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NEWSLETTER OF THE  
**WESTERN DISTRICT OF WISCONSIN  
BAR ASSOCIATION**

Volume 21, Number 2

May 2012

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## **Judge Diane Woods on Civil Procedure Rules**

**Richard Briles Moriarty, President-Elect  
Western District Bar Association**



Past Keynote Speakers at Annual Meetings of the Western District Bar Association have set high standards. Those attending the 2012 Annual Meeting are in for a treat, as would be confirmed by anyone who has appeared before Seventh Circuit Judge Diane Wood, our 2012 Keynote Speaker.

Judge Wood, a highly respected and nationally known jurist, will present the Keynote Address on “Are the Civil Procedure Rules Ready for More Change?” bringing to bear her expertise and experience, both on the bench and on the federal Judicial Conference Committee on Rules of Practice and Procedure. A Senior Lecturer in Law at University of Chicago Law School, Judge Wood obtained her undergraduate and law degrees from University of Texas-Austin with high honors. Before joining the Seventh Circuit in 1995, she served clerkships on the Fifth Circuit and U.S. Supreme Court, as an Assistant Attorney General with the U.S. Department of Justice, and in academic settings as both a professor and Associate Dean. She is a Fellow of the American Academy of Arts & Sciences and on the Council of the American Law Institute. The luncheon,

which will feature the Keynote Address, will begin at noon at the Concourse Hotel in Madison.

The Annual Business Meeting of the WDBA will precede the luncheon and start at 11:00 a.m. at the U.S. courthouse. After the luncheon, the Annual Meeting continues at the courthouse, with a CLE program from 2:00 to 4:00 p.m. Clerk Oppeneer will provide his valued annual summary of Court statistics and information from the Clerk’s office followed by an ethics program entitled “Practical Ethics in the Information Age” and presentations summarizing U.S. Supreme Court civil and criminal law developments from representatives of the Wisconsin Attorney General’s office, the Federal Public Defender’s office, and the U.S. Attorney’s office. Chief Judge Conley will round out the program discussing the Pro Bono Program and Pro Bono Appointments.

The CLE Program will be followed by our traditional and popular Judges’ panel. The Meeting will conclude with a reception, starting at 4:30 p.m., with hors d’oeuvres and beverages provided by the WDBA, that provides opportunities for practitioners and the judiciary to interact informally.

Registration materials and a full agenda for this Annual Meeting are included with this newsletter.

We look forward to seeing you there.

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## Federal Courts Jurisdiction and Venue Clarification Act of 2011: Changes to Jurisdiction and Venue

**Andrew N. DeClercq**  
**Boardman & Clark LLP**

In January of this year, the Federal Courts Jurisdiction and Venue Clarification Act of 2011 went into effect, modifying a number of the jurisdictional, venue, and transfer provisions of title 28 of the United States Code. The Act made significant changes to the rules regarding to diversity jurisdiction, removal, and venue. Some of these changes were made to clarify the law by, for example, resolving conflicting judicial interpretations of these rules. In other cases, the Act introduced changes to prior law. Here is a summary of some of the most notable changes:

### Jurisdictional Changes

**Removal and Remand Procedures.** The Act reorganized section 1441 ("Removal of civil actions"), changed the title of section 1446 ("Procedure for removal of civil actions"), and created a new section 1455 ("Procedure for removal of criminal prosecutions"). In addition, the Act also made a variety of substantive changes to the removal rules.

**Certain state-law claims no longer removable.** The Act revised section 1441(c) to change the rules applicable to the removal of actions that include multiple claims. Under the prior rule, in cases involving both claims based on an independent federal question and unrelated state-law claims, section 1441(c) permitted a district court to retain jurisdiction over the entire case or remand all matters in which state law predominates. This rule was criticized, because it permitted federal courts to decide state-law claims for which they did not have original jurisdiction. In fact, several federal courts have declared the provision unconstitutional or raised constitutional concerns regarding the provision. In light of these objections, the Act revised section 1441(c) so that it now requires district courts to remand unrelated state law matters. State law claims that share the same nexus as federal claims are not affected. As revised, section 1441(c) provides: "Upon removal of an action . . . the district court shall sever from the action all claims [not within the original or supplemental jurisdiction of the district court or that have

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been made nonremovable by statute] and shall remand the severed claims to the State court from which the action was removed.”

**Clarification of removal deadline in multi-defendant cases.** The Act made clarifying changes regarding the application of the time limit on removal in multi-defendant cases. Prior to the Act, section 1446 provided a 30-day period for “the defendant” to remove an action, but it did not expressly address the removal period in multi-defendant cases. This lack of guidance led courts to reach different conclusions regarding when the 30-day period begins to run, particularly in cases involving multiple defendants who are served over an extended period of time during and after the first-served defendant’s 30-day period for removal. To clarify this issue, the revised rule expressly provides that “[e]ach defendant shall have 30 days after receipt by or service on that defendant of the initial pleading or summons . . . to file the notice of removal.”

