



New Rules

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Federal court practitioners need to understand the impact of recent legislation on their day-to-day practices.

Federal Court Jurisdiction, Venue, and Removal



Changes are afoot for attorneys practicing in the United States federal courts. Effective with all state and federal lawsuits commenced on or after January 6, 2012, the Federal Courts Jurisdiction and Venue Clarification Act of

2011, H.R. 394, P.L. 112-63, makes changes to the federal statutory provisions on diversity jurisdiction, 28 U.S.C. §1332, venue, 28

U.S.C. §§1390-92, 1404, and removal, 28 U.S.C. §§1441, 1446, 1454. House of Representatives Report 112-10, submitted by the



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U.S. House of Representatives Committee on the Judiciary, which accompanied the house bill, explains at length the purposes and effects of this legislation. This article provides a synopsis of the key changes and the implications for day-to-day practice.

Resident Alien Treatment for Diversity Purposes

The Federal Courts Jurisdiction and Venue Clarification Act (the “Act”) changes the treatment of resident aliens, meaning aliens “admitted to the United States for permanent residence,” for diversity jurisdiction purposes, effectively closing the federal courthouse doors to disputes between aliens whether permanent residents or not. According to House Report 112-10, these changes constitute a “modest[]” jurisdictional restriction while leaving state courts available to resolve disputes between such parties. H.R. Rep. No. 112-10, at 7 (2011).

Diversity jurisdiction exists when a matter in controversy exceeds \$75,000 and is between citizens of different states. The federal courts have long required “complete diversity” between the parties: no plaintiff and no defendant can have citizenship in the same state. Under the revisions to section 1332(a)(2), federal district courts do not have jurisdiction 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.” Formerly, the federal courts did not have jurisdiction over a dispute that involved only aliens. See H.R. Rep. No. 112-10, at 6 (2011) (“Alienage jurisdiction exceeds the limits of Article III unless a citizen of the United States also appears as a party. See *Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303 (1809)). But the closing paragraph of section 1332(a) formerly contained “deeming” language specifying 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.” H.R. Rep. No. 112-10, at 6 (2011). This language, added in 1988 by the Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, precluded federal jurisdiction in lawsuits between a citizen of a state and an alien who permanently resided in the same state. House Report No. 112-10 recognizes that the 1988 amend-

ment “curtailed alienage jurisdiction in one setting” but “created an arguable basis for expansion of alienage jurisdiction in other settings.” H.R. Rep. No. 112-10, at 7 (2011). Namely, two resident aliens domiciled in different states each could be “deemed” a resident of the state of domicile thus claiming access to federal courts in violation of the rule in *Hodgson v. Bowerbank*.

The Act removes the resident alien provision and the deeming language. Instead, section 101 of the Act, codified at §1332(a)(2), now creates an exception to diversity of citizenship jurisdiction and accomplishes “the goal of modestly restricting jurisdiction, which Congress sought to accomplish when it first enacted the resident alien proviso” in 1988. H.R. Rep. No. 112-10, at 7 (2011). The report further notes that “[s]tate court forums would remain available to aliens if Federal court forums were foreclosed.” *Id.*

Notably, the Act adds this restriction only to section 1332(a)(2). Section 1332(a)(3) remains unchanged. Thus, citizens or subjects of a foreign state may continue to appear as additional parties to disputes between citizens of different states.

Citizenship of Corporations and Insurance Companies

The Act, by broadening the deemed citizenship of corporations and, in direct actions, insurance companies, probably will slightly reduce the frequency with which these entities will appear before federal courts in diversity jurisdiction cases.

Section 102 of the Act changes the way that courts will treat corporations and insurance companies in direct actions in diversity jurisdiction cases under 28 U.S.C. §1332(c)(1). According to House Report No. 112-10, the “purpose [of the amendment to that section] is to clarify how foreign contacts should affect the determination of whether diversity of citizenship exists when a case involving these entities is filed in or removed to Federal court.” H.R. Rep. No. 112-10, at 8 (2011).

