

# Client Alert

January 6, 2012

For more information, contact:

**Atlanta**

1180 Peachtree Street, NE  
Atlanta, GA 30309-3521  
Tel: +1 404 572 4600  
Fax: +1 404 572 5100

**Austin**

401 Congress Avenue, Suite 3200  
Austin, TX 78701  
T: +1 512 457 2000  
F: +1 512 457 2100

**Charlotte**

100 N Tryon Street, Suite 3900  
Charlotte, NC 28202  
T: +1 704 503 2600  
F: +1 704 503 2622

**Houston**

1100 Louisiana, Suite 4000  
Houston, TX 77002  
T: +1 713 751 3200  
F: +1 713 751 3290

**New York**

1185 Avenue of the Americas  
New York, NY 10036  
T: +1 212 556 2100  
F: +1 212 556 2222

**San Francisco**

101 Second Street, Suite 2300  
San Francisco, CA 94105  
T: +1 415 318 1200  
F: +1 415 318 1300

**Silicon Valley**

333 Twin Dolphin Drive, Suite 400  
Redwood Shores, CA 94065  
T: +1 650 590 0700  
F: +1 650 590 1900

**Washington, D.C.**

1700 Pennsylvania Avenue NW, Suite 200  
Washington, D.C. 20006  
T: +1 202 737 0500  
F: +1 202 626 3737

[www.kslaw.com](http://www.kslaw.com)

## Federal Courts Jurisdiction and Venue Clarification Act of 2011

The Federal Courts Jurisdiction and Venue Clarification Act of 2011 (the “Act”), signed into law on December 7, 2011, becomes effective today, January 6, 2012. It applies to any case either commenced in federal court on or after today or removed to federal court and “commenced,” as determined under State law, on or after today. The Act amends certain jurisdictional and venue-related provisions of the United States Code, including substantially modifying the procedures for removing cases to federal court. It is an important development for federal court litigants. This alert identifies and describes the more significant alterations on existing law as a result of the Act. The full text of the Act is available at <http://www.gpo.gov/fdsys/pkg/BILLS-112hr394enr/pdf/BILLS-112hr394enr.pdf>.

According to the Judiciary Committee Report on the Act, the changes made by the Act were developed and based on the recommendation of the United States Judicial Conference to address the belief, expressed by judges, that “the current rules force them to waste time determining jurisdictional issues at the expense of adjudicating underlying litigation.” Report 112-10, p. 2. The Act was intended to “bring[]” more clarity to the operation of Federal jurisdictional statutes and facilitate[] the identification of the appropriate State or federal court where actions should be brought.” *Id.* To that end, the Act contains both “jurisdictional improvements,” altering the basis for determining citizenship of resident aliens, certain corporations, and certain insurers for purposes of diversity jurisdiction and modifying the procedures for removing cases to federal court, and “venue and transfer improvements,” altering the determination of proper venue and giving courts discretion to allow for an agreed-upon transfer to a particular forum.

### JURISDICTIONAL IMPROVEMENTS

#### Removal Procedures

The most substantial changes caused by the Act are likely the modifications to Sections 1441 and 1446 of Title 28 -- the procedures for removing cases to federal court. In addition to reorganizing the text of statute sections regarding removal, and creating a new section of Title 28 to address removal of criminal cases, the Act alters the procedures for and effect of removal in civil cases in four primary ways. First, the Act resolves a circuit split regarding the timing of removal in cases involving multiple defendants. According to the current version of Section 1446, removal must be effectuated “within

# Client Alert

thirty days after the service of summons upon the defendant.” 28 U.S.C. § 1446(b). Courts had reached different conclusions regarding the meaning of this phrase when a case involved multiple defendants served at different times. Some courts had held that a removal notice must be filed within thirty days of the time that the first defendant was served. Other courts gave all defendants, including later-served defendants, the full thirty days to remove a case to federal court. The Act statutorily resolves this split in authority and adopts the more lenient view, allowing each defendant a full thirty days following service on that defendant to file a removal notice. New Section 1446(b)(2)(A) now provides that “[e]ach defendant shall have 30 days after receipt by service on that defendant . . . to file the notice of removal.”

Second, the Act adopts new procedures for establishing the amount in controversy necessary to sustain diversity jurisdiction. New Section 1446(c) provides that “the sum demanded in good faith in the initial pleading shall be deemed to be the amount in controversy,” except in certain circumstances. The Act allows a defendant’s notice of removal to establish the amount in controversy 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.” Section 103(b)(3)(C). Further, the Act defines the standard of proof imposed on a defendant attempting to establish the amount in controversy. Under new Section 1446(c)(2)(B), the district court must determine that the amount in controversy exceeds the jurisdictional minimum “by the preponderance of the evidence.” *Id.* Finally, the Act makes clear that information collected during state-court discovery may be used to support removal even if removal is not appropriate based on the initial pleading. *See* Section 103(b)(3)(C) (adopting new Section 1446(c)(3)(A), which provides that “[i]f the case stated by the initial pleading is not removable solely because the amount in controversy does not exceed the amount specified in section 1332(a), information relating to the amount in controversy in the record of the State proceeding, or in responses to discovery, shall be treated as an ‘other paper’ under subsection (b)(3).”). According to the Judiciary Report on the Act, these procedures were intended to “address issues relating to uncertainty of the amount in controversy when removal is sought,” including resolving a circuit split regarding the burden of showing that the amount in controversy is satisfied. *See* Report 112-10, p. 15. The full impact of these provisions on the somewhat complicated caselaw that has developed regarding a party’s burden of demonstrating the amount in controversy is unclear.

