

Out With The Old, In With The New: The JVCA Changes Rules Governing Removal, Jurisdiction and Venue

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The Federal Courts Jurisdiction and Venue Clarification Act of 2011 (JVCA), P.L. 112-63, took effect in January 2012. With it comes clarification of – and, for the most part, welcomed changes to – statutes governing removal, jurisdiction and venue in federal court. As explained below, the end result should be broader and easier access to federal courts for most domestic defendants.

Removal – Section 1446

The JVCA's amendments to 28 U.S.C. § 1446 address many of the problems defendants historically have had in removing actions to federal court, in particular the problems surrounding the timing of removal and establishing the requisite amount in controversy.

- > **The “Last Served Defendant” Rule.** The JVCA amends Section 1446 to resolve a longstanding circuit split over the timing of removal in multi-defendant cases. The prior version of Section 1446 required that notice of removal be filed within 30 days after service on “the defendant,” and was unclear as to when the 30 days should begin to run if multiple defendants were served on different dates, *i.e.*, whether it should run when the first defendant or the last defendant was served. The JVCA removes this trap for the unwary by codifying the “last served defendant” majority rule and rejecting the “first served defendant” minority rule under which plaintiffs in some circuits could avoid federal court simply by serving sophisticated defendants more than 30 days after others. *See* 28 U.S.C. § 1446(b)(2)(B).
- > **The Unanimity Requirement.** The JVCA formally codifies the longstanding unanimity requirement, which requires that all named and served defendants join in or consent to the removal. *See id.* § 1446(b)(2)(A). To reconcile this requirement with the codification of the last served defendant rule, *see supra*, the JVCA provides that “[i]f defendants are served at different times, and a later-served defendant files a notice of removal, any earlier-served defendant may consent to the removal even though that earlier-served defendant did not previously initiate or consent to removal.” *Id.* § 1446(b)(2)(C).

- > **The One-Year Limit on Removal.** The JVCA creates an exception to the traditional one-year limit on diversity jurisdiction removals. Under the prior version of Section 1446, defendants could not remove an action more than one year after it was commenced, even if in its initial form the action was not removable – a rule that encouraged plaintiffs to conceal the amount in controversy until after the year expired. The JVCA remedies this problem by allowing removal if the plaintiff acted in bad faith to prevent removal, for example by failing to disclose the amount in controversy in discovery or otherwise. *See id.* § 1446(c)(1), (c)(3)(B). (The one-year limitation continues to be inapplicable to federal question removals pursuant to Section 1446(c)(1) and to all class action removals pursuant to Section 1453(b).)
- > **The Burden of Proof.** The JVCA provides guidance regarding the burden of proof that applies to establishing the jurisdictional amount in controversy, the answer to which had varied from circuit to circuit, particularly in putative class actions removed pursuant to the Class Action Fairness Act. *See, e.g., Lowery v. Ala. Power Co.*, 483 F. 3d 1184, 1211 (11th Cir. 2007) (Tjoflat, J.) (dicta) (suggesting that amount in controversy will be met if it “is either stated clearly on the face of the documents before the court or readily deducible from them.”). The JVCA amends § 1446 by expressly allowing defendants to state in notices of removal that the amount in controversy is satisfied, and by expressly requiring courts to exercise their jurisdiction so long as the amount in controversy can be established by a preponderance of the evidence. *See* 28 U.S.C. § 1446(c)(2)(B). This language anticipates some amount of jurisdictional discovery may be conducted after removal, which is consistent with prior practice in most courts as well as the legislative history of the Class Action Fairness Act.
- > **Jurisdictional Discovery.** The JVCA amends Section 1446 to clarify that discovery in state court can be used to establish jurisdiction in federal court, in particular the jurisdictional amount in controversy. Under the amendment, if a discovery response or state court filing indicates that the amount in controversy is satisfied, the defendant may remove the action within 30 days of that date. *See id.* § 1446(c)(3)(A). This amendment is moderated, however, by the general one year limitation discussed above. Thus, if a defendant receives discovery indicating that the amount in controversy is satisfied more than a year after a diversity action was commenced, it cannot, absent bad faith by the plaintiff, remove the action.

