



# SIGNIFICANT CHANGES TO THE FEDERAL JURISDICTIONAL STATUTES EFFECTIVE JANUARY 6, 2012

The Federal Courts Jurisdiction and Venue Clarification Act of 2011, H.R. 394, P.L. 112-63 (the “JVCA”), took effect with relatively little fanfare on January 6, 2012. Although the JVCA has not garnered much attention, it amended important sections of Title 28 of the United States Code concerning the removal to federal court of lawsuits initially commenced in state court, venue, and diversity jurisdiction.<sup>1</sup> The JVCA was passed by unanimous consent in both chambers of Congress and applies to cases commenced on or after its effective date. For removed cases, the JVCA applies if the action was commenced in state court on or after the effective date. This *Commentary* briefly summarizes certain aspects of the JVCA of particular interest to litigants and litigators, with a prevailing focus on the provisions concerning civil case removal.<sup>2</sup>

## TIMING FOR REMOVAL OF CASES INVOLVING MULTIPLE DEFENDANTS

One significant element of the JVCA is a provision that resolved a conflict among federal courts concerning the commencement of the statutory 30-day deadline for removal, codified at 28 U.S.C. § 1446, in cases where multiple defendants are served over an extended time period. The previous version of § 1446(b) specified a 30-day period for “the defendant” to remove the lawsuit but did not address cases involving multiple defendants.

New § 1446(b)(2)(B) provides that “[e]ach defendant shall have 30 days after receipt by or service on that defendant of the initial pleading or summons . . . to file the notice of removal.” That provision abrogated the “first-served” minority rule pursuant to which the 30-day removal period commenced when the

first defendant was served, and the first-served defendant and all then-served defendants were required to join in the notice of removal within 30 days. In *Getty Oil Corp. v. Ins. Co. of N. Am.*, for example, the Fifth Circuit concluded that:

[i]t follows that since all served defendants must join in the petition, and since the petition must be submitted within thirty days of service on the first defendant, all served defendants must join in the petition no later than thirty days from the day on which the first defendant was served.

841 F.2d 1254, 1263 (5th Cir. 1988). The House of Representatives Report of the Committee on the Judiciary, No. 112-10 (the “House Report”), explains that the JVCA rejected the minority “first-served” rule because “[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.” House Report at 14.<sup>3</sup>

Litigants and litigators should be mindful that, although the new and the former versions of § 1446(b) both describe “receipt” of the initial pleading “through service or otherwise” as sufficient to trigger the 30-day removal period codified in that section, there is no indication in the JVCA that Congress intended to abrogate *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344 (1999). In that decision, the Supreme Court held that “a named defendant’s time to remove is triggered by simultaneous service of the summons and complaint, or receipt of the complaint, ‘through service or otherwise,’ after and apart from service of the summons, *but not by mere receipt of the complaint unattended by any formal service.*” 526 U.S. at 347 (emphasis supplied). Accordingly, formal service remains the necessary trigger to commence the 30-day removal period applicable to each defendant.

## **CODIFICATION OF THE REQUIREMENT THAT ALL DEFENDANTS JOIN IN OR CONSENT TO REMOVAL**

The JVCA codified the “rule of unanimity” first established by the Supreme Court more than 110 years ago in *Chi., Rock Island & Pac. Ry. Co. v. Martin*, 178 U.S. 245 (1900). That rule

requires all defendants “properly joined and served” to join in or consent to removal. The new statutory provision, codified at 28 U.S.C. § 1446(b)(2)(A), applies only to removal under § 1441(a) and does not modify other statutes permitting removal. The Class Action Fairness Act (“CAFA”) removal provision, for example, codified at § 1453(b), authorizes removal of certain class action suits even without the consent of all defendants.

The fact that an earlier-served defendant could no longer itself remove a case because of the 30-day limitation period does not prohibit that defendant from joining in or consenting to a timely removal by a later-served codefendant. New § 1446(b)(2)(C) permits such an earlier-served defendant to join in or consent to removal. Any different rule, of course, would negate the JVCA’s abrogation of the “first-served” rule, because it would make it impossible for later-served defendants to satisfy the rule of unanimity by prohibiting earlier-served defendants from joining in or consenting to removal.

## **REMOVAL ON FEDERAL-QUESTION GROUNDS**

For federal-question removal cases, the JVCA revised the “separate and independent claim or cause of action” provision previously codified at 28 U.S.C. § 1441(c). That provision vested federal district courts with discretion to retain or remand “all matters in which State law predominates” in connection with a case removed on federal-question grounds. Some federal district courts and commentators previously raised concerns regarding the constitutionality of that provision, which purported to permit federal district courts to hear state law claims for which federal courts otherwise lacked jurisdiction. Pursuant to new § 1441(c)(2), the inclusion of unrelated and otherwise nonremovable state law claims does not defeat federal-question removal, but those unrelated state law claims must be subsequently severed and remanded if they are not within the original or supplemental jurisdiction of the federal district court.

