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500 Days Of The Revised Removal Statutes

Law360, New York (July 24, 2013, 2:41 PM ET) -- While it did not receive as much publicity as when health care legislation passed in 2011, the Federal Courts Jurisdiction and Venue Clarification Act of 2011 (the "JVCA") is extremely important to federal court practitioners. The JVCA, which went into effect on Jan. 6, 2012, amended several venue and jurisdictional-related provisions of the United States Code, including provisions regarding removal of cases from state to federal court. As its title suggests, the JVCA does not necessarily change existing law relating to removal, but often simply clarifies conflicting judicial interpretations of the removal provisions.

This article summarizes the removal-related changes and highlights how the changes have been interpreted by various federal courts during the year and a half following passage of the JVCA.

Timing of Removal

The JVCA clarifies the law regarding timing for removal in three significant respects.

First, the JVCA makes clear that, in a case removable based on the initial complaint, each defendant has 30 days after receipt of the complaint to remove. Second, the JVCA clarifies that cases that are not initially removable may become removable upon receipt of information in discovery satisfying the amount in controversy requirement. Third, removal can occur more than one year after the filing of the complaint if bad faith is shown.

Timing of Removal When There Are Multiple Defendants

The JVCA provides: "Each defendant shall have 30 days after receipt by or service on that defendant of the initial pleading ... to file the notice of removal." 28 U.S.C. § 1446(b)(2) (B).

Thus, the JVCA clarifies that each defendant, and not just the first-served defendant, has its own 30-day clock. This provision was amended in order to clarify "the rule of timeliness and provide [] for equal treatment of all defendants in their ability to obtain Federal jurisdiction over the case against them." H.R. REP. NO. 112-10, at 14 (2011). Post-JVCA decisions illustrate that cases that could not have been timely removed in certain jurisdictions under the old law, are now removable. See, e.g., Propane Resources Supply and Marketing LLC v. G.J. Creel & Sons Inc. (D. Ks., Jan. 17, 2013) (recognizing that each subsequently served defendant could timely remove regardless of when the first defendant was served); Miller v. California Dept. of Corrections and Rehabilitation (E.D. Cal., Oct. 26, 2012) (noting the plaintiff's first-served defendant argument is without merit under the amended 28 U.S.C. § 1446 and removal is proper).

On a related note in multid defendant diversity cases, the JVCA codifies the "rule of unanimity," requiring all defendants in diversity cases to consent to removal. Thus, each

and every properly served defendant must consent to removal. *Pacy v. Cohen Holding Inc.* (W.D. N.Y., Oct. 25, 2012). Failure to satisfy the rule of unanimity makes the defendant's removal defective. *Witcher v. Ford Motor Co.* (W.D. La., Nov. 20, 2012). Notably, the codification of the unanimity rule only applies to diversity cases. See *DaPrin v. Verska* (D. Idaho, Sept. 18, 2012) ("The [JVCA] clarifies that only defendants against whom a claim arising under federal law is asserted are required to consent to removal.").

The means of demonstrating compliance with the rule of unanimity may vary by jurisdiction. Compare *Mayo v. Bd. of Edu. of Prince George's Cty.* at *5 (4th Cir. April 11, 2013) (indicating in dicta that a notice of removal that speaks unambiguously for the other defendants and voices their consent, satisfies the rule of unanimity.), with *Tilley v. Tisdale*, at *5 (E.D. Tx., Dec. 27, 2012) ("silence is not valid consent ... This rule simply requires that there be 'some timely filed written indication from each served defendant ... that it has consented to such action.'). Thus, practitioners should be careful to show consent in a manner that meets the requirements for the applicable jurisdiction.

Removal More Than 30 Days After Service Based Upon Receipt of Other Paper

The JVCA explains that, if the case was not removable based on the initial pleading, information obtained in state court discovery may be used to support removal — notwithstanding the fact that the initial 30-day post-service removal deadline may have expired. See 28 U.S.C. § 1446(c)(3)(A).

The new statutory language in 28 U.S.C. § 1446(c)(3)(A) qualifying discovery responses as an "other paper," which can form the basis for removal, appears to be a codification of existing law in most jurisdictions. See e.g., *Wilson v. General Motors Corp.*, 888 F.2d 779, 782 (11th Cir. 1989) (response to request for admission constitutes an "other paper" allowing removal); *Lee v. Food Lion LLC* (E.D. Va. Feb. 13, 2013) (noting the Fourth Circuit's prior policy allowing a defendant to prove the amount in controversy from any information he had received from informal or formal communications).