Formerly, when one of the parties to a civil action was a corporation, the corporation was deemed a citizen of “any State” in which it had been incorporated and the state in which it had its principal place of business. Congress added these provisions to 28 U.S.C. §1332(c)(1) in 1958 to “expand

the concept of corporate citizenship... to preclude diversity jurisdiction over a dispute between an in-state citizen and a corporation incorporated *or* primarily doing business in the same state.” H.R. Rep. No. 112-10 at 8 (2011) (emphasis added).

According to House Report No. 112-10, federal courts struggled to apply the former version of the statute in actions involv-

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ing United States corporations with foreign contacts or foreign corporations operating in the United States. H.R. Rep. No. 112-10, at 8 (2011). The difficulty apparently stemmed from the word “State” in §1332(c)(1). Did “State” mean a state within the United States, or did it include a foreign state? Section 1332(e) defined “States” as *including* “the Territories, the District of Columbia and the Commonwealth of Puerto Rico.” House Report No. 112-10 noted that several courts had held that the word “States” applied only to the 50 states and other places specified in the definition because it began with a capital “S.” *E.g.*, *Torres v. Southern Peru Copper Corp.*, 113 F.3d 540, 543 (11th Cir. 1997); *Cabalceta v. Standard Fruit Co.*, 883 F.2d 1553, 1559 (5th Cir. 1989). One federal district court expressed the following reasoning:

Throughout Chapter 85 of Title 28, which are the sections of the law dealing with the jurisdiction of district courts, the term “foreign state” is used to refer to foreign states, but the word “State” is used to refer to states within the United States. Additionally, section 1332(e) clarifies that “State” is referring to American citizens by saying: “The word ‘States’ as used in this section includes the Territories, the District of Columbia, and

the Commonwealth of Puerto Rico.” 28 U.S.C. §1332(e).

Wu v. Ryder Truck Rental, Inc., 561 F. Supp. 2d 1061, 1063 (E.D. Mo. 2008)

Other courts, however, held that the word “States” meant foreign states *and* the states of the United States. *E.g., Nike, Inc. v. Comercial Iberica de Exclusivas Deportivas, S.A.*, 20 F.3d 987 (9th Cir. 1994). This, of course, conforms to the jurisdiction-limiting purpose of the 1958 amendment. In *Nike*, the Ninth Circuit declined to draw a distinction between foreign and domestic corporations when determining the corporations’ citizenship for purposes of diversity jurisdiction, instead deeming each a citizen of both its place of incorporation and its principal place of business. *Id.* at 990. Because Nike, the plaintiff, was incorporated in Bermuda and none of the defendants was a U.S. citizen, the Ninth Circuit held that the federal district court lacked diversity jurisdiction. *Id.* at 991.

Under the recently amended section 1332(c)(1), the language “any State” has been abandoned in favor of “every State.” Thus, courts will regard all foreign and domestic corporations as citizens of both their places of incorporation *and* their principal places of business, which will eliminate diversity jurisdiction when (1) a foreign corporation with its principal place of business in a state sues or is sued by a citizen of the same state, and (2) a citizen of a foreign country sues a U.S. corporation with its principal place of business abroad. H.R. Rep. No. 112-10, at 9 (2011). House Report No. 112-10 notes that state courts of general jurisdiction remain available to parties blocked from the federal courts by the amendment. *Id.* The report further notes that this clarification brings 28 U.S.C. §1332(c)(1) in line with the definition of corporate citizenship in the Multiparty, Multiforum Trial Jurisdiction Act of 2002, Pub. L. No. 107-273, which deems a corporation a “citizen of any State and a citizen or subject of any foreign state, in which it is incorporated or has its principal place of business.” 28 U.S.C. §1369(c)(2). *See also* Jonathan M. Stern, *Terrible Twos or Doing What It’s Supposed to Do? The Multiparty, Multiforum Trial Jurisdiction Act, For The Defense* (May 2005).

The same broadened definition of citizenship applies to insurance company parties in direct action lawsuits. As described

by House Report No. 112-10, in a direct action case “the plaintiff sues the liability insurance company directly without naming as a defendant the insured party whose negligence or other wrongdoing gave rise to the claim.” H.R. Rep. No. 112-10, at 10 (2011). Formerly, section 1332(c)(1) deemed an insurer in such a lawsuit a citizen of any state by which the insurer had been incorporated and of the state in which it had its principal place of business. Now under section 1332(c)(1) in direct actions

against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not a party defendant, the insurer shall be deemed a citizen of (A) every State and foreign state of which the insured is a citizen; (B) every State and foreign state by which the insurer has been incorporated; and (C) the State or foreign state where the insurer has its principal place of business.

