
In the most sweeping reform since 1990, the Act - which took effect on 6 January - resolves some confusion that previously existed in the US statutory scheme and reconciles conflicting judicial interpretations of these statutes by refining US federal rules related to removal, venue, and jurisdiction.

Removal

The Act is arguably a victory for defendants in American litigation primarily due to its changes to the federal court removal provisions, by which defendants may, in certain situations, “remove” a case filed in a US state court into the federal judicial system for resolution.

Since federal courts may offer advantages for defendants, such as higher pleading burdens, defendants often prefer a federal forum.

On the whole, the changes contained in the Act potentially allow defendants broader access to federal courts.

a. Thirty days allowed to remove for each defendant

Perhaps the most notable change is to provide each defendant in a multi-defendant suit a 30-day window to remove the case from state court to federal court. The prior statute referenced only a single defendant, and courts interpreting the statute had disagreed as to how the statute should be applied in cases with multiple defendants.

On the one hand, certain courts held that the statute allowed each defendant 30 days from service to remove a case to federal court, meaning that each defendant, no matter when it was joined in the suit, would have a full 30 days to have the case removed.
On the other hand, several other courts interpreted the statute to require the first-served defendant to file a notice of removal within 30 days to effect removal, precluding later-joined defendants from filing a removal.

To resolve the dispute, Congress adopted the later-served defendant rule, under which each defendant, no matter when they are added to the lawsuit, has its own 30-day time period to seek removal. The adoption of the later-served defendant rule constitutes a major shift in federal court practice in significant portions of the United States.

Equitably, the new rule makes sense. The right of removal for later-served defendants is not conditioned now on the actions taken by previously served defendants.

Savvy plaintiffs’ lawyers can no longer serve an unsophisticated defendant first and a more sophisticated defendant later in the hope that the unsophisticated defendant will not remove, and thereby prejudice the rights of the later-served defendant. Instead, each defendant has the ability to weigh its right to a federal forum regardless of when it is joined in the suit. This will likely result in more suits finding their way to federal court.

**b. “Rule of unanimity” codified and extended**

The Act also codifies the US Supreme Court created “rule of unanimity.” Specifically, the Act requires all defendants who have been properly joined and served to consent to removal. To accompany the later-served defendant rule, the Act allows earlier-served defendants to join in or consent to removal by a later-served defendant.

Thus, a plaintiff who adds defendants after a lawsuit has progressed now runs the risk of removal, even if the original defendant had initially waived the right to remove.

Because the calculus often changes with the introduction of a new litigant, this revision is warranted. Under the old rule, when determining whether to remove in some circuits, the earlier-served defendant had to assess the probability that the plaintiff would later join additional defendants.

With this revision, the earlier-served defendant has the ability to reexamine its position on removal when a new defendant is joined and desires to remove, or perhaps to be persuaded by the new defendant of the propriety of removal.

**c. If plaintiff drops non-diverse defendants after one year, other defendants allowed to remove, if plaintiff acted in bad faith**

The Act also attempts to prevent the gamesmanship that some plaintiffs’ lawyers had engaged in under prior rules to prevent defendants from asserting their right to a federal forum.

One of the most well-known grounds on which a federal court may assert jurisdiction over a particular dispute is when one party to the dispute is a citizen of a US state, and the opposing party is a citizen of a different US state or a foreign country.
Under prior law, when this “diversity of citizenship” exists (and a certain monetary value of the case is exceeded), a defendant had the right to remove, but only for the first year after a case was filed.

The US Congress adopted this one-year removal period in 1988 to encourage prompt determination of removal in diversity proceedings and prevent disruption of state court proceedings that might occur when changes in the case made it subject to removal. Yet, it quickly became clear that parties could abuse this provision.

Some plaintiffs adopted a practice of suing additional defendants that did not meet the diversity of citizenship test, even though that they had no intention of going to trial against them, just to prevent the “true” defendant from having the ability to remove; after the one-year period expired, these non-diverse defendants would be dropped, and the remaining defendant would have lost its right to remove the case.

As noted by one US court, many plaintiffs would “include in diversity cases a non-diverse defendant only to non-suit that very defendant after one year passed in order to avoid a federal forum.”

The Act rectifies this situation by authorizing a district court to allow removal after the one-year removal period for diversity cases, if it finds that the plaintiff acted in “bad faith” to prevent an earlier removal based on diversity of citizenship.

The adoption of a “bad faith” standard may put an end to possible “procedural gamesmanship” and thereby increase the number of removals. But it is also possible that, as an unintended consequence, plaintiffs may attempt to keep all defendants in the case through trial.

Nonetheless, the extent to which district courts will apply this “bad faith” exception remains to be seen. The House Report that accompanied the Act states that the “bad faith” exception is “limited in scope.” Courts may require a showing of demonstrable intent of the plaintiff to prevent removal to invoke the exception.

