The Federal Courts Jurisdiction and Venue Clarification Act of 2011

What Litigators and Litigants Need To Know

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The Federal Courts Jurisdiction and Venue Clarification Act of 2011, H.R. 394, P.L. 112-63, which took effect on January 6, 2012, makes important amendments to several federal jurisdictional statutes. This jurisdictional overhaul — Congress' first in more than a decade — significantly alters federal practice and procedure in several areas, including removal, citizenship of parties, and venue. Practitioners in the federal courts should be aware of and understand these changes.

Removal and Remand (28 U.S.C. §§ 1441, 1446, 1454)

Arguably, the most significant changes brought about by the Act involve the removal of actions from state to federal court. Among other things, the Act contains an express provision aimed at clarifying the amount of time within which defendants in a multi-defendant action may remove the action to federal court.

Previously, § 1446(b) of Title 28 of the U.S. Code established a 30-day window for removal after receipt by "the defendant," singular, of the initial pleading. In cases involving multiple defendants served on different dates, federal courts had reached differing conclusions as to when the 30-day period began to run for each defendant. Some circuits held that no defendant could remove an action later than 30 days after service of the first-served defendant, while others held that each defendant had 30 days from the date of service on that defendant.

New § 1446(b)(2)(B) resolves the conflict, and takes the latter approach. The statute now provides that each defendant has 30 days from his or her *own* date of service (or receipt of the initial pleading) to seek removal of the action. Subsection (b)(2)(C) allows earlier-served defendants to join in or consent to removal by a later-served defendant.

The Report on the Act by the House of Representatives Committee on the Judiciary, No. 112-10 ("House Report"), states that "[f]airness to later-served defendants, whether they are brought in by the initial complaint or an amended complaint, necessitates that they be given their own opportunity to remove, even if the earlier-served defendants chose not to remove initially. Such an approach does not allow an indefinite period for removal; plaintiffs could still choose to serve all defendants at the outset of the case, thereby requiring all defendants to act within the initial 30-day period."

New § 1446(b)(2)(A) now codifies the well-established "rule of unanimity" for cases involving multiple defendants, which requires that all defendants who have been properly joined and served must join in or consent to removal. The unanimity provision applies only to cases removed exclusively under 28 U.S.C. § 1441(a), and therefore does not apply to class actions.

The Act also eliminates federal courts' discretion to hear unrelated state-law claims in removed actions based on federal-question jurisdiction. Previously, 28 U.S.C. § 1441(c) authorized a defendant to remove the entire case whenever a "separate and independent" federal-question claim was joined with one or more non-removable claims.

The amendment to § 1441(c) still permits removal of the entire case, but now requires the federal district court to sever and remand any state law claims over which it does not have original or supplemental jurisdiction. The House Report notes that "[t]his sever and remand approach is intended to cure any constitutional problems while preserving the defendant's right to remove claims arising under Federal law."

The Act addresses issues relating to uncertainty of the amount in controversy when removal is sought. Where an initial pleading seeks non-monetary relief or state law allows recovery in excess of the amount demanded, new § 1446(c)(2) expressly allows defendant to assert the amount in controversy in the notice of removal. Removal will be permitted if the federal court finds, by a preponderance of evidence, that the amount-in-controversy requirement is satisfied.

The Act clarifies that defendant can use discovery in state court to determine the amount in controversy where it is not established by the initial pleading. Now, a party who receives information in discovery first demonstrating that the amount in controversy is sufficient has 30 days in which to remove the action.

Specifically, new § 1446(c)(3)(A) deems that a statement in response to discovery relating to the amount in controversy is an "other paper" within the meaning of § 1446(b)(3) (previously the second paragraph of § 1446(b)), which provides: "if the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant … of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable."

New § 1446(c)(1) maintains the prohibition against removal of diversity actions more than one year after commencement of the action, but adds a limited exception authorizing district courts to permit such removal if the court finds that plaintiff has acted in bad faith to prevent a defendant from removing the action. The House Report notes that the "inclusion in the new standard of the phrase 'in order to prevent a defendant from removing the action' makes clear that the exception to the bar of removal after one year is limited in scope." However, if a finding is made that plaintiff deliberately failed to disclose the amount in controversy to prevent removal, that failure would be *deemed* to be bad faith for removal purposes under new §1446(c)(3)(B).

—see VENUE CLARIFICATION ACT page 15

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In a final bit of housekeeping, the Act also reorganizes the removal and remand statutes by, among other things: (1) separating the removal statute into civil and criminal statutes; (2) creating a new § 1454 which contains the criminal provisions; (3) revising the heading of §1441 to make clear that it applies only to civil actions; and (4) placing the civil removal provisions that apply exclusively to diversity actions under a separate subheading, new § 1441(b).

Citizenship of Parties for Purposes of Diversity Jurisdiction (28 U.S.C. § 1332)

The Act also makes several changes to diversity jurisdiction under 28 U.S.C. § 1332. For one, it removes the so-called "resident alien proviso" from § 1332(a), which provided that "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 intent of the proviso was to *limit* federal court jurisdiction by precluding diversity jurisdiction in cases between United States citizens and resident aliens domiciled in the same state, where the risk of bias was perceived to be low.