Amended Section 1441(c)— “Sever and Remand”

Amendments to 28 U.S.C. §1441(c) “clarify the right of access to Federal court upon removal for the adjudication of separate Federal law claims that are joined with unrelated state law claims.” H.R. Rep. No. 112-10, at 12 (2011). Formerly, this section of the statute appeared to permit removal of an entire case whenever a “separate and independent” federal question claim was joined to one or more claims over which the federal courts did not have original jurisdiction. The federal district court would either retain the entire case or remand all matters in which state law predominated. H.R. Rep. No. 112-10, at 12 (2011). According to House Report No. 112-10, “[s]ome Federal district courts have declared the provision unconstitutional or raised constitutional questions because... subsection 1441(c) purports to give courts authority to decide state law claims for which the Federal courts do not have original jurisdiction.” H.R. Rep. No. 112-10, at 12 (2011).

The Federal Courts Jurisdiction and Venue Clarification Act establishes a “sever-and-remand” approach: a defendant can remove a case to a federal court to have a federal forum resolve federal claims, but the federal district court must remand unrelated state law matters. H.R. Rep. No. 112-10,

at 12 (2011). The Act does not explain what makes a state law matter “unrelated” to a federal claim, so we assume that the jurisprudence developed by the courts under the previous version of the statute still stands. *See, e.g., Nesbitt v. Bun Basket, Inc.*, 780 F. Supp. 1151 (W.D. Mich. 1991) (remanding to state court an employee’s contract claim against an employer but retaining the employee’s Fair Labor Standards Act claim because the contract claim was insufficiently related to the statutory overtime claim, the two claims were not part of a single ongoing wrong, and they did not arise from a common nucleus of fact).

Removal Procedures Changes and Clarifications

Perhaps the most significant changes made by the Federal Courts Jurisdiction and Venue Clarification Act have to do with removal procedures. In particular, the Act clarifies removal timing and consent to removal.

The Act provides that *each* defendant shall have 30 days after service of the initial pleading or summons to file a notice of removal. 28 U.S.C. §1446(b)(2)(A). Previously, the federal courts differently approached removal timing in multi-defendant cases: some courts held that the date of service on the last-served defendant activated the 30-day period while others held that the date of service on the first-served defendant activated the 30-day period. Other courts adhered to what is the new statutory standard. House Report No. 112-10 lists several cases demonstrating these divergent approaches. *See* H.R. Rep. No. 112-10, at 13–14 (2011). The report notes that “[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.” H.R. Rep. No. 112-10, at 14 (2011). Moreover, now earlier-served defendants may join in and consent to removal by a later-served defendant even if the earlier-served defendant did not previously initiate or consent to removal. 28 U.S.C. §1446(b)(2)(C).

Section 1446(c)(2), a completely new subsection, will allow a defendant to assert an amount in controversy in the removal

notice if a plaintiff's initial pleading seeks non-monetary relief or a money judgment when the state practice either does not permit a plaintiff to demand a specific sum or permits a plaintiff to recover damages in excess of the amount demanded. Subsection 1446(c)(2) allows a defendant to use discovery from the state court action to determine for removal purposes the amount in controversy. Information in the state court action record that shows a sufficient amount in controversy is deemed "other paper" under 28 U.S.C. §1446(b)(3), starting the 30-day removal period anew. Further, under the Act, when litigating parties dispute the amount in controversy, the trial judge must apply the preponderance of the evidence standard to his or her jurisdictional fact finding.

Additionally, the amendment to section 1446(c)(3) lifts the one-year limitation on removal of diversity actions if a plaintiff has "acted in bad faith" to prevent removal. The federal district court has the discretion to allow removal at any time if bad faith is found. We believe that this more than any other aspect of the Act will lead to the most litigation. House Report No. 112-10 importantly notes that, if a plaintiff deliberately fails to disclose the amount in controversy to prevent removal, that would constitute bad faith. H.R. Rep. No. 112-10, at 16 (2011). See 28 U.S.C. §1446(c)(3)(B).