Jurisdiction – Sections 1332 and 1441

The JVCA’s amendments to 28 U.S.C. §§ 1332 and 1441 operate to limit federal jurisdiction. For the most part, these amendments are only applicable in cases removed by aliens or removed due to federal question jurisdiction. Actions removed by domestic defendants on the basis of diversity jurisdiction should be unaffected by them.

- > **Supplemental Jurisdiction.** The JVCA amends the supplemental jurisdiction provisions of Section 1441. As amended, Section 1441 eliminates federal courts' discretion to hear unrelated state-law claims in cases that are removed on the basis of federal question jurisdiction. The amendment requires courts to sever and remand such claims that fall outside of its supplemental jurisdiction, whereas the prior version of Section 1441 gave courts discretion to hear such claims. *See id.* § 1441(c).
- > **Alien Citizenship.** The JVCA amends Section 1332 by eliminating the provision 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." As a result, resident aliens will no longer be considered U.S. citizens for purposes of diversity jurisdiction, thus eliminating the possibility of diversity jurisdiction in lawsuits between two resident alien litigants domiciled in different states. *See id.* § 1332(a). The JVCA also states that diversity jurisdiction is permissible "between citizens of a State and citizens or subjects of a foreign state, except that the district courts shall not have original jurisdiction under this subsection of 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." *Id.* § 1332(a)(2). This prevents adverse parties domiciled in the same state from using alienage jurisdiction to gain access to federal courts.
- > **Corporate Citizenship.** The JVCA also affects the citizenship of corporations and insurance companies with significant foreign operations. Specifically, new Section 1332(c) states that such corporations are to be considered citizens of both the state or foreign state in which they are incorporated and any other state, including any foreign state, where they maintain their principal place of business. Thus, diversity jurisdiction will not be found to exist when a foreign corporation with its principal place of business in a state sues or is sued by a citizen of that same state or where a citizen of a foreign country (alien) sues a domestic corporation with its principal place of business abroad.

Venue – Sections 1390, 1391, and 1404

The JVCA's amendments to 28 U.S.C. §§ 1390, 1391 and 1404 provide helpful definitions for terms with which courts have struggled, and allow for greater flexibility in transferring venue from one district to another.

- > **Change in Venue.** The JVCA amends Section 1404 by permitting parties to stipulate to the transfer of an action to a district in which the action could not have originally been brought. *See id.* § 1404(a). Under the prior version of Section 1404, actions could only be transferred to courts in which they could have been brought originally. Courts interpreted this requirement as meaning that personal jurisdiction must exist in the transferee court, and venue must have been proper there as well. The JVCA changes Section 1404 by explicitly permitting actions to be transferred to any district to which all parties have consented, even if the action could not have been brought there. *Id.*

- > **“Venue” and “Residence” Defined.** The JVCA provides a general definition of venue, distinguishes venue from subject matter jurisdiction, and states that the venue provisions do not apply to admiralty or maritime claims and do not determine the proper venue for a case that has been removed to federal court. *See id.* § 1390(a)-(c). It also codifies a definition of the term “residence,” which is one of the determining factors for venue in suits against natural persons. *See* 28 U.S.C. § 1391(b)(1). Because that term had been interpreted inconsistently, the JVCA clarifies that, for venue purposes, “a natural person, . . . shall be deemed to reside in the judicial district in which that person is domiciled.” *Id.* § 1391(c)(1). The JVCA also defines residency for incorporated and unincorporated entities, which for defendants is now any judicial district in which the defendant is subject to personal jurisdiction, and for plaintiffs is the judicial district in which the entity maintains its principal place of business. *See id.* § 1391(c)(2).

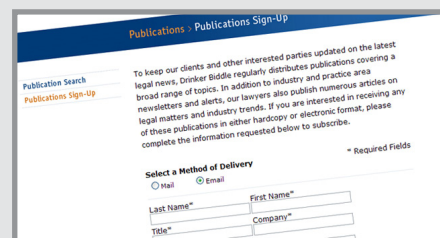
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