**Codification of “rule of unanimity”.** The Act codified the “rule of unanimity” for cases involving multiple defendants. That rule, which requires all defendants to consent to removal, was well-established prior to the passage of the Act. The rule is codified in new section 1446(b)(2)(A), which provides: “When a civil action is removed solely under section 1441(a), all defendants who have been properly joined and served must join in or consent to removal of the action.”

**Exception to one-year limit on removal.** The Act introduced an exception to the one-year limitation period on the removal of diversity actions. Under new section 1446(c)(1), a district court may permit removal more than one year after commencement of an action if it “finds that the plaintiff has acted in bad faith in order to prevent a defendant from removing the action.” Further, under new section 1446(c)(3)(B), if there is a finding that the plaintiff deliberately failed to disclose the actual amount in controversy to prevent removal, that finding will be deemed bad faith for purposes of applying section 1446(c)(1).

**Changes to the rules regarding the amount in controversy requirement.** The Act amended section 1446(c) by adding two new paragraphs, (2) and (3), that address issues relating to uncertainty surrounding the amount in contro-

versy when removal is sought. New paragraph 1446(c)(2) provides that if removal is sought on the basis of diversity jurisdiction, the amount demanded in good faith in the initial pleading shall be deemed to be the amount in controversy. However, it also provides an exception to this rule, which permits the amount in controversy to be asserted in the notice of removal if the pleading seeks (1) nonmonetary relief or (2) “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.”

In addition to this change, new paragraph 1446(c)(3) clarifies that the defendant’s right to take discovery in state court may be used to help determine the amount in controversy. Paragraph 1446(c)(3)(A) provides that in cases in which the initial pleading is not removable solely because the amount in controversy does not exceed the required amount, a defendant will be able to remove the action within 30 days of receiving a response to discovery or information in the record that indicates that the amount in controversy exceeds the threshold amount.

Under both of these new amount-in-controversy provisions, the standard for determining the amount in controversy is a preponderance of the evidence. Discovery may be taken on the issue of the amount in controversy and, if there is a dispute, the district court must make findings of jurisdictional fact on the issue.

**Citizenship of Corporations and Insurance Companies.** The Act revised section 1332(c)(1) to clarify how foreign contacts affect diversity jurisdiction in actions involving corporations and insurance companies. The revisions make it clear that all corporations, foreign and domestic, are regarded as citizens of both their place of incorporation and their principal place of business. As a consequence of these revisions, diversity jurisdiction will be denied in two situations: (1) where a foreign corporation with its principal place of business in a state sues or is sued by a citizen of that same state, and (2) where a citizen of a foreign country sues a U.S. corporation with its principal place of business abroad.

*(Continued on page 4)*

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In regard to insurance companies, a separate amendment to section 1332(c)(1) provides the same definition of citizenship for an insurance company engaged in direct action litigation as the definition for corporations with foreign contacts. This change makes it clear that for diversity purposes, the citizenship analysis for an insurer will be no different than that for a corporation, and the analysis should recognize the insurer's foreign contacts. This change is significant for Wisconsin practitioners, as Wisconsin is one of several states that permit direct actions against insurers.

**Resident Aliens and Diversity Jurisdiction.** The Act eliminated the "resident alien proviso" from section 1332(a). Under the resident alien proviso, a resident alien was "deemed a citizen of the State in which such alien is domiciled." With the elimination of the proviso, resident aliens will no longer be deemed to be U.S. citizens for purposes of diversity jurisdiction. The effect of this change is that resident aliens who are domiciled in different states will not be able to invoke diversity jurisdiction. In addition to this change, the Act also added a provision to section 1332(a) that clarifies that district courts do not have diversity jurisdiction over a suit between a citizen of a state and a citizen or subject of a foreign state who has been admitted for permanent residence in that same state.

### **Venue and Transfer Changes**

**Venue.** The Act added new section 1390 to define the term "venue" and specify two areas where the venue chapter is inapplicable.

**Definition of venue.** Section 1390(a) defines "venue" as follows:

As used in this chapter, the term "venue" "refers to the geographic specification of the proper court or courts for the litigation of a civil action that is within the subject-matter jurisdiction of the district courts in general, and does not refer to any grant or restriction of subject-matter jurisdiction providing for a civil action to be adjudicated only by the district court for a particular district or districts.

This definition distinguishes venue from provisions of federal law that operate as restrictions on subject-matter jurisdiction. Although some subject-matter jurisdiction restrictions include geographic terms, they differ from venue

rules in that they may not be waived by the parties.

