

The Recorder

January 27, 2012

New Way of Doing Jurisdiction

Federal legislation alters the rules of civil procedure with regard to removal, venue and citizenship, explains Robert D. Rose of Sheppard Mullin.

Robert D. Rose

The Federal Courts Jurisdiction and Venue Clarification Act of 2011 became effective on Jan. 6 for all cases filed in state (for removal purposes) or federal courts. Some commentators call it the most sweeping package of revisions to the judicial code in the past 20 years. The [amendments](#) deal primarily with jurisdiction and venue.

REMOVAL

The act amended the removal procedures: Title 28, §§1441 and 1446. It completely rewrote §1441(b), reorganized several sections and created a new section in Title 28 for removal of criminal cases. The act changed removal procedures in civil cases in four ways:

1. A circuit split has been resolved as to the timing of removal in cases with multiple defendants. The previous version of §1446 required removal "within 30 days after the service of summons upon the defendant." Courts disagreed as to its meaning when a case involved multiple defendants who were served at different times. Some held that a removal notice must be filed within 30 days of the time that the first defendant was served. Others gave all defendants, including defendants served later, the full 30 days to remove a case to federal court. The act resolves the split and adopts the more lenient view: "each defendant shall have 30 days after receipt of service on that defendant ... to file the notice of removal."

2. There are new procedures for establishing the amount in controversy necessary for diversity jurisdiction. Except in certain circumstances, the amount "demanded in good faith in the initial pleading shall be deemed to the amount in controversy." (New §1446(c)). A notice of removal may establish the amount if the "initial pleading seeks (1) nonmonetary relief; or (2) 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." Note that deleted from the final version of the act were provisions that would have allowed a plaintiff to avoid removal based on diversity by filing a declaration reducing the amount in controversy below the minimum specified in §1332(a).

The burden of proof for the defendant in determining the amount in controversy is a preponderance of evidence. (New) §1446(c)(2)(B). And information collected during state court discovery may be used to support removal, even if removal is inappropriate based on the initial pleading. (New) §1446(c)(3)(A).

These changes specifically are inapplicable to disputes arising under the Class Action Fairness Act. See §1332(d).

3. It remains true that a notice of removal based on diversity jurisdiction must be filed no later than one year after the action is begun. Now, a defendant may avoid the one-year bar by demonstrating that the "plaintiff has acted in bad faith in order to prevent a defendant from removing the action." One example of bad faith is where "the district court finds that the plaintiff deliberately failed to disclose the actual amount of the controversy to prevent removal."

4. The act eliminated a federal court's discretion to hear state-law claims asserted in a case removed on the basis of federal question jurisdiction. The new §1441 requires the district court to sever and remand all state-law claims. The sever-and-remand provisions apply only to "separate and independent" state-law claims. Thus, the federal court's supplemental jurisdiction under 28 U.S.C. §1367 — to hear state-law claims that form part of the same case or controversy as the federal-law claims — is probably unchanged by the amendment.

5. Lastly, the judicially crafted rule that all defendants in an action (except those statutorily excepted) must consent to removal of a case in order to establish federal court jurisdiction is now codified in §1446(2)(A).

VENUE AND TRANSFER

A new §1390 clarifies existing law on venue. It defines venue, distinguishes venue from subject-matter jurisdiction and clarifies applicability to maritime and admiralty cases. The general venue provision in §1391 was also amended, but with no substantive changes.

The method for determining residency for purposes of venue was addressed in a new subsection (c) to §1391. Residency is defined for (1) natural persons; (2) entities, whether or not incorporated; and (3) defendants who do not reside in the U.S. Little has changed except some clarification of residency for natural persons and unincorporated associations.

A new procedure has been approved for transferring venue to a forum in instances where the parties have consented. Section 1404 permits transfer "to any district or division to which all parties have consented." What's important here is that transfer to an agreeable district is permitted even if venue would not otherwise be proper in the receiving district.

CITIZENSHIP DETERMINATIONS

The amendments clarify how to determine citizenship for resident aliens and for corporations or insurance companies with significant foreign operations. Per the amended §1332(a)(2), federal courts retain jurisdiction over state-law claims between a citizen of a state and citizens of a foreign state, but federal courts cannot exercise jurisdiction over such claims if they are asserted between a citizen 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."

As for corporations and insurance companies with significant foreign operations, they must be considered citizens of both the state of incorporation and any other state (including a foreign

state) where they maintain their principal place of business. The amendment has the effect of expanding the citizenship of such parties and thereby limiting diversity jurisdiction

Robert D. Rose is a partner in Sheppard Mullin Richter & Hampton's San Diego office and specializes in white-collar criminal defense and all varieties of civil fraud litigation in the state and federal courts.

This article is reprinted with permission from the January 27, 2012 edition of The Recorder. © 2012 ALM Properties, Inc. All rights reserved. Further duplication without permission is prohibited.