

Client Alert.

January 6, 2012

Beginning Today, New Removal and Venue Rules Improve Defendants' Access to Federal Courts

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Today, a number of important but unheralded changes to the landscape of federal jurisdiction take effect. These changes are part of the Federal Courts Jurisdiction and Venue Clarification Act of 2011, H.R. 394, P.L. 112-63 (the "Act"), signed into law by President Obama on December 7, 2011. Focusing on the removal and venue statutes, the Act clarifies many aspects of the jurisdictional inquiry and improves defendants' access to federal courts. The far-reaching new law applies to any action "commenced" after today. Highlights of the law include:

1) The rule of unanimity is codified. The Act codifies the common law "rule of unanimity" for removal in cases involving multiple defendants. Under the new rule, every defendant who has been properly joined and served in an action must consent to removal. 28 U.S.C. § 1446(b)(2)(A).

2) Each defendant now has 30 days to remove. The Act also adds a provision clarifying that each defendant will have 30 days from receipt or service of the initial pleadings to remove an action. 28 U.S.C. § 1446(b)(2)(B). Previously, circuit courts had been split on when the 30-day period for removal begins to run. This new rule allows an earlier-served defendant to join in the removal of a later-served defendant, even if the earlier-served defendant's 30-day period has already lapsed. This rule provides equal treatment for all defendants in their ability to obtain federal jurisdiction.

3) The one-year limit on removal in diversity cases contains a "bad faith" exception. The old rules prohibited removal of a diversity case more than one year after filing. While some courts viewed the one-year limit as an absolute bar to jurisdiction, others held that the time limit was subject to equitable tolling where a plaintiff tried to thwart removal. The Act resolves this issue by providing that a court may allow removal on diversity grounds after one year if the court "finds that the plaintiff has acted in bad faith in order to prevent a defendant from removing the action." 28 U.S.C. § 1446(c)(1). A plaintiff's deliberate failure "to disclose the actual amount in controversy to prevent removal" constitutes bad faith under this exception. 28 U.S.C. § 1446(c)(3)(B).

4) Courts have more guidance for resolving uncertainties in the amount in controversy. The Act also provides several clarifications to the rules regarding removal in diversity cases where the amount in controversy is uncertain. First, the new law clarifies that, where a complaint seeks either nonmonetary relief or "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," the defendant may assert the amount in controversy in the notice of removal. 28 U.S.C. § 1446(c)(2)(A). Second, if discovery or records in the state court proceeding reveal that the amount in controversy exceeds the threshold requirement, the new law allows a defendant to remove within 30 days after this information is revealed. 28 U.S.C. §§ 1446(b)(3), (c)(3)(A). Third, the new law adopts a "preponderance of the evidence" standard, making clear that a defendant need not prove the amount in controversy to a "legal certainty." 28 U.S.C. § 1446(c)(2)(B). These changes codify certain common-law practices and allow courts to make more informed decisions regarding amounts in controversy.

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5) Unrelated state law claims do not prevent federal question removal. The Act amends the removal standard in cases containing both federal and state law claims. Under the old law, where a case included a “separate and independent” federal law claim and an “otherwise non-removable” state law claim, the action was removable and the court could choose to retain the entire case or to “remand all matters in which State law predominates.” Some courts expressed concern that this provision allowed federal courts to decide claims over which they did not have original or supplemental jurisdiction. Other courts chose to remand the entire case when the complaint contained both federal and unrelated state law claims, thus preventing access to federal courts for federal claims. To address these issues, the new law clearly gives defendants the right to remove when the complaint contains both types of claims. Federal courts are now directed to allow removal, but to sever and remand any unrelated state claim (“a claim not within the original or supplemental jurisdiction of the district court or a claim that has been made non-removable by statute”). 28 U.S.C. § 1441(c)(2).

6) Venue change by consent is now possible. The Act significantly expands the options for a venue transfer. Under the new rules, in the interests of justice and for the convenience of the parties and witnesses, a court may transfer a case not only to a district where the case “might have been brought”—which was all that the old rules authorized—but also “to any district or division to which all parties have consented.” 28 U.S.C. § 1404(a). The authority to transfer based on consent appears to apply both to ordinary litigation as well as to cases consolidated for pretrial proceedings by the Judicial Panel on Multidistrict Litigation.

CONCLUSION

While the removal process remains highly technical, the Act simplifies it by clarifying which cases may be removed. The Act also expands defendants’ access to federal courts, and improves all parties’ ability to litigate in a convenient forum. These are welcome changes for corporate defendants who seek the benefits of litigating in the federal system. Furthermore, the Act allows parties to avoid some of the litigation costs caused by ambiguities in the removal and venue statutes, which often must be addressed at the beginning of a case, and instead to focus on the true merits of the action.

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