**Venue rules not applicable to certain actions.** The Act added section 1390(b) to clarify that the general venue provisions do not apply to proceedings in admiralty. In addition, new section 1390(c) clarifies that the venue statutes do not determine the proper venue for a case removed from state court to a federal district court. (For such cases, section 1441(a) makes venue proper in the federal district court for the district in which the state court action was pending.)

**Elimination of the "local action" rule.** New section 1391(a)(2) eliminates the "local action" rule, which pertained to certain actions over real property by providing for venue in the district in which the property is located. Section 1391(a)(2) provides: "the proper venue for a civil action shall be determined without regard to whether the action is local or transitory in nature."

**Revised provisions regarding determination of proper venue.** The Act created new section 1391(b) to establish a single, unitary approach to the venue rules that govern actions brought in federal court based on diversity or federal question jurisdiction. Prior to the change, there were separate but largely overlapping provisions regarding venue in actions brought pursuant to diversity jurisdiction and actions brought pursuant to federal question jurisdiction. New section 1391(b) provides for venue on the basis of either the residence of the defendants or the location in which a substantial part of the events or omissions giving rise to the claim occurred. If proper venue cannot be found on either basis, there is a fallback provision that provides for venue in any judicial district in which any defendant is subject to the court's personal jurisdiction.

In some cases, these revised rules will narrow the range of venues that would have been available under prior law. In particular, the revised rule regarding venue based on the residence of the defendants eliminates certain venue options that may have been available previously. Under the new law, venue based on residence is limited to "a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located" (emphasis added). The prior rule provided for venue in "a judicial district where any defendant resides, if all defendants reside in the same State" (emphasis added).

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Thus, the prior rule potentially provided a greater range of venue options in cases involving defendants that reside in the same state, if some of those defendants also reside in other states. For example, in an action involving events that occurred in Wisconsin brought against both an individual resident of Wisconsin and a corporation that does substantial business in every state (including Wisconsin), the prior rule would have permitted venue in any state, because both defendants reside in the same state (i.e., Wisconsin). Under the new rule, however, venue would be limited to Wisconsin, since the revised venue provision regarding residence limits venue to a judicial district in a state in which all defendants reside.

**Residency rules.** The Act also added a new section 1391(c), which defines residency for natural persons as well as incorporated and unincorporated entities. As discussed, one manner in which proper venue may be established (under both the new and the old rules) is on the basis of where the defendants “reside.” Previously, there was no definition of the term “reside” for venue purposes. Consequently, there was a circuit split regarding the meaning of that term, with some courts interpreting it to be synonymous with a party’s domicile, and others interpreting it more broadly (e.g., finding that a person may reside in their state of domicile as well as in additional states). The new section 1391(c) resolves this split by specifying that “a natural person, including an alien lawfully admitted for permanent residence in the United States, shall be deemed to reside in the judicial district in which that person is domiciled.”

In addition, section 1391(c) also clarifies the residency rules for unincorporated associations, such as unions. Under section 1391(c)(2), an unincorporated association and any other entity with the capacity to sue and be sued in its common name, whether or not incorporated, “shall be deemed to reside, if a defendant, in any judicial district in which such defendant is subject to the court’s personal jurisdiction with respect to the civil action in question and, if a plaintiff, only in the judicial district in which it maintains its principal place of business.”

Finally, section 1391(c)(3) changes the law regarding venue for aliens and nonresident defendants (including nonresident U.S. citizens). Section 1391(c)(3) provides

that “a defendant not resident in the United States may be sued in any judicial district, and the joinder of such a defendant shall be disregarded in determining where the action may be brought with respect to other defendants.” Thus, neither an alien nor a United States citizen domiciled abroad is able to claim a venue defense to the location of litigation (although a jurisdictional defense may still be available). On the other hand, under the revised section 1391(c)(1), a permanent resident alien domiciled in the United States may raise a venue defense (which is a change from prior law).

**Transfer of venue.** The Act amended section 1404 to provide more flexibility for parties to consent to the transfer of venue. Under the prior rule, transfer was limited to those districts where the action “might have been brought.” Under the new rule, transfer is permitted to “any district or division to which all parties have consented.” Thus, transfer may be permitted even to districts where the action may not have originally been brought.

Text of the Act can be found here: <http://www.gpo.gov/fdsys/pkg/PLAW-112publ63/pdf/PLAW-112publ63.pdf>.

The House report regarding the Act, which discusses in detail the purposes of many of the changes, can be found here: <http://www.gpo.gov/fdsys/pkg/CRPT-112hrpt10/pdf/CRPT-112hrpt10.pdf>.

## **Important Note!**

The WDBA will increasingly use Email as a way to rapidly and more cost-effectively communicate with our membership.

For this to work, it is important that your office Email filter be set to allow messages from [info@wdbar.org](mailto:info@wdbar.org)

Please have you IT department  
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