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Jurisdictional Remix: The Federal Courts Jurisdiction and Venue Clarification Act Presents New Challenges to Federal Litigation

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**JURISDICTIONAL REMIX: THE FEDERAL COURTS
JURISDICTION AND VENUE CLARIFICATION ACT
PRESENTS NEW CHALLENGES TO FEDERAL LITIGATION**

ABSTRACT

In response to a growing concern about the efficiency and clarity of jurisdiction in the federal judicial code, Congress passed the Federal Courts Jurisdiction and Venue Clarification Act (“JVCA”) on November 30, 2011. The JVCA is the most far-reaching package of revisions to the judicial code since the Jurisdictional Improvements Act of 1990. Although the JVCA affects almost every aspect of federal jurisdiction, the majority of the amendments focus primarily on removal and venue. The new amendments resolve circuit splits, carve out new exceptions, and codify judicially created rules 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.” While the stated purpose of the JVCA is to bring guidelines and clarity to often confusing jurisdictional issues, there is concern the JVCA will create new challenges and confusion for future federal litigants. This Note will examine the new jurisdictional amendments created by the JVCA, and will argue the JVCA was intended to clarify jurisdiction, but the JVCA may present future federal litigants with more questions than answers.

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I. INTRODUCTION

On December 7, 2011, President Barack Obama signed into law one of the most expansive pieces of legislation affecting the United States judicial code since the Judicial Improvements Act of 1990.¹ The Federal Courts Jurisdiction and Venue Clarification Act of 2011² (“JVCA”), was passed in response to an increased demand for clarification of federal jurisdiction. Although the JVCA affects almost every aspect of federal jurisdiction, the majority of the amendments focus primarily on removal and venue. The new amendments resolve circuit splits, carve out new exceptions, and codify judicially created rules 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.”³

1. Arthur Hellman, *The Federal Courts Jurisdiction and Venue Clarification Act is Now Law*, JURIST (Dec. 30, 2011), <http://jurist.org/forum/2011/12/arthur-hellman-jvca.php>.

2. Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, §103(b)(3)(A), 125 Stat. 758 (enacted Dec. 7, 2011).

3. H.R. REP. NO. 112-10, at 1-2 (2011).

While the stated purpose of the JVCA is to bring guidelines and clarity to often confusing jurisdictional issues, there is concern the JVCA will create new challenges and confusion for future federal litigants.

This Note will explore the JVCA in depth and discuss how the new amendments may impact federal litigants. Specifically, Part II will address the lengthy and complex legislative history of the JVCA, including the development of the bill and its passage through Congress. Part III will address the key amendments of the JVCA, including timely removal, amount in controversy, and venue clarification. Finally, Part IV will discuss the challenges presented by these new provisions, and the new strategy concerns the JVCA presents for federal litigants.

II. A CALL FOR CLARITY IN FEDERAL JURISDICTION

In the 1990s, the Judicial Conference Committee on Federal-State jurisdiction began to identify recurring problems encountered by litigants and judges.⁴ The Judicial Conference Committee consulted with law professors, the American Law Institute (“ALI”), and the legal community to hone in on the particular areas of jurisdiction that required clarification.⁵ In particular, judges raised concerns about the increasing confusion they faced when applying certain jurisdiction and venue statutes.⁶

A. JURISDICTION AND EFFICIENCY

Judges, law professors, and the ALI raised concerns on the vagueness and confusing procedural limitations of the federal judicial code.⁷ As a result, several jurisdictional issues, including defendant removal and venue, were resolved differently across the Circuit Courts of Appeals.⁸ A specific example of this confusion surrounded the singular use of “the defendant” in former 28 U.S.C. § 1446(b); nothing in the legislative history discussed the significance of the singular use of “the defendant,” but the ambiguity gave rise to a split in interpretation by the federal circuit courts.⁹

4. The Third Branch, *Long-Awaited Act Clarifies Venue and Jurisdiction* (Dec. 2011), http://www.uscourts.gov/News/TheThirdBranch/11-12-01/Long-Awaited_Act_Clarifies_Venue_and_Jurisdiction.aspx.

5. *Id.*

6. *Id.*

7. Paul E. Lund, *The Timeliness of Removal and Multiple-Defendant Lawsuits*, 64 BAYLOR L. REV. 50, 64 (2012).

8. *Id.* at 52.

9. *Id.* at 60.