The House Report explains that “[t]his section of the bill is intended to make changes to better serve the purpose for which the statute was originally designed, namely to provide a Federal forum for the resolution of Federal claims that fall within the original jurisdiction of the Federal courts,” and that

the “sever-and-remand approach is intended to cure any constitutional problems while preserving the defendant’s right to remove claims arising under Federal law.” House Report at 12. There is no suggestion that this new restriction implicates federal district courts’ supplemental jurisdiction concerning “related” claims pursuant to 28 U.S.C. § 1367. In addition, pursuant to new § 1441(c)(2), only the parties named as defendants in connection with the federal law claims need join in or consent to removal; it is not necessary for defendants named only in connection with unrelated and otherwise nonremovable state law claims to join in or consent.

## REMOVAL ON DIVERSITY-OF-CITIZENSHIP GROUNDS

As amended by the JVCA, all of the statutory provisions uniquely applicable to the procedure for removal based on diversity-of-citizenship jurisdiction are now contained in § 1446(c).

One addition in this regard is a “bad faith” exception to the statutory prohibition concerning removal of a diversity case more than one year after commencement of the action, set forth in the amended version of § 1446(c)(1). (Note that the one-year limitation period does not apply to cases removed pursuant to CAFA. See 28 U.S.C. § 1453(b).) The amended version of § 1446(c)(1) provides that:

[a] case may not be removed under subsection (b)(3) on the basis of jurisdiction conferred by section 1332 more than 1 year after commencement of the action, unless the district court finds that the plaintiff has acted in bad faith in order to prevent a defendant from removing the action.

One example of conduct perhaps invoking this bad-faith provision is a case in which a plaintiff includes a nondiverse defendant for the purpose of precluding removal on diversity grounds and later dismisses that party after expiration of the one-year removal limitation period.

The JVCA also resolved several issues concerning determination of the amount in controversy for the purpose of diversity jurisdiction removals. Under new § 1446(c)(3)(A), if a case

is not removable on the basis of the amount in controversy alleged in the initial pleading, a defendant may later remove the case within 30 days of first learning through discovery or otherwise that the jurisdictional amount is in fact satisfied, notwithstanding whether the initial 30-day post-service removal deadline has expired. In addition, the otherwise applicable one-year removal deadline is excused pursuant to new § 1446(c)(3)(B) in instances where the court finds that the plaintiff “deliberately failed to disclose the actual amount in controversy to prevent removal.”

Pursuant to new § 1446(c)(2)(A), in cases where state practice does not permit a specific monetary demand, where recovery may be in excess of the demand, or where the plaintiff seeks only nonmonetary relief, defendants are now authorized, in their removal notice, to allege the amount in controversy. Finally, pursuant to new § 1446(c)(2)(B), the JVCA adopted the majority view requiring the defendant to show the amount in controversy by a preponderance of the evidence. This provision refers only to § 1332(a) diversity jurisdiction cases and does not apply to the amount-in-controversy provision applicable under CAFA, codified at 28 U.S.C. § 1332(d).

## OTHER POTENTIALLY SIGNIFICANT CHANGES ENACTED IN CONNECTION WITH THE JVCA

The JVCA also revised the general federal venue statute, 28 U.S.C. §§ 1391–1413. Among other changes, new § 1391(c) resolved the circuit split on the question of residency for the purposes of venue, adopting the majority standard that residency is a natural person’s state of domicile, the same standard used in citizenship determinations for diversity jurisdiction purposes. The amended version of § 1404(a) provides for transfer of venue to “any district or division to which all parties have consented,” even if the action could not have been originally brought in that district or division. The JVCA also clarified that resident aliens are not considered to be citizens for the purpose of diversity jurisdiction. Accordingly, there is no federal court diversity jurisdiction in connection with a lawsuit between two resident alien litigants domiciled in different states. Finally, the JVCA confirmed that all corporations (foreign and domestic) are considered to be citizens of both the place of their incorporation and their principal place of business.

The JVCA has clarified the rules concerning case removal to provide national uniformity. These new rules are now in effect to guide decisions on removal and venue.

## LAWYER CONTACTS

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at [www.jonesday.com](http://www.jonesday.com).

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## ENDNOTES

- 1 A copy of the JVCA is available at <http://www.gpo.gov/fdsys/pkg/BILLS-112hr394enr/pdf/BILLS-112hr394enr.pdf> (both web sites herein last visited January 12, 2012).
- 2 The particular focus of this *Commentary* is civil litigation. It should be noted, however, that the JVCA separated the removal provisions concerning civil and criminal proceedings, which were both previously codified in § 1446, into two separate statutory sections. The section applicable to civil actions remains § 1446. New § 1454 codifies the provisions applicable to criminal proceedings.
- 3 A copy of the House Report, which provides, among other things, a section-by-section explanation of the JVCA and a comparison indicating the textual revisions to Title 28 enacted in connection with the JVCA, is available at <http://www.gpo.gov/fdsys/pkg/CRPT-112hrpt10/pdf/CRPT-112hrpt10.pdf>.