# Removal News

**Friday, December 23, 2011**

There hasn't been a lot of talk about this, but Congress just passed, and the President signed, something called the" Federal Courts Jurisdiction and Venue Clarification Act of 2011," H. R. 394, P.L 112-63, copy here. As far as we're concerned, this new act (we'll call it, creatively, "the Act") is as significant for what it didn't do as for what it did.

The Act completely rewrote 28 U.S.C. §1441(b). Why's that important? Because the literal language of §1441(b) – "removable only if none of the parties in interest properly joined and served is a citizen of the State in which such action is brought" – is what allows removal prior to service to trump the so-called "forum defendant" loophole. As we've pointed out in many posts (most of which you can access from here), the "and served" qualifier to the forum defendant loophole means that, if an otherwise diverse action is removed before an in-state defendant is served, then that defendant's citizenship, according to the statute, must be ignored and the action is properly in federal court.

That's the express language of the statute. The plaintiffs have responded with a mushy, result-oriented counter-argument that surely Congress didn't mean what it said; that result would be absurd. As we've mentioned, some benighted courts have bought that rationale.

Well, that argument just went out the window. Why? Because in the Act (the 2011 one mentioned above), Congress had the opportunity to change §1441(b) if it was uncomfortable with the result dictated by that section's express terms. It didn't. Quite the contrary, while Congress completely rewrote §1441(b) in the Act, it retained (and arguably improved, see this law review article, pp. 162-63) the "properly filed and served" language verbatim in the new version. After the Act, here's how §1441(b) now reads:

"(b) REMOVAL BASED ON DIVERSITY OF CITIZENSHIP. – (1) In determining whether a civil action is removable on the basis of the jurisdiction under section 1332(a) of this title, the citizenship of defendants sued under fictitious names shall be disregarded.

(2) A civil action otherwise removable solely on the basis of the jurisdiction under section 1332(a) of this title

may not be removed if any of the parties in interest **properly joined and served** as defendants is a citizen of the State in which such action is brought."

Act §103(a)(3) (emphasis added).

Thus Congress reenacted the identical language of the statute that plaintiffs claim creates an "absurd" result. When amending statutes, Congress is presumed to appreciate how the existging language is being interpreted in the courts. E.g., Forest Grove School Dist. v. T.A., 129 S.Ct. 2484, 2492 (2009) ("Congress is presumed to be aware of a[] . . . judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change") (citation and quotation marks omitted) (there are lots of similar cases). Obviously, in the case of removal before service, Congress didn't consider elimination of the forum defendant rule to be "absurd" in the least. Rather, the forum defendant rule is itself an anachronism of earlier times when local prejudice against "foreigners" – that is, those from other states – was much greater than in the extremely mobile society of the Twenty-First Century.

So we think that the Act, by re-enacting verbatim the "and served" caveat to the forum defendant rule, has effectively ratified the validity of pre-service removal as a means of escaping hellhole jurisdictions where diversity is otherwise present.

What else is there in the Act?

Probably of most import to practicing litigators, Congress cleaned up the controversy about whether the 30-day removal period began to run with the first, or with the last, defendant to be served, where (as is usually the case these days) more than one defendant is sued. Congress adopted the majority (but hardly unanimous) rule measuring time from the date of the last service – the so-called "last served defendant" rule. See Act §103(b)(3)(B) (creating a new 28 U.S.C. §1446(b)(2)(B) specifically addressing this issue). Earlier served defendants, even if they independently blew the 30-day removal period, may nevertheless consent to a timely petition filed by a later-served defendant. Id. (creating a new 28 U.S.C. §1446(b)(2)(C) specifically addressing this issue).

Also, Congress has codified the formerly judge-made (but extremely long-standing) gloss on §1446, and now formally requires that all defendants (except those otherwise statutorily excluded) join in a diversity-based removal petition. See Act §103(b)(3)(B) (creating a new 28 U.S.C. §1446(b)(2)(A) specifically addressing this issue).

Plaintiffs like to play hide-the-ball with the amount in controversy ("AiC") (currently $75,000 - that hasn't changed) in potentially removable cases. The Act addresses this problem, as well, by providing that, where the AiC is not plainly stated in the complaint, any later filing (such as discovery) that yields AiC information establishing a demand above the limit required for diversity-based removal is treated as “another paper” that creates a new window for removal of the case. See Act §103(b)(3)(C) (creating a new 28 U.S.C. §1446(c)(3)(A) specifically addressing this issue).

Also regarding the jurisdictional AiC, any dispute over what the plaintiff is actually demanding is to be resolved by the court on a “preponderance of the evidence” basis (some courts had imposed more restrictive proof standards). Id. (creating a new 28 U.S.C. §1446(c)(2)(B) specifically addressing this issue). Note, this section of the Act consistently refers to "§1332(a)," meaning that it doesn't apply to AiC disputes under the Class Action Fairness Act, which is codified elsewhere, at 28 U.S.C. §1332(d).

There’s now a catch-all escape valve from the one-year limit (from time of suit commencement) for removing a diverse action. If the court finds that the plaintiff acted in “bad faith” in any way to prevent removal, the one-year limit doesn’t apply. See Act §103(b)(3)(C) (creating a new 28 U.S.C. §1446(c)(1) specifically addressing this issue). This “bad faith” exception also applies to AiC issues. Id. (creating a new 28 U.S.C. §1446(c)(3)(B) specifically addressing this issue).

Another change involves cases in which there are mixed removable (usually federal question) and non-removable (usually non-diverse tort claims) parts of a complaint. Under the Act, the entire action can be removed (as at present) but once in federal court it’s now mandatory to sever the non-removable parts of the litigation and remand them to state court. Conversely, defendants not affected by the removable parts, need not consent to removal. See Act §103(a)(4) (amending §1441(c)).

Given the date that the Act was enacted, it will become effective on January 6, 2012. From that day forward, it applies to all commenced in state (for removal purposes) or federal court.

NOTE: The Act also contains amendments affecting jurisdiction and venue, but that's beyond the scope of this post. Here are a couple of write ups of the Act that cover those aspects.