In the spirit of addressing the issue of efficiency and clarity, the ALI began the Federal Judicial Code Revision Project.¹⁰ Finalized in 2001, the Federal Judicial Code Revision Project was one of the primary influences on the JVCA and spurred the discussion for drafting the JVCA.¹¹ Around 2001, the federal Committee on Federal-State Jurisdiction began its own initiative “to ascertain amendments for judicial improvements.”¹²

B. A PROPORTIONAL RESPONSE: THE JURISDICTION
AND VENUE CLARIFICATION ACT

Charged with legislating a response to the growing concerns with federal court jurisdiction and efficiency, the Committee on Federal-State Jurisdiction began drafting several proposals for consideration.¹³ Ultimately, the Committee recommended seven specific amendments to Title 28 “to improve the clarity of the law and increase judicial efficiency.”¹⁴

1. *Preliminary Legislation by the Committee on Federal-
State Jurisdiction*

One of the seven initial proposals related to citizenship of insurers in direct-action litigation.¹⁵ The remaining six proposals related to removal and remand procedures.¹⁶ In addition to a last-served defendant proposal, to resolve the circuit split discussed above, these proposals included: (1) how to address removal issues in diversity cases when the amount in controversy was unclear; (2) authorizing federal district courts to waive the one-year limit on removal in some circumstances; (3) clarified 28 U.S.C. §1441(c) regarding the removal and remand of cases containing both federal-law claims and unrelated state-law claims; (4) separating the removal provisions for criminal and civil cases into two statutes; and (5) removal of the specific reference to Rule 11 in 28 U.S.C. §1446(a).¹⁷

In 2005, the Subcommittee on Courts, the Internet, and Intellectual Property of the House Judiciary Committee held a hearing on these

10. AMERICAN LAW INSTITUTE, *Federal Judicial Code Revision Project* (2001), http://www.ali.org/index.cfm?fuseaction=publications.ppage&node_id=78.

11. *Id.*

12. Lund, *supra* note 7, at 98 (quoting AM. LAW INST., FEDERAL JUDICIAL CODE REVISION PROJECT § 1446(b)(1), 459 (2004)).

13. *Id.* at 99.

14. *Id.* at 98-99 (quoting Judicial Conference Report, Sept. 23, 2003, at 22-23).

15. *See* Judicial Conference Report, Sept. 23, 2003, at 22-23.

16. *Id.*

17. *Id.*

proposals.¹⁸ Subcommittee Chair Lamar Smith of Texas stated that these proposals would have “a wide impact on ordinary private litigations in the federal courts.”¹⁹ Smith also noted, “our job is not to favor plaintiffs or defendants, but to make sure that the jurisdiction arrangements are both fair and efficient for all litigants.”²⁰

2. *Consultation with Legal Stakeholders*

While Chairman Smith and the subcommittee considered these proposals, several legal scholars consulted and testified to the project during the 111th Congress. Scholars from law schools such as the University of Houston, Chicago-Kent, Loyola, and Duke endorsed the changes.²¹ Professor Arthur Hellman of the University of Pittsburgh School of Law testified before the Subcommittee and contributed significantly to the project.²²

Other legal stakeholders were also consulted during the drafting of the JVCA. The American Bar Association and the American Association for Justice spoke to the amount in controversy requirements, removal, and transfer of venue provisions.²³ Lawyers for Civil Justice and the Federal Bar Association also pledged general support for the bill.²⁴ Most importantly, this informal vetting process with legal stakeholders allowed the JVCA to mark up the bill, increasing the likelihood the JVCA could be passed by both the House and the Senate.

3. *Congressional Candor and Bargaining*

In 2006, the bill was introduced containing the proposals by the Subcommittee;²⁵ however, the bill was not reported out of committee.²⁶ The bill did not reappear until November 2009.²⁷ It returned as House Bill 4113, entitled the Federal Courts Jurisdiction and Venue Clarification Act in the 111th Congress.²⁸

18. Lund, *supra* note 7, at 99.

19. *Id.*

20. See *Federal Courts Jurisdiction Clarification Act: Hearing Before the Subcomm. on Courts, the Internet, and Intell. Prop. of the H. Comm. on the Judiciary*, 109th Cong. (Nov. 15, 2005) (statement of Rep. Smith, Member, H. Comm. on the Judiciary).

21. H.R. REP., *supra* note 3, at 2.

22. *Id.*

23. *Id.*

24. *Id.*

25. Lund, *supra* note 7, at 101.

26. *Id.*

27. *Id.*

28. *Id.*

The House passed the bill by voice vote on September 28, 2010.²⁹ Upon review by the