Removal More Than One Year After Commencement if Bad Faith Is Shown

The third significant timing clarification under the JVCA establishes that a case may now be removed more than one year after commencement of a case if the removing defendant demonstrates that the "plaintiff has acted in bad faith in order to prevent a defendant from removing the action." 28 U.S.C. § 1446(c)(1). While the JVCA does not define "bad faith," it provides that a plaintiff "deliberately fail[ing] to disclose the amount in controversy to prevent removal" shall be deemed bad faith. *Id.* § 1446(c)(3)(B).

This bad faith exception codifies the approach of many federal courts that held that a plaintiff who engaged in bad faith was estopped from asserting the one-year limitation on removal. See e.g. *Tedford v. Warner-Lambert*, 327 F.3d 423 (5th Cir. 2003) (recognizing equitable exception where plaintiff attempted to manipulate requirements for removal jurisdiction). However, the language may present new opportunities for removal in some jurisdictions where a bad faith exception was not previously applied. See *Richfield Hospitality Inc. v. Charter One Hotels and Resorts Inc.* (D. Colo., Feb. 14, 2013) (holding that the "bad faith" exception is unavailable when the claim was commenced prior to the effective date of the JVCA because there was no previous requirement).

Since the JVCA only applies to cases commenced on or after Jan. 6, 2012, the new bad faith exception to the one-year limit on removal could not provide a basis for removal until Jan. 7, 2013, at the earliest. See *Richfield Hospitality Inc. v. Charter One Hotels and Resorts Inc.*, at *2 (D. Col. Feb. 14, 2013) (refusing to consider bad faith argument because case was commenced prior to effective date of the JVCA). Thus, there is very little new case law on what will satisfy the bad faith requirement.

Establishing the Amount in Controversy — the Standard and Burden of Proof

The next significant clarifications to removal procedure relate to when the defendant may go beyond the amount prayed for in the complaint to assert that the amount in controversy is satisfied and the burden of proof on the amount in controversy when removal is challenged.

The new § 1446(c)(2) provides: “[T]he sum demanded in good faith in the initial pleading shall be deemed to be the amount in controversy.” However, that subsection also provides that “the notice of removal may assert the amount in controversy is satisfied if the initial pleading seeks — (i) nonmonetary relief; or (ii) 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.” *Id.* By implication, a defendant may also remove a lawsuit and prove the amount in controversy where the complaint alleges unspecified damages. See, *Firmin v. Richard Const. Inc.* (E.D. La., Oct. 26, 2012).

Establishing the Amount in Controversy

The provision in the JVCA declaring that “the sum demanded in good faith in the initial pleading shall be deemed to be the amount in controversy” will be significant in some jurisdictions. For example, prior to the JVCA, the Tenth Circuit allowed a removing defendant to present its own evidence on the amount in controversy and a plaintiff’s attempt to limit his damages in the initial complaint was not dispositive. *Frederick v. Hartford Underwriters Ins. Co.*, 633 F.3d 1242, 1247 (10th Cir. 2012). However, under the new JVCA amendment, the amount sought in good faith in an initial pleading is considered the amount in controversy, subject to the listed exceptions. *Id.*

Several courts have applied the JVCA’s clarifying exceptions and allowed removal when the complaint does not demand a sum certain or seeks less than \$75,000, but state practice permits recovery of damages in excess of the amount demanded. See e.g. *Carneal v. Travelers Cas. Ins. of America* (W.D. Ky., Jan. 7, 2013) (denying remand on the ground that defendant proved more likely than not that the amount in controversy exceeded \$75,000 based on the face of the initial pleading); *Butler*, at *2 (noting that defendant is permitted to contest the amount in controversy even when plaintiff demands a sum certain below the jurisdictional amount in the complaint because Kansas law recognized that a final judgment should grant relief to which each party is entitled, even if the party has not demanded that relief in its pleadings); *Warren v. Mac’s Convenience Stores LLC*, * 2 (W.D. Ky., Oct. 18, 2012) (remanding on other grounds, but noting that defendant was permitted to assert the amount in controversy was satisfied upon removal because “Kentucky both prohibits the demand for a specific sum and allows recovery beyond that demanded in the pleadings, these amendments apply”).