However, if the defendant is able to show that intent, then the exception’s application could be expansive. Moreover, there will likely be significant battles over what type of evidence is necessary to satisfy this standard.

One could make a strong argument, for instance, that a court’s determination that the claims against a defendant are clearly non-meritorious is sufficient to indicate bad faith. On such grounds, one can imagine that, if non-diverse defendants are granted summary judgment in a case and thereby eliminated from the case, the remaining defendants may argue that this exception applied and seek to remove at that time.

**d. Rule on determining amount in controversy changed**

The Act also liberalises the “amount in controversy” rules, which limit the cases that can be removed on diversity of citizenship grounds only to those that exceed a specific monetary threshold.
Generally speaking, prior law required that the facts showing the value of the case exceeded the statutory threshold had to be apparent from the face of the plaintiff’s pleading; it was not permissible for the defendant to identify the amount at stake in its responsive pleading.

Under the Act, however, in cases in which the initial pleading seeks non-monetary relief or in which state practice does not allow a specific monetary demand or permits recovery of damages in excess of the amount demanded, defendants may now assert the amount in controversy in the notice of removal.

Moreover, the Act allows removal after the 30-day removal period if defendants later discover that there is a sufficient amount in controversy. In other words, more removals will come later if defendants believe and can show that the damage amount has increased.

**e. Unrelated state law claims will not defeat federal court jurisdiction**

The Act resolves concerns over the troublesome “separate and independent” claim provision found in 28 USC § 1441(c). In so doing, the Act strips federal courts of discretion to hear unrelated state law claims in cases removed based on federal question jurisdiction.

The revisions make plain that the inclusion of an unrelated state law claim does not defeat the defendant's ability to remove an otherwise properly removable action based on federal law claims. However, the revisions require the court to sever the claims over which it does not have original or supplemental jurisdiction and “remand the severed claims to the State court from which the action was removed.”

This is a welcome change for both federal court litigants and constitutional law scholars. Prior to the change, some federal district courts found 28 USC. § 1441(c) unconstitutional on its face because it purported to give courts authority to decide state law claims for which they did not have original jurisdiction.

Other courts simply chose to remand the entire case to avoid constitutional concerns, thereby defeating the effect of the statute. This led commentators to declare the statute “useless.”

The Act’s revision breathes life back into the statute and resolves constitutional concerns. This change benefits defendants by ensuring that the federal claims in a lawsuit will be heard by a federal court under the federal rules, even when the suit as filed included unrelated state law claims.

**Venue**

On the venue front, the Act is not as liberal for defendants. The changes, however, do provide clarity and consistency in and among the venue provisions. Additionally, they improve litigants’ ability to have their case heard in the most convenient forum.

**a. “Local action” rule abrogated**

The Act jettisons the “local action” rule, which provided that certain kinds of actions pertaining to real property had to be brought in the district in which the property was located. As noted by the American Law Institute, it was a near unanimous opinion that “the local-action rule serve[d] no usual function as a device for allocating venue.”
The elimination of the “local action” rule alleviates problems caused in suits for damages due to trespass, because the district court often was not able to assert jurisdiction over the defendant in the place where the property was located.

The change, however, prevents defendants from escaping liability on jurisdictional grounds. Now, plaintiffs can pursue their cases in any venue appropriate under the general venue provisions.

**b. All parties may agree on a venue and transfer by consent**

In an expansion of permissible venues, the Act also allows an action to be transferred to any district or division to which all parties have consented, even if the action could not have originally been brought in that district or division.

This change gives enhanced flexibility to courts to allow federal court litigants to have their suits heard in the most convenient venue.

The extent to which this new addition will be used is uncertain; however, one can imagine several circumstances when this section might be invoked. For instance, this provision could be used to put the parties in front of a judge who has extensive knowledge on a certain subject area.

Parties in cases that have been consolidated for pretrial purposes pursuant to the statute governing multidistrict litigation, 28 USC. § 1407, may also invoke this provision to select a venue for cases to be tried.

Or, the plaintiff can invoke this provision as a means to compromise with the defendant who has moved to transfer to a different venue.

And because time is not specified for consent, defendants could invoke this provision to enforce pre-suit contractual venue agreements. Courts, nevertheless, must still approve to ensure that a transfer is either in the interest of justice or for the convenience of the parties or witnesses.

Conclusion

The Act makes significant changes to some of the basic rules underlying federal litigation. As a consequence, defendants who find themselves sued in the United States will likely enjoy greater rights to remove cases filed in American state courts to the US federal courts, at later times over the life of the case.

Both removal and venue rules have also been streamlined and clarified. In so doing, the Act reduces pretrial uncertainty and allows the litigation to move forward more efficiently.

While defendants will surely appreciate the enhanced flexibility of the revised removal provisions, all parties will benefit from the greater clarity provided by these provisions.