



MAY 2012

## Remove It or Lose It: New Federal Rules Change Defendants' Rights to Remove Cases to Federal Court

When a company is sued in state court, one of the first decisions is whether to remove the case to federal court. Strict timing and procedural rules limit a company's ability to do so. It is therefore imperative that in-house counsel become familiar with recent changes to the Federal Rules of Civil Procedure governing removal and venue, embodied in the [Federal Courts Jurisdiction and Venue Clarification Act of 2011, H.R. 394 P.L. 112](#) (the Act). Applicable to all cases filed after January 6, 2012, the Act significantly impacts litigation strategy for all corporate defendants.

### REMOVAL CHANGES

#### When Does the Removal Clock Start Ticking?

The Act clarifies a longstanding dispute over application of the statutory 30-day period for removing actions to federal court. Federal appeals courts have disagreed over how to interpret the 30-day rule in cases involving multiple defendants served at different times. In some circuits, the 30-day period ran from the date of service on the last-served defendant. In other circuits, the 30-day countdown commenced upon service of the first defendant.

The Act makes clear that each defendant has 30 days from its own date of service to remove the action. 28 U.S.C. § 1446(b)(2)(B).

#### Do All Defendants Have to Agree to Removal?

The Act codifies the well-established common law "rule of unanimity" promulgated by the U.S. Supreme Court. Under the "rule of unanimity," there is no federal jurisdiction if at least one defendant officially and unambiguously refuses to consent to a removal petition within 30 days of service. Put differently, in a court applying the rule of unanimity, if one of 12 defendants refuses to consent to removal, all 12 defendants must remain in state court. Now, as a matter of statutory law, all defendants who have been properly joined and served must consent to removal. 28 U.S.C. § 1446(b)(2)(A).

### **When Can a Defendant Remove Based on Diversity Jurisdiction?**

Defendants seeking to remove an action to federal court based on diversity jurisdiction have struggled with how to show a federal court the amount in controversy exceeds \$75,000. Often the amount in controversy is unclear from the complaint, especially when state practice does not require plaintiffs to allege an amount in controversy.

Before the Act, circuits were split on which standard to apply when deciding if a case met the amount in controversy requirement. Under the Act, where a complaint seeks either nonmonetary relief or "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," the defendant may assert the amount in controversy in the notice of removal. 28 U.S.C. § 1446(c)(2)(A).

Also, under the Act, if a defendant learns during discovery that the amount in controversy exceeds \$75,000, the defendant can remove even though the 30-day window for removal has closed. Nevertheless, the defendant still must seek removal within 30 days of obtaining the new information indicating satisfaction of the jurisdictional amount. 28 U.S.C. §1446(c)(3)(A).

### **What if the Plaintiff Plays Games to Avoid Diversity Jurisdiction?**

Under the old rules, a defendant could not remove a case based on diversity more than one year after the case's filing date. Historically, some plaintiffs adopted removal-defeating strategies to keep the case in state court to ensure the one-year period elapsed. For instance, it was not uncommon for plaintiffs to join defendants from the same state as the plaintiff, with no real connection to the dispute, in an effort to defeat a federal court's diversity jurisdiction.

Before the Act, some courts held that the time limit for removal was subject to equitable tolling when a plaintiff acted in bad faith to evade removal. Other courts disagreed with this approach and held that after the one-year period expired, a case could not be removed to federal court.

The Act now gives district courts discretion to permit removal after one year if the court finds that the plaintiff acted in bad faith to thwart removal. 28 U.S.C. § 1446(c)(1).

### **VENUE CHANGES**

Once a company's case is in federal court, the next issue is to determine in which federal court the case should proceed. In other words, should the case be moved to a different federal venue. The Act also changes the rules for venue motions.

Previously, 28 U.S.C. § 1404(a) allowed a case to be transferred to a different federal district, in the interests of justice and for the convenience of the parties and witnesses, only if the case originally could have been brought in the transferee district. For example, under the old rules, even if a defendant company consented to moving a case to a federal court in California, the case could not be transferred there unless the defendant company had sufficient connections to California to subject it to personal jurisdiction there.

The Act now allows a federal court to transfer a case to another federal venue if all the parties consent. See 28 U.S.C. § 1404(a). Still, under the new provision, such transfers are only possible where all parties agree and the court finds it to be for the convenience of the parties and witnesses and in the interest of justice.

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## CONTACT US

This legal update highlights just a few of the important changes to the Federal Rules of Civil Procedure regarding removal and venue.

Our lawyers have extensive experience with state and federal litigation. If you find yourself served with a state court complaint, you may want to consider seeking advice from an experienced attorney sooner rather than later to avoid forfeiting the potential advantages of litigating in federal court.

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