... to preclude diversity jurisdiction over a dispute between an in-state citizen and a corporation incorporated or primarily doing business in the same state. H.R. Rep. No. 112-10, at 8 (2011). Again according to the House Report, courts struggled to apply the former version of the statute in actions involving United States corporations with foreign contacts or foreign corporations in the United States due to the word "State" and the issue of whether, according to the definition of "States" appearing in § 1332 (e), it applied only to the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, and U.S. territories, or whether also included foreign states. *See id. Compare Cabalceta v. Standard Fruit Co.*, 883 F.2d 1553, 1559 (5th Cir. 1989) (applied only to the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, and United States territories because "State" began with a capital "S") *with Nike, Inc. v. Comercial Iberica de Exclusivas Deportivas, S.A.*, 20 F.3d 987 (9th Cir. 1994) ("States" included foreign states and states of the United States).

[29]As described by the House Report, in a direct action case "the plaintiff sues the liability insurance company directly without naming as a defendant the insured party whose negligence or other wrongdoing gave rise to the claim." H.R. Rep. No. 112-10, at 10.

[30]28 U.S.C. § 1332(c)(1); H.R. Rep. No. 112-10 at 9. An insurance company named as a party in a direct action (again, an action to which the insured is not joined as a party-defendant) also is a citizen of "every States and foreign state of which the insured is a citizen." § 1332((c)(1)(A).

[31]*Hunt v. Acromed Corp.*, 961 F.2d 1079 (3d Cir. 1992) (noting a distinction between "a" principal place of business and "its" principal place of business).

[32]*McGovern v. American Airlines, Inc.*, 511 F.2d 653, 654 (5th Cir. 1975).

[33]*Hertz Corp. v. Friend*, 559 U.S. ___, 130 S. Ct. 1181, 175 L. Ed. 2d 1029 (2010).

[34]*Id.* at 11.

[35]28 U.S.C. § 1391(d).

[36]The objection that a federal court lacks subject-matter jurisdiction, see Fed. R. Civ. P. 12(b)(1), may be raised at any stage in the litigation, even after trial and the entry of judgment, Fed. R. Civ. P. 12(h)(3). *See Kontrick v. Ryan*, 540 U.S. 443, 455, 124 S. Ct. 906, 157 L. Ed. 2d 867 (2004) ("A litigant generally may raise a court's lack of subject-matter jurisdiction at any time in the same civil action, even initially at the highest appellate instance.").

[37]*FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 229, 110 S. Ct. 596, 606-07, 107 L. Ed. 2d 603 (1990) ("federal courts are under an independent obligation to examine their own jurisdiction").

[38]*Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 807-10, 106 S. Ct. 3229, 3231-33, 92 L. Ed. 2d 650 (1986); *Franchise Tax Bd. of State of Cal. v. Construction Laborers Vacation Trust for So. Cal.*, 463 U.S. 1, 7-12, 27-28, 103 S. Ct. 2841, 2845-48, 2855-56, 77 L. Ed. 2d 420 (1983).

[39]*Arbaugh v. Y & H Corp.*, 546 U.S. 500, 516, 126 S. Ct. 1235, 1245 163 L. Ed. 2d 1097 (2006) ("the threshold number of employees for application of Title VII is an element of a plaintiff's claim for relief, not a jurisdictional issue" and therefore can be waived by defendant's failure to contest the element in the trial), reversing 380 F.3d 219 (5th Cir. 2004). *See also Reed Elsevier, Inc. v. Muchnick*, ___ U.S. ___, 130 S. Ct. 1237, 150-51, 176 L. Ed. 2d 18 (2010) (general requirement in the Copyright Act that copyright holders must register their works before suing for copyright infringement is an element of the claim of infringement and is not jurisdictional); *Leeson v. Transamerica*, 671 F.3d 969, 979 (9th Cir. 2012) (employee's status as a plan "participant" was substantive element of ERISA claim, not jurisdictional prerequisite). *But see Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 478, 127 S. Ct. 1397, 1411-12, 167 L. Ed. 2d 190 (2007) (requirement that plaintiff, a *qui tam* relator, be an "original source" of information is jurisdictional under the False Claims Act).

[40]*Rivet v. Regions Bank of La.*, 522 U.S. 470, 475, 118 S. Ct. 921, 139 L. Ed. 2d 912 (1998) (whether a claim arises under federal law is determined by the "well-pleaded complaint rule").

[41]*Olguin v. Inspiration Consol. Copper Co.*, 740 F.2d 1468, 1472 (9th Cir. 1984).

[42]*Norris v. AstraZeneca Pharm. L.P.*, No. 12cv0836 JM(BLM), 2012 WL 1944760, at *3 (S.D. Cal. May 30, 2012).

[43]*Id.* The Court also found that diversity jurisdiction did not exist. *Id.* at *2.

[44]*Id.* at *3 (citing *Lippitt v. Raymond James Fin. Servs., Inc.*, 340 F.3d 1033, 1044 (9th Cir. 2003)).

[45]*Id.*

[46]*Franchise Tax Bd. of State of Cal.*, 463 U.S. at 13, 103 S. Ct. at 2848, 77 L. Ed. 2d at 420 (emphasis added).

[47]*Rains v. Criterion Sys., Inc.*, 80 F.3d 339, 341-42 (9th Cir. 1996).

[48]*Id.* at 342.

[49]*Id.*

[50]*Id.*

[51]*Id.* at 344-45.

[52]*Id.*

[53]28 U.S.C. § 1332 (c)(1); H R. Rep. No. 112-10, at 9.