Third, while retaining the requirement that a notice of removal based on traditional diversity jurisdiction be filed no later than one year after an action is commenced, the Act allows defendant to avoid the one-year bar by demonstrating that the “plaintiff has acted in bad faith in order to prevent a defendant from removing the action.” *See* Section 103(b)(3)(C). As an example of such bad faith, the Act expressly allows a defendant to remove a case following one year if “the district court finds that the plaintiff deliberately failed to disclose the actual amount in controversy to prevent removal.” *Id.*

Fourth, the Act eliminates a federal court’s discretion to hear state-law claims asserted in a case removed to federal court on the basis of federal question jurisdiction. Under new Section 1441(c), while a case involving a federal question and state-law claims may be removed to federal court, upon removal, the district court “shall sever from the action all [state-law] claims . . . and shall remand the severed claims to the State court from which the action was removed.” *See* Section 103(a)(3). While the Act is not entirely clear on this point, it appears that the sever-and-remand provisions apply only to “separate and independent” state-law claims, thus, preserving a federal court’s authority to hear state-law claims that form part of the same case or controversy as the federal claims and are properly in federal court under supplemental jurisdiction pursuant to 28 U.S.C. § 1367. *See* Report 112-10, p. 12.

# Client Alert

The Act also codifies the “unanimity rule,” requiring that all defendants in an action consent to removal of a case to establish federal court jurisdiction. This judicially constructed rule has been long recognized by courts across the country, and it is now codified into Section 1444(2)(A).

## **Citizenship Determinations**

The Act’s jurisdictional changes also clarify how to determine citizenship for resident aliens, as well as corporations and insurance companies with significant foreign operations. Section 101 of the Act attempts to apply the complete diversity requirement to certain claims involving resident aliens. Under the revised version of 28 U.S.C. § 1332(a)(2), while federal courts retain jurisdiction over state-law claims between a citizen of a State and citizens of a foreign state, federal courts cannot exercise jurisdiction over such claims if they are asserted between a citizen of a State and “citizens or subjects of a foreign state who are lawfully admitted for permanent resident in the United States and are domiciled in the same State.” *See* Section 101(2).

With regard to corporations and insurance companies with significant foreign operations, Section 102 of the Act clarifies that such corporations and insurance companies are to be considered citizens of *both* the state by which they are incorporated and any other state, including any foreign state, where it maintains its principal place of business. *See* Section 102. This modifications are intended to limit diversity jurisdiction by expanding the number of states of which corporations and insurers are considered citizens and will modify existing law only in “a small range of cases.” *See* Report 112-10, pp. 8-11.

## **VENUE AND TRANSFER IMPROVEMENTS**

The Act also makes a series of changes to the venue provisions of Title 28. The Act creates a new Section 1390, which generally defines venue, distinguishes venue from subject-matter jurisdiction, and makes clear that the venue provisions immediately following Section 1390 in the United States Code do not apply to admiralty or maritime claims and also do not modify the rules for determining proper venue in removed cases. *See* Report 112-10, p. 17. This section merely clarifies existing law.

The Act also amends Section 1391, the general venue provision of Title 28, in a number of ways. The new Section 1391 uses slightly different language to define proper venue, but it does not significantly alter the general venue requirements. Under the new Section 1391, venue for any civil action, whether based on diversity or federal question jurisdiction, is proper in “(1) a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located; (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or (3) if there is no district in which an action may otherwise be brought as provided [above], any judicial district in which a defendant is subject to the court’s personal jurisdiction with respect to such action.” *See* Section 202(1). Other than clarifying the so-called “fallback” venue provision for cases based on federal questions, described in (3) above, the Act creates no substantive change in these general venue requirements.

The Act describes in some detail the method for determining residency for purposes of venue. Creating a new subsection (c) to Section 1391, the Act defines residency for (1) natural persons; (2) entities, whether or not incorporated; and (3) defendants who do not reside in the United States. This change is intended largely to clarify existing law, but it resolves certain ambiguities regarding the rules applicable to determining residency, for purposes of establishing venue, for natural persons and unincorporated associations. *See* Report 112-10, pp. 20-21.

# Client Alert

---

Finally, the Act provides a new procedure for transferring venue to a forum where the parties consent that the case be heard. The Act amends Section 1404 to allow for transfer “to any district or division to which all parties have consented. *See* Section 204. This new procedure allows for transfer to a district chosen by the parties even if venue would not otherwise be proper in that district. *See* Report 112-10, pp. 23-24.

## CONCLUSION

While the Act purports merely to “bring more clarity” to certain jurisdictional and venue provisions of Title 28, the changes created by the Act are quite significant. The full impact of these changes will have to be determined over time, as courts wrestle with the various new provisions and alterations in existing law created by the Act.

*Celebrating more than 125 years of service, King & Spalding is an international law firm that represents a broad array of clients, including half of the Fortune Global 100, with 800 lawyers in 17 offices in the United States, Europe, the Middle East and Asia. The firm has handled matters in over 160 countries on six continents and is consistently recognized for the results it obtains, uncompromising commitment to quality and dedication to understanding the business and culture of its clients. More information is available at [www.kslaw.com](http://www.kslaw.com).*

*This alert provides a general summary of recent legal developments. It is not intended to be and should not be relied upon as legal advice.*