

## **NEW LAW CHANGES RULE GOVERNING REMOVAL OF MATTER FROM STATE COURT TO FEDERAL COURT**

On January 6, 2012, the Federal Courts Jurisdiction and Venue Clarification Act (“Act”) of 2011<sup>i</sup>, came into effect. The Act as a whole brought changes to Federal statutes affecting venue, removal and jurisdiction. The purpose of this article is to discuss the important changes under the Act that impact the timing requirements associated with removing an action from a State Court to Federal Court. Under the Act, in multi-defendant litigation, each defendant now has thirty days from the date on which they were served to file a Notice of Removal to the Federal District Court.

Prior to the Act becoming effective, there was a split between Circuit Courts and within the Circuits themselves, regarding when the timing requirements for seeking removal from State Court to Federal Court began to run. The two legal doctrines applied in addressing this issue were known as the “later-served” rule and the “first-served” rule. Prior to the passing of the Act, the Fourth and Fifth Circuit Courts had adopted the “first-served” rule while the Third, Sixth, Eighth, Ninth and Eleventh Circuit had adopted the “later-served” rule.

Before the Act’s enactment, courts disagreed on whether the language in 28 U.S.C. § 1446 provided that the thirty-day window for filing a Notice of Removal began to run when the first defendant was served or was triggered upon the service of each defendant who was a party to the litigation. As was noted by the Ninth Circuit Court of Appeals, the question presented to the courts was “does the first-served defendant’s thirty day clock run for all subsequently served defendants (the first-served rule), or does each defendant gets its own thirty days to remove after being served (the later-served rule)?”<sup>ii</sup> Prior to the passing of the Act, 28 USC §1446 (a) provided that: “[any] defendant or defendants desiring to remove any civil action... from a state shall file in the District Court of the United

States for the district and division within which such action is pending a Notice of Removal...containing a short plain statement of the grounds for removal together with a copy of all process, pleadings, and orders served on such defendant or defendants to such action.” Further, 28 USC § 1446(b) provided that “the Notice of Removal of the civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after service of summons upon the defendant if such initial pleading has been filed in court and is not required to be served on the defendant, whichever period is shorter.” In interpreting this statutory language, courts found ambiguity permitting the development of the “first-served” and “later-served” rules.

The reasoning utilized to support the first-served rule was enunciated in Mcanally Enterprises, Inc. v. Mcanally, et al., 107 F. Supp. 2d 1223 (2000). In that matter, plaintiff had originally filed a complaint in the Superior Court of the State of California. During the course of the litigation, pleadings were amended to include defendants. The new defendants filed a Notice of Removal within thirty days of being served with the amended complaint. Plaintiff then filed a motion to remand the matter to state court claiming that the procedural requirements of 28 USC §1446 had not been met. Specifically, plaintiff argued that the thirty day period for removal began to run when the first defendant was served. Accordingly, plaintiff asserted that as the initial defendant did not seek removal within the thirty day period, removal was not appropriate.

In ordering that the matter be remanded to state court, the federal court initially noted that in multi-defendant litigation all defendants must consent to the removal (known as the Unanimity Rule).<sup>iii</sup> The court reasoned that as the initial defendant in this action did not seek removal within the thirty day timing requirement, allowing that defendant to later consent to removal sought by a newly added party would defeat the timing requirement set in the statute. Further, the court held that applying the “first-served” rule would support the proposition that forum selection should be resolved as early as possible in litigation and that removal statutes must be narrowly construed.<sup>iv</sup> Accordingly, based on this

reasoning, the court determined that the thirty day time period for removal ran upon service on the first defendant. This reasoning largely served as the basis for the “first-served” rule which was exercised by a minority of jurisdictions at the time the Act was passed.

The rationale behind the “later-served” rule was enunciated by the Third Circuit Court of Appeals in the Delalla v. Hanover Insurance et al.<sup>v</sup> In that matter, plaintiff had initially been sued in connection with a trademark dispute over a line of nutritional supplements. Plaintiff’s liability insurance carrier retained defense counsel to represent the plaintiff in connection with that action. Defense counsel negotiated a settlement in that matter on behalf of the clients. Subsequently, plaintiff felt the terms of the settlement were improper and filed suit against its liability carrier and its attorneys in the State Court of New Jersey.

The liability carrier was initially served and did not seek to remove the matter to Federal Court. Former defense counsel was subsequently served and then filed a Notice of Removal. At that time, the thirty day period to seek removal had expired for the liability carrier. The liability carrier consented to the request to remove the matter to District Court. The matter was subsequently removed to the District Court. Plaintiff then filed a Motion to Remand the matter back to State Court. Ultimately, the request to remand was denied.

On appeal, the Third Circuit addressed the issue as to when the thirty day time period for removal began to run under 28 USC § 1446. Ultimately, the Third Circuit found that the “later-served” rule should be applied in addressing removal matters under 28 USC § 1446. The court noted “the first-served rule not only unfairly prejudices later-served defendants, but it creates a perverse incentive system that encourages further inequity. Under the first-served rule, a plaintiff who wishes to remain in State Court benefits by serving a defendant who is indifferent to removal, and then waiting to serve other defendants who are more likely to wish to remove. The rule thus incentivizes plaintiffs to take advantage of the inequities inherent under the first-served rule. By protecting each defendant’s right to removal without regard to whether other defendants were served earlier, the later-served rule thus

removes the incentive for unfair manipulation by delaying service on defendants most likely to remove.”<sup>vi</sup>

The Act has now resolved the differences between the Circuit Courts in applying the timing requirements for removal. Under the Act, 1446(b) now provides “each defendant shall have thirty days after receipt by or service on that defendant of the initial pleading or summons described in paragraph one to file the notice of removal.” Further, “if defendants are served at different times, and a later-served defendant files a Notice of Removal, any earlier-served defendant may consent to the removal even though that earlier-served defendant did not previously initiate or consent to removal.” The Act also codifies the unanimity rule by providing “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 the removal of the action.”

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<sup>i</sup> P.L. 112-63

<sup>ii</sup> Destfino v. Reiswig, 630 F. 3rd 952, 955 (9th Cir. 2011)

<sup>iii</sup> See Chicago, Rock Island & Pacific Railroad v. Martin, 178 US 245, 248 (1900)

<sup>iv</sup> The decision in Mcanally was handed down prior to the Supreme Court’s decision in Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc., 526 US 344 (1999), which allowed a lenient interpretation of 28 USC 1446.

<sup>v</sup> 660 F. 3d 180 (2011)

<sup>vi</sup> Id. at 187, citing Destfino, 630 F.3d at 955