

The Route to Federal Court Clarified

Congress Amends Removal Statutes

By John E. Goodman

An oft-recurring task for counsel (both inside and outside) is analyzing whether a new lawsuit filed in state court can properly be removed to federal court, or whether the client (often an out-of-state company) must be left to the tender mercies of the state forum. The passage by Congress of the Federal Courts Jurisdiction and Venue Clarification Act of 2011 (the JVCA or the Act) doesn't open the door to the federal courthouse a great deal wider, as the Class Action Fairness Act did. Nonetheless, the points of law settled by the JVCA may provide defendants with removal opportunities that they didn't have formerly, at least in some circuits. Further, in supplying uniform rules on a number of removal issues, the Act brings a measure of predictability to removal practice, which alone makes the statute significant.

The JVCA was signed into law on Dec. 7, 2011, and became effective on Jan. 6, 2012, applying to all cases removed to federal court on or after that date. While the statute also deals with jurisdiction, venue and transfer

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rules in the federal courts, this article focuses on the statute's most significant changes, those affecting removal from state to federal court. The most salient points of the Act as affecting removal are summarized below.

TIMING IN CASES WITH MULTIPLE DEFENDANTS

Your client is sued in a case in which there is complete diversity, and the amount in controversy is satisfied. However, your client is served later than its co-defendant, which has not availed itself of the right to remove within 30 days of its being joined and served. Prior to the JVCA, at least in some circuits, your right to remove would have been lost by your co-defendant's waiver of the right to remove (under the so-called "first-served defendant" rule); some circuits began counting the 30-day removal deadline from the date of service of the first defendant (the "last-served defendant" rule). As of the passage of the JVCA, there was a square split in the circuits on this point, with the Fourth and Fifth following the first-served defendant rule, and the Eighth, Ninth and Eleventh following the last-served defendant rule. With the passage of the Act, modifying 28 U.S.C. § 1446(b), now each defendant gets a full 30 days from the time of service to remove. If an earlier-served defendant misses the deadline, it may still consent to a later-served defendant's removal of the case. The new provision also eliminates the ability of a plaintiff to later add a diverse defendant to a suit that wasn't initially

removed, knowing that the case would remain in state court. This provision of the Act also codifies the long-standing judge-made rule that all defendants must consent to removal, often referred to as the "rule of unanimity."

"Bad faith" exception to one-year bar on diversity removals 28 U.S.C. § 1446(b) formerly provided that no case could be removed on the basis of diversity jurisdiction more than one year after commencement of the action. A not infrequent situation in the removal context has been the purposeful limitation of damages by a plaintiff in a complaint to below the jurisdictional minimum, then removing that limitation after the passage of a year. The defendant could thus believe itself to be defending, for example, a \$50,000 case only to find, after passage of a year, that the case is now claimed to be worth a great deal more. Similarly, changes of parties after one year — the voluntary dismissal by plaintiff of a diversity-destroyed local defendant, for example — have been used in order to defeat removal to federal court. The Act attempts to deal with such "hide the ball" situations, and now provides that if the plaintiff has acted in bad faith so as to frustrate the defendant's removal right, the one-year bar does not apply. 28 U.S.C. § 1446(c)(1). This "bad faith" exception also now applies to all amount in controversy issues. 28 U.S.C. § 1446(c)(3)(B).

The Act does not provide guidance on what constitutes "bad faith," though the House Report on the Act states that "[t]

he 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." Decisions dealing with the issue of equitable exceptions to the one-year bar prior to the JVCA are in disarray as to whether a plaintiff's (or plaintiff's attorney's) subjective motivation is relevant. Nor has a uniform standard emerged in the cases which allowed for equitable tolling of the one-year bar. Given Congress' apparent intent to not allow manipulative tactics to defeat a defendant's right to a federal forum, however, counsel should be particularly attuned to the voluntary dismissal of in-state defendants or the increasing of the amount claimed after the case has been pending for a year. It is also advisable to attempt to pin a plaintiff down through discovery as to the amounts being sought early on in the litigation; efforts to "move the goal posts" later may well give the defendant grounds to remove successfully.

AMOUNT IN CONTROVERSY CHANGES

Defendants should now have an easier time demonstrating the amount in controversy for diversity removals. If the complaint demands in excess of \$75,000, the amount in controversy requirement is satisfied. If the complaint does not demand a specific sum, a removing defendant may assert an amount in controversy in the notice of removal. The district court will evaluate the amount in controversy using a "preponderance of the evidence" standard. Even if the amount claimed in plaintiff's complaint is lower than the jurisdictional minimum, the defendant may still assert a higher amount in the notice of removal, so long as the governing state law would allow for a recovery in excess of the amount demanded.

These changes do not shift from the defendant the burden of proving that more than \$75,000 is at stake in a diversity case. But they do allow the defendant, in a proper case, to show that the amount involved is really greater than the amount claimed in the complaint, so long as the defendant can demonstrate that by the weight of the evidence. In many circuits, a plaintiff's claimed amount was formerly, as a

practical matter, dispositive of the issue. In the Ninth and Eleventh Circuits, for example, the law prior to the JVCA was that a removing defendant had to show that it was clear to a "legal certainty" that more than the jurisdictional minimum was involved if a plaintiff claimed less than that minimum. To meet the "legal certainty" test in those jurisdictions meant the defendant had to show that an award lower than the jurisdictional amount would be "below the range of legally permissible awards," an almost impossible standard to satisfy in most cases. Under the Act, however, it is now no longer enough for the plaintiff simply to state that he is seeking \$74,999, and thereby avoid federal court.

It seems likely that the Act thus answers the question of whether a plaintiff may elect to forego part of the damages to which he might be entitled, in order to secure a state court forum. A not insubstantial body of law emanating from Supreme Court decisions held that he could. In practice, such limitations often are made both in state court complaints or petitions, and in stipulations or affidavits filed in federal court to obtain remand. By allowing a removing defendant to prove that state law would allow for a recovery in excess of the jurisdictional minimum — without regard to what a plaintiff in fact is claiming — Congress appears to have overruled the law that left the plaintiff free to claim less than his claim might objectively be worth. This is significant, particularly in those states that have adopted some version of Federal Rule 54(c), which provides that every judgment should grant the relief to which a party is entitled, without regard to what that party has sought in its pleadings. Certainly, under the JVCA, counsel should not be deterred from exploring the prospect of removal to federal court of a diversity case by the fact that plaintiff may claiming less than \$75,000 in his complaint.

'SEPARATE AND INDEPENDENT CLAIM' REMOVALS

The Act modifies 28 U.S.C. § 1441(c), to make clear that federal claims, when joined with nonremovable

state claims, may be removed and will be adjudicated in a federal forum. Section 1441(c) provides that a case can be removed when it contains a "separate and independent" federal claim joined with one or more nonremovable claims; the statute formerly provided that, after removal, the district court could either retain the whole case, or remand all matters in which state law predominated. This wording led many courts to conclude that it was permissible to remand the entire case — even the federal claims. The Act cures this problem by clarifying that the district court may sever and remand the nonremovable claim or claims and remand them to state court, but must keep the federal claim.

While the JVCA does not change the jurisdictional requirements for removal, and the basic removal procedures are left largely unchanged, the Act does in-house and outside counsel a service by settling removal issues that often varied by circuit, including the first-or-last-served defendant rule, the standard for measuring the amount in controversy, and the permissibility of exceptions to the one-year bar.