However, the proviso had the unintended consequence of expanding federal court jurisdiction in other settings. For instance, the proviso would deem resident aliens from different states to be citizens of their respective states of domicile, allowing them to claim access to the federal courts in a suit between them. To remedy this situation, the Act removes the resident alien proviso and simply amends § 1332(a)(2) to provide that federal courts have no diversity jurisdiction between a citizen of a state and a citizen or subject of a foreign state who is domiciled in the same state. This satisfies the initial intent of the proviso while avoiding its unintended consequences.

The Act further clarifies that corporations, foreign and domestic, are citizens both of their place of incorporation and their principal place of business. Previously, some courts had treated a U.S. corporation with its principal place of business abroad as a citizen only of its place of incorporation. The Act adds the words "foreign state" in two places in § 1332(c)(1), resulting in a denial of diversity jurisdiction where: (1) a foreign corporation with its principal place of business in a state sues or is sued by a citizen of that same state; and (2) a citizen of a foreign country sues a U.S. corporation with its principal place of business abroad.

New § 1332(c)(1) also clarifies that in the case of direct actions against insurance companies, the insurer is deemed a citizen of every state and foreign state in which its insured is a citizen for diversity purposes, in addition to the insurer's place of incorporation and principal place of business.

Venue and Transfer Improvements (28 U.S.C. §§ 1390, 1391, 1392, 1404)
New Venue Provisions

New § 1391(b) refines the venue rules applicable to civil actions generally, and unifies the heretofore disparate approaches to venue in diversity versus federal-question cases. Previously, the wording of the venue statute allowed a plaintiff to sue multiple defendants in a district in which any defendant resided, so long as all defendants resided in the same state. Literally applied, if one defendant was a corporation with residences in multiple states, venue was proper in any district in which the corporate-defendant resided regardless of whether that district was located in the state of common residence.

Subsection 1391(b)(1) continues to allow for cases to be brought in a judicial district in which any defendant resides, but now limits venue in multiple-defendant cases to a district of the state where all defendants reside. Subsection 1391(b)(3) also eliminates the difference in the fallback venue provisions between diversity and federal-question claims, providing that *any* civil action may now be brought in a judicial district in which a defendant is subject to the court's personal jurisdiction, provided there is no other district in which the action could be brought.

The Act ends use of the "local action" rule, which provided that certain kinds of actions pertaining to real property could be brought *only* in the district in which the property was located. New § 1391(a)(2) now provides that "the proper venue for a civil action shall be determined without regard to whether the action is local or transitory in nature."

Subsection 1391(c)(1) resolves a split in the circuits over whether the residence of a natural person is the same as her "domicile." It answers the question in the affirmative.

Subsection 1391(c)(2) clarifies that, for venue purposes, not just corporations but *any* entity that has the right to sue and be sued in its common name, if a defendant, is deemed to be a resident in any judicial district in which it is subject to the court's personal jurisdiction. If a plaintiff, the entity is deemed to reside only in the judicial district in which the entity maintains its principal place of business.

Subsection 1391(c)(3) clarifies that, for defendants residing outside the U.S., whether a U.S. or foreign citizen (but not including permanent resident aliens with a domicile in the U.S), venue is proper in *any* judicial district. The Act thus focuses on residency in the U.S., not on alienage, and restricts both aliens *and* United States citizens domiciled abroad from claiming a venue defense to the location of the litigation. Litigants could still object to personal jurisdiction, however.

Finally, the second clause of § 1391(c)(3) makes clear that defendants who reside outside the U.S. shall be disregarded for purposes of determining the appropriate place for bringing an action as to resident defendants.

New Transfer Provision

Previously, 28 U.S.C. § 1404(a) allowed transfer of a case to a new district for the convenience of parties and witnesses and in the interest of justice, but limited the transfer to a district where the case could originally have been brought. Subsection 1404(a) now removes this latter restriction so long as all parties consent to the transfer. Thus, a case may now be transferred to a district to which all parties consent – whether or not the case could originally have been brought there – for the convenience of the parties and witnesses and in the interest of justice.

These are just some of the changes created by the Act. For a complete catalogue of the changes occasioned by the new law, see the full text of H.R. 394, P.L. 112-63.

Long-Arm *continued from page 1*

sufficient contacts with Maine for the exercise of personal jurisdiction." The single transaction here and alleged statement regarding the tax returns sufficed even though he did not enter into Maine to provide accounting and tax services.

Because it found the first two requirements were not met, the trial court did not reach the third. Accordingly, the case was remanded to the trial court, which may conduct an evidentiary hearing, to determine whether it is reasonable to require Benoit to defend this action in Maine.

Thomas F. Hallett argued the case for Fore, LLC and Edward S. MacColl argued for Benoit. Efforts to reach them for comment on the case were not successful by the time this article was submitted for publication. Hallet practices with The Hallett Law Firm in Portland. MacColl practices with Thompson, Bull, Furey, Bass & MacColl in Portland.

A summary of the decision in *Fore, LLC v. Benoit*, MLR # 114-12, appears in this issue on p. 3.

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Consortium *continued from page 1*

the probate code and the Family Medical Leave Act to include domestic partners. But the Legislature has not changed the loss of consortium statute."

Pitney said her personal opinion is that the law on loss of consortium will change to include domestic partners, it will just require action by the Legislature.

"I think that's why they challenged it," Veilleux said, "just to see if there would be any analysis by the judge that might open the door for this type of claim."

The decision in *Gribizis et al. v. Cray et al.*, MLR/SC#122-12, is summarized in this issue on page 5.

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