

# The Federal Courts Jurisdiction and Venue Clarification Act of 2011

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**P**resident Obama signed the Federal Courts Jurisdiction and Venue Clarification Act of 2011 into law on December 7, 2011, and the act took effect on January 6, 2012. The act contains significant revisions in the areas of removal of cases to federal court and venue, and less important changes in jurisdiction and transfer of cases. This article summarizes the amendments.

## Jurisdiction

The amendment revises the treatment of resident aliens for purposes of diversity jurisdiction. In 1988, Congress added to 28 USC 1332(a) the Resident Alien Proviso, providing that an alien admitted to the United States for permanent residence was deemed a citizen of the state in which he or she was domiciled. The purpose of this amendment was to preclude diversity jurisdiction in suits between a citizen and resident alien of the same state. Some courts interpreted the Resident Alien Proviso to actually expand diversity jurisdiction to permit suits between aliens residing in different states. The new act repeals the Resident Alien Proviso and enacts what was intended in 1988. Resident aliens are no longer deemed residents of any state, and diversity specifically does not exist between a citizen and resident alien of the same state.<sup>1</sup>

Amendments to 28 USC 1332(c)(1) address citizenship of corporations and insurers sued in direct actions. First, the treatment for diversity purposes accorded domestic corporations since 1958 will now clearly extend to all corporations. Under existing law, a corporation is a citizen of both the state in which it is incorporated and the state in which it has its principal place of business. Inconsistency has arisen when some courts have limited the definition of “state” to the 50 United States and its territories, while oth-

ers have taken “state” to include foreign nations. The amendment resolves that inconsistency, providing that a corporation will be treated as a citizen of every U.S. state or every foreign state in which it is incorporated and every U.S. state or foreign state in which it has its principal place of business.<sup>2</sup> Second, a similar revision is made with respect to direct actions against insurers in which the insured is not named as a party. The amendment clarifies that, for diversity purposes, the insurer is deemed a resident of any U.S. state or foreign state in which (1) the insured is a citizen, (2) the insurer itself is incorporated, or (3) the insurer itself has its principal place of business.<sup>3</sup>

## Removal

Where formerly 28 USC 1441 governed removal of both civil and criminal cases, the revised section and those following it are now expressly applicable only to civil actions. Removal of criminal cases is now governed solely by a new 28 USC 1454.

28 USC 1441(b) and (c) now distinguish between cases in which removal is based on diversity of citizenship under 28 USC 1332 and those removed based on federal question jurisdiction under 28 USC 1331. No substantive changes are made with respect to removal based on diversity. With respect to removal under federal question jurisdiction, a major change is made with respect

to cases containing both claims removable under § 1331 and claims that do not arise under federal law—generally purely state law questions. Under prior law, a case involving both types of claims could be removed in its entirety, and the federal court would have the discretion to remand “all matters in which state law predominates.”<sup>4</sup> Many courts expressed constitutional concerns with this provision since it gave the federal court authority in its discretion to decide state law claims of which federal courts lack jurisdiction. Some courts “resolved” this concern by simply remanding the entire case to state court, thus depriving the defendant of the right to litigate the federal question portion of the case in federal court. To alleviate the concerns, revised § 1441(c) permits the entire case to be removed if a portion of the case presents a federal question, but *requires* that the district court “shall sever” all claims outside the federal courts’ original jurisdiction and remand the severed claims to state court.

The new act changes several removal procedures contained in 28 USC 1446. Section 1446(b)(2)(A) codifies the “rule of unanimity” well-established by caselaw, providing that all defendants properly joined and served must join in or consent to a removal. Section 1446(b)(2)(B) also clarifies that each defendant will have the opportunity to remove the case within 30 days after receipt by or service on that defendant, with § 1446(b)(2)(C)

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adding that any previously served defendant may consent to a later-served defendant's removal of the case even if that earlier-served defendant had not itself removed the case.

Section 1446 continues to permit in certain circumstances a case that is not immediately removable as filed to be removed on the basis of diversity of citizenship within one year of commencement of the action, but § 1446(c)(1) provides that the one-year period may be extended if the court "finds that the plaintiff has acted in bad faith in order to prevent a defendant from removing the action."

Section 1446(c)(2) contains new rules for the determination of the amount in controversy for purposes of removal based on diversity. An amount demanded in the complaint in good faith will ordinarily be deemed the amount in controversy. When the complaint seeks nonmonetary relief, or when state law either prohibits the demand of a certain amount or permits recovery in excess of the amount demanded, an amount in controversy may be asserted by the notice of removal. Removal will be deemed proper if the court finds, by the preponderance of evidence, that the amount in controversy exceeds the minimum prescribed by § 1332. In other cases, if removal does not initially occur because of an insufficient amount in controversy, § 1446(c)(3)(A) establishes that information regarding the amount in controversy in the state case record or obtained in state court discovery will constitute an "other paper" sufficient to permit removal after the expiration of the ordinary 30-day removal period. And § 1446(c)(3)(B) provides that a plaintiff's deliberate failure to disclose the actual amount in controversy to defeat removal constitutes "bad faith" sufficient to permit removal of the case under § 1446(c)(1) more than one year after its commencement.