The Burden of Proof Regarding the Amount in Controversy

The JVCA resolves a split between the circuit court of appeals and adopts the majority view that it is the defendant’s burden to establish the amount in controversy by a “preponderance of the evidence.” See 28 U.S.C. § 1446(c)(2)(B). The “preponderance of the evidence” standard has recently been interpreted to mean “proof to a reasonable probability that jurisdiction exists,” *Frank Bryan Inc. v. CSX Transp. Inc.* (W.D. Pa., Apr. 15, 2013), or that it is “more like than not the amount in controversy exceeds \$75,000.00,” *Proctor v. Swifty Oil Co. Inc.* (W.D. Ky., Oct. 1, 2012).

The clarification of the defendant’s burden of proof on the amount in controversy is a significant development in some jurisdictions. For instance, in *County of Washington, Pa. v. U.S. Bank Nat’l Ass’n.*, *21 (W.D. Pa., Aug. 17, 2012), the court noted the effect the

JVCA had on cases within the Third Circuit regarding the allocation of the burden of proof:

Until recently, allocation of the burden of proving or disproving the requisite amount-in-controversy was a murky area, despite substantial efforts by the Court of Appeals for the Third Circuit to clarify seemingly conflicting standards ("legal certainty" and "preponderance of the evidence") that had arisen from two lines of United States Supreme Court caselaw. ...

It appears that any lingering confusion has been addressed and, hopefully, dispelled by Congress. [The JVCA] endorsed the preponderance of the evidence standard in the newly enacted Section 1446(c)(3) in Title 28.

Id. Conversely, in *Jefferson v. BEUSA Energy LLC*, *1 (W.D. La., Aug. 17, 2012), the court noted that the "preponderance of evidence" standard in the JVCA "is consistent with the approach long taken by the Fifth Circuit in similar cases.

To meet its burden of proof if removal is challenged, a defendant is required to present more than a conclusory statement that the amount in controversy exceeds \$75,000, it must supply additional evidence proving the amount is satisfied. *Schillaci v. Wal-Mart* (W.D. Pa., Sept. 14, 2012) (rejecting argument that amount in controversy was established by conclusory allegation and plaintiff's refusal to stipulate that damages were below the threshold). Other courts have remanded cases where the evidence submitted by the defendant to support removal was not admissible. See *County of Washington, Pa. v. US Bank NA*, at *23 (W.D. Pa. Aug. 17, 2012).

No Discretion to Hear Separate and Independent State-Law Claims

The third significant revision under the JVCA relates exclusively to cases removed based on federal question jurisdiction and eliminates a federal court's discretion to hear separate and independent state-law claims asserted in the same cases. See 28 U.S.C. § 1441(c)(2).

Under this subsection, a defendant can remove a case with federal claims, but the court must sever and remand any "claim not within the original or supplemental jurisdiction of the district court or a claim that has been made non-removable by statute." Id. The sever and remand provisions of the JVCA only apply to "separate and distinct" claims, thereby preserving a federal court's discretion to hear state-law claims arising out of the same nucleus of operative facts as the federal-law claims. *Petersen v. County of Stanislaus* (E.D. Cal., Apr. 1, 2013); see *Brown v. K-MAC Enterprises*, 897 F. Supp. 2d 1098, 1102 (N.D. Okl., Sept. 19, 2012) (noting that the federal court will have discretion to retain the state-law claims if it finds that these claims fall within its supplemental jurisdiction as a part of the same case or controversy as the federal law claims).

Numerous post-JVCA decisions have recognized that a federal court no longer has discretion to hear separate and independent state law claims where removal is based on federal question jurisdiction. See *Shaw v. Ring Power Corp.* (N.D. Fla., Jan. 22, 2013) (noting the new § 1441(c) requires that a district court "shall sever" all otherwise-nonremovable claims and remand them to state court); see, e.g., *Petrano v. Old Republic Nat. Title Ins. Co.*, *6 (N.D. Fl., June 13, 2012) (commenting on the court's obligation, as opposed to discretion, to sever and remand to state court any state-law claims that were not removable on their own).

In sum, in some jurisdictions the JVCA may represent a change in removal rules and procedure and a codification of existing law in others. Thus, the JVCA should result in more uniform decisions across jurisdictions regarding such issues as the time for removal, determining the amount in controversy and the burden of proof when removal is

contested.

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