[54]*See Carden v. Arkoma Assocs.*, 494 U.S. 185, 195, 110 S. Ct. 1015, 1021, 108 L. Ed. 2d 157 (1990) (diversity of citizenship in suit by or against noncorporate artificial entity "depends on the citizenship of 'all the members.'" (citation omitted)); *Harvey v. Grey Wolf Drilling Co.*, 542 F.3d 1077, 1080 (5th Cir. 2008) ("All federal appellate courts that have addressed the issue have reached the same conclusion: like limited partnerships and other unincorporated associations or entities, the citizenship of a LLC is determined by the citizenship of all of its members"); 28 U.S.C. § 1391(c) (venue).

[55]28 U.S.C. § 1332(a)(2); H.R. Rep. No. 112-10, at 22. But, citizens of foreign states may appear as additional parties to disputes between citizens of different states. 28 U.S.C. § 1332(a)(3).

[56]*D.B. Zwirn Special Opportunities Fund v. Mehrotra*, 661 F.3d 124, 125-26, 127 (1st Cir. 2011).

[57]*Id.* at 124.

[58]*Id.* at 125.

[59]*Id.*

[60]*Id.*

[61]*Id.*

[62]*Id.* at 125-26.

[63]*Id.* at 126-27.

[64]28 U.S.C. § 1441(c) (2011); *Eastus v. Blue Bell Creameries, L.P.*, 97 F.3d 100, 106 (5th Cir. 1996). Prior to the act, 18 U.S.C. § 1441(c) provided:

> Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

[65]*Jones v. Petty-Ray Geophysical, Geosource Inc.*, 954 F.2d 106 (5th Cir. 1992). If a separate or independent claim or cause of action that is removable is joined with a non-removable claim, the entire case may be removed under § 1441(c) so long as the two claims are part of the same case under Article III of the U.S. Constitution. *In re Wilson Indus., Inc.*, 886 F.2d 93, 95 (5th Cir. 1989). A federal court has no removal jurisdiction over purely state law claims that are filed separately, even if those claims are based upon identical facts to those filed as federal claims in federal court. *See Carpenter v. Wichita Falls Ind. Sch. Dist.*, 44 F.3d 362 (5th Cir. 1995). The Fifth Circuit has held that a court may *not* remand the component state claims that are conclusively deemed to have arisen under *federal law* pursuant to the "state law predominates" standard in § 1441(c). *Poche v. Texas Air Corps, Inc.*, 549 F.3d 999 (5th Cir. 2008).

[66]*See* 28 U.S.C. § 1367(c) (federal court may exercise supplemental jurisdiction "over all claims that are so related to the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.").

[67]*See Salei v. Boardwark Regency Corp.*, 913 F. Supp. 993, 1007 (E.D. Mich. 1996).

[68]28 U.S.C. § 1441(c) (2011).

[69]*See id.* § 1441(c).

[70]*Id.* § 1441(c)(2).

[71]In *Grigsby*, the district court granted a motion to remand, even though the removing defendant stated in the notice of removal that "[c]onsent has been requested and obtained" from the other defendants, because the Fifth Circuit has held that "each served defendant" or "some person or entity purporting to formally act on its behalf in this respect and to have the authority to do so" must timely file a "written indication" that it consents to the removal. 2012 WL 3526903, at *1 (citing *Getty Oil Corp. v. Insurance Co. of N. Am.*, 841 F.2d 1254, 1262 n.11 (5th Cir. 1988)).

[72]*Sawyer v. USAA Ins. Co.*, 839 F. Supp. 2d 1189, 1196, 1208-14, 1224-30 (D.N.M. 2012).

[73]28 U.S.C. § 1390(a). The House Report states the change provides a "general definition" of venue to distinguish it from other provisions of federal law that operate as restrictions on subject matter jurisdiction. H.R. Rep. No. 112-10, at 17. The distinction between venue and subject matter jurisdiction is important because venue can be waived, but federal subject matter jurisdiction cannot be waived.

[74]*Id.*

[75]H.R. Rep. No. 112-10 at 19.

[76]28 U.S.C. § 1391(b)(1), (b)(2), and (c).

[77]It has been observed that the language (venue is proper in any district in which "any defendant is subject to the court's personal jurisdiction *with respect to such action*") is ambiguous. Does the act look for specific personal jurisdiction rather than general jurisdiction? That is, if the test for specific personal jurisdiction over a defendant is met, then it would seem a substantial part of the events giving rise to the claim occurred in the venue and the test would include general jurisdiction as well. *See* Georgene Vairo, *Congress Clarifies Some Removal and Venue Issues*, Nat'l L.J., Mar. 5, 2012, at 22. The act also ends the use of the "local action" rule which required federal courts to borrow state law (certain kinds of actions pertaining to real property may be brought only in the district in which the property is located) as opposed to the "transitory actions" that may be brought in any court with jurisdiction over the dispute and the parties. The "local action" rule had caused problems in suits for damages due to trespass because the district court may not be able to exercise personal jurisdiction over the defendant in the place where the property is located. Under the act, general venue rules apply without regard to whether the action is local or transitory.

[78]28 U.S.C. § 1390(c).

[79]*Id.* § 1391(c)(1).

[80]*Id.* § 1391(c)(2).

[81]The act does not expressly address how to treat an alien illegally residing in the United States who might be treated as domiciled in the state in which he or she resides under § 1391(c)(1) or as a nonresident under § 1391(c)(3).

[82]The act clarifies that transfers of cases from U.S. district courts (Article III courts) to territorial district courts (Article IV courts) are not permissible (such that a case may not be transferred from a district court of the United States to the district courts of Guam, Northern Mariana Islands, or Virgin Islands). *Id.* § 1404(d).