## Venue

The act makes a number of changes to the federal venue statutes including a general definition of venue, 28 USC 1390(a) ("Venue Defined"), that distinguishes venue (a geographic specification of the appropriate forum) from other provisions of federal law that operate as restrictions on subject-

matter jurisdiction. While subject-matter restrictions include geographic terms, the difference is that subject-matter restrictions cannot be waived by the parties.

New Code Section 28 USC 1391(a), setting forth the general application of venue requirements, maintains the existing law for venue choices but makes clear that it does not displace the special venue rules under particular federal statutes. As observed by the House Judiciary Committee report, there

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are more than 200 specialized venue statutes in the United States Code. The specialized statutes will continue to govern, but the act's intent is to lessen the need for special venue provisions.

Perhaps the most significant change is the abolition of the venue distinction between "local" and "transitory" actions. The "local action" rule, previously found at 28 USC 1392, limited certain kinds of actions pertaining to real property to the district in which the property is located. This rule primarily created problems in disputes over property damage suits because a district court was often unable to exercise personal jurisdiction over the defendant in the place where the property was located. The change to § 1391(a)(2) makes clear that only subject-matter and personal jurisdiction restrictions will apply to such actions. As a result of the change, § 1392 is repealed.

Other important changes include the act's establishing a "unitary" approach to venue. These revisions are intended to eliminate the venue distinction between diversity and federal question actions. The unitary approach does this by establishing a single approach to venue, regardless of how subject-matter

jurisdiction is obtained. It preserves § 1391 as a general venue statute under which venue is based on (1) residence of the defendants, (2) where the events giving rise to the action took place, and (3) "fallback" venue, which is used if there is no other district in which the action may be brought.<sup>5</sup> However, the act addresses the potential problem posed by the earlier fallback venue provisions, which differentiated between diversity federal question cases. The earlier diversity venue fallback provision resorted to a district "in which any defendant is subject to personal jurisdiction" while the federal question fallback provision pointed to a district "in which any defendant may be found."<sup>6</sup> The new language at 28 USC 1391(b)(3) directs that venue for both diversity and federal question matters shall fall back to a judicial district "in which any defendant is subject to the court's personal jurisdiction with respect to such action." Elimination of the diversity and federal question fallback distinction is intended to avoid the possibility of an overly broad assertion of venue.

Prior Code Sections 28 USC 1391(a)(1) and (b)(1) laid venue against natural persons in a district where the defendant "resides," a concept some courts read more broadly than the notion of "domicile." The earlier "resides" language could permit venue in a district, for instance, where a party has a summer home. New subsection 1391(c)(1) adopts the majority view by providing that, for venue purposes, a natural person is deemed to reside in the judicial district where that person is domiciled.

Pursuant to new Code Section 1391(c)(2), venue treatment for unincorporated associations such as partnerships and unions is the same as for corporations. That is, an unincorporated association is to be regarded as a resident in any judicial district in which it is subject to the court's personal jurisdiction and, if it is aligned as a plaintiff in a case, only in the judicial district in which it maintains its principal place of business. This change resolves a split of authority on the issue.

For nonresident defendants, including U.S. citizens living abroad, 28 USC 1391(c)(3) provides that they may be sued in any judicial district limited only by whether the defendant is subject to personal jurisdiction

in that district. This means that a party resident abroad, whether a natural person or a corporation, could not claim a venue defense to the location of the litigation. Conversely, the act now permits permanent resident aliens domiciled in the U.S. to raise a venue defense.<sup>7</sup> Previously, permanent resident aliens domiciled in the U.S. were treated the same as nonresident aliens for purposes of being barred from raising a venue defense. The change is consistent with the act's emphasis on shifting the focus of venue law from "alienage" of a defendant to whether the defendant has his or her "residence" outside the U.S.

Lastly, the act allows for the transfer of venue to *any* district on consent of the parties.<sup>8</sup> The earlier version of 28 USC 1404(a) permitted venue transfers, but only to districts where the action could have been brought initially. The amended version of that section now allows consent venue transfers even if the action could not have been brought in the district to which transfer is sought originally. Such transfers, however, are only possible when all parties agree and only if the court determines it to be for the convenience of the parties and witnesses and in the interest of justice.<sup>9</sup> ■



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#### FOOTNOTES

1. 28 USC 1332(c)(2).
2. 28 USC 1332(c)(1).
3. 28 USC 1332(c)(1)(A) through (C).
4. Former 28 USC 1441(c).
5. 28 USC 1391(b)(1) through (3).
6. Former 28 USC 1391(b)(3).
7. See 28 USC 1391(c)(1).
8. 28 USC 1404(a).
9. *Id.*