

New Year's Cheer: A Defendant's Removal Wishlist Fulfilled

Congress and President Obama delivered early New Year's cheer for defendants who often find themselves venued in undesirable state courts. On December 7, 2011, President Obama signed into law a rare expansion of removal rights for defendants in the "Federal Courts Jurisdiction and Venue Clarification Act of 2011," H. R. 394, P.L. 112-63 (the "Act"). The Act codifies and/or clarifies existing caselaw concerning the timing of and requirements for removal. Highlights of the fulfilled removal wishes are set forth below.

Removal Wishlist	
30-Day Removal Deadline (trigger date): The 30-day deadline for removal is triggered by formal service, not mere receipt, of the initial pleading (codifying <i>Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.</i> , 526 U.S. 344 (1999)).	✓
30-Day Removal Deadline (trigger date in multi-defendant cases): In multi-defendant cases, each defendant has 30 days to remove from the date it is served with the initial pleading and not from the date the first defendant is served (adopting the "later served defendant" rule followed by the Third, Sixth, Eighth, Ninth and Eleventh Circuits and rejecting the "first-served defendant" rule of the Fourth and Fifth Circuits).	✓
In-State Defendants: In cases in which there is complete diversity, the presence of an in-state defendant will defeat removal only where the in-state defendant has been "properly joined and served" (adopting same language as in prior removal statute, notwithstanding some district court decisions holding that a lack of service on an in-state defendant in cases with complete diversity was not a basis to support removal).	✓
Amount in Controversy: Although amount sought in complaint is generally deemed the amount in controversy for removal purposes, a defendant can still establish the requisite amount in controversy (\$75K+) where plaintiff seeks (i) non-monetary relief; or (ii) a money judgment in a state where local practice either does not permit a demand for a specific sum or permits recovery of damages in excess of the amount demanded.	✓
Amount in Controversy: Even if a case is not initially removable, it can be removed later upon receipt of a pleading or discovery indicating that the requisite amount is satisfied.	✓
Amount in Controversy (burden): Even where the complaint expressly alleges less than the requisite amount in controversy, defendant's burden to establish the requisite amount is only by a "preponderance of the evidence" standard, rather than to "a legal certainty," as some courts have required (<i>e.g.</i> , <i>Burns v. Windsor Ins. Co.</i> , 1 F.3d 1092 (11 th Cir. 1994)).	✓
Exception to One-Year Limit: The one-year limit on diversity-based removals does not apply where plaintiff acted in "bad faith in order to prevent a defendant from removing the action" (codifying the "equitable exception" to the one-year limit recognized in <i>Tedford v. Warner-Lambert Co.</i> , 327 F.3d 423 (5 th Cir. 2003)); "deliberately fail[ing] to disclose the actual amount in controversy to prevent removal" is an example of such "bad faith."	✓

The Act takes effect on January 6, 2012, and the new removal provisions will apply to all lawsuits commenced in state court on or after that date.

With best wishes for a year filled with many happy removals (without "returns" to state court)!

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