

# Changes to Removal and Remand Procedures for Civil Actions

January 06, 2012

On December 7, 2011, President Obama signed into law the Federal Courts Jurisdiction and Venue Clarification Act of 2011 ("FCJVCA"). The FCJVCA makes a variety of changes to sections of the United States Code such as the treatment of resident aliens (28 U.S.C. § 1332(a)), citizenship of corporations and insurance companies with foreign contacts (28 U.S.C. § 1332(c)(1)), procedures for removal of criminal prosecutions (28 U.S.C. § 1455 (newly added section)) and venue (28 U.S.C. §§ 1390 et seq.). However, the changes to the civil removal and remand procedures in 28 U.S.C. §§ 1441 and 1446 are the first of their kind in over 10 years by the executive and legislative branches of government. For any state court action commenced on or after January 6, 2012, substantive changes to 28 U.S.C. §§ 1441 and 1446 are summarized below and referred to with their newly enacted citations:

1. 1441(b)(2) - **Resident/Forum Defendant Rule in Diversity Cases** - Congress retained the "properly joined and served as defendants" language, thereby addressing the split of authority and implicitly approving removal of state cases in which any defendant, including a resident defendant, has not been served in diversity cases.
2. 1441(c)(2) - **Supplemental Jurisdiction** - The FCJVCA eliminates a district court's discretion in deciding all state and federal law questions or remanding claims in which unrelated state law claims predominate. While an action containing state law and federal question claims can be removed, the FCJVCA now requires district courts to sever and remand all unrelated non-federal question jurisdiction claims or claims that are non-removable by statute. Note: Only defendants in which a federal question jurisdiction claim has been asserted must consent to removal.
3. 1446(b)(2)(A) - **Unanimity Rule** - This revision codifies the long-standing but judicially-created rule that all "properly joined and served" defendants "must join in or consent to the removal...."

4. 1446(b)(2)(B) and (C) - **Later-Served Defendant Rule** - Congress adopted the majority rule by granting each defendant the opportunity to remove within 30 days of service. Earlier-served defendants may consent to removal even though they did not timely remove.
5. 1446(c)(1) - **Bad-Faith Exception to One-Year Deadline to Remove in Diversity Cases** - Congress has created an exception to the long-standing one-year from commencement of the action deadline to remove in diversity cases when plaintiffs act in bad faith in order to thwart removal. Plaintiffs' deliberate failure to disclose the amount in controversy is a codified example of what constitutes bad faith. See 28 U.S.C. §1446(c)(3)(B).
6. 1446(c)(2)(A) - **Amount in Controversy ("AIC") in Diversity Cases** - In removals based upon 1332(a), i.e. not the Class Action Fairness Act codified in 28 U.S.C. 1332(d), courts shall deem the sum demanded in good faith in the initial pleading as the AIC unless the initial pleading seeks (i) nonmonetary relief, such as in a declaratory action, or (ii) monetary relief, but "state practice either does not permit demand for a specific sum or permits recovery of damages in excess of the amount demanded." In either exception, a district court can exercise its own discretion and find an action removable if by the preponderance of the evidence the AIC is met. See 28 U.S.C. 1446(c)(2)(B).
7. 1446(c)(3)(A) - **AIC Established by "Other Paper" in Diversity Cases** - This revision clearly delineates that information in the state court record or in response to discovery constitutes "other paper" to establish AIC for cases that were not initially removable.

In sum, Congress and President Obama's actions addressed many splits of authority across the nation and, hopefully, eliminated much confusion, without creating any more.

## Authored By



David J. Walz

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