Finally, the Act separates the provisions for removal of civil and criminal proceedings into two statutes, codifying the process for removal of criminal proceedings in 28 U.S.C. §1454 and leaving the civil provisions in 28 U.S.C. §1446.

"Venue" and "Residency" Definitions

Section 201 of the Federal Courts Jurisdiction and Venue Clarification Act redefines the term "venue" as

a geographic specification of the appropriate forum for litigation of a civil action that is within the subject-matter jurisdiction of the district courts in general and does not refer to any grant or restriction of subject-matter jurisdiction providing for a civil action to be adjudicated only by the district court for a particular district or districts.

28 U.S.C. §1390(a).

House Report No. 112-10 characterizes this change as providing a "general defini-

tion" that distinguishes venue from other provisions of federal law that operate as restrictions on subject-matter jurisdiction. H.R. Rep. No. 112-10, at 17 (2011).

The Act also clarifies that, consistent with current case law, the removal statute—not the venue statute—governs the proper venue for cases removed from state to federal courts. See 28 U.S.C. §1390(c).

The Act also establishes a "unitary approach" to venue requirements that removes distinctions between federal question jurisdiction and diversity jurisdiction in section 1391, the "general venue statute." H.R. Rep. No. 112-10, at 19 (2011). Specifically, 1391(b)(1) explains venue rules for venue based on residency of the defendants; section 1391(b)(2) explains venue rules for venue based on where the events leading to an action took place; and section 1391(c) establishes a "fallback venue" when there is no appropriate district in which an action may otherwise be brought. The Act defines "fallback venue" as any judicial district in which any defendant is subject to personal jurisdiction in the action.

The Act amends 28 U.S.C. §1391(c) by defining "residency" for all venue purposes in the United States Code. This subsection formerly defined residency but only for purposes of venue under Chapter 87 and only as applied to corporations. The amended version of section 1391(c) now defines residency for natural persons, incorporated and unincorporated entities, and nonresident defendants. 28 U.S.C. §1391(c).

The Act now specifies that "residency" for natural persons means "the judicial district in which that person is domiciled." 28 U.S.C. §1391(c)(1). According to House Report No. 112-10, this amendment adopts a rule followed by a majority of appellate courts; in lawsuits involving multiple defendants not domiciled in the same state, it requires courts to situate lawsuits for adjudication in claim-based venues. Aliens lawfully admitted for permanent residence also are covered by section 1391(c)(1).

The Act also clarifies the appropriate venue for nonresident defendants. Formerly, a person could sue an alien defendant under section 1391(d) in any district, which meant that aliens could not raise venue as a defense to the place of litigation. The Act focuses on defendants "not resident in the United States," so persons

domiciled abroad, whether aliens or United States citizens, cannot raise a venue defense to the litigation location. H.R. Rep. No. 112-10, at 22 (2011) (emphasis added). Objecting to personal jurisdiction in the United States' courts, however, remains available to aliens as well as to United States citizens domiciled abroad. 28 U.S.C. §1391(c)(3). The amended statute further requires courts to

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disregard United States citizens who reside abroad in determining the proper venue in actions with multiple defendants. *Id.* Note, however, that permanent resident aliens have a venue defense under section 1391(c)(1), which treats them as "natural persons" for residency purposes.

Changing Venue

The revisions to 28 U.S.C. §1404(a) will permit a federal district court to transfer a civil action to any district or division to which all parties have consented if convenient for the parties and witnesses and in the interest of justice. This expands the authority of 28 U.S.C. §1404, which previously allowed transfer only to another district or division in which a case might have been brought, meaning to a district proper in terms of both venue and subject-matter jurisdiction requirements. Section 1404(d), however, expressly prohibits transfers from Article III district courts to the district courts of Guam, the Northern Mariana Islands, and the Virgin Islands. 28 U.S.C. §1404(d).

Federal court practitioners will want to familiarize themselves with these new rules before filing a new action or responding to an action filed in state court. As mentioned, they apply to actions filed after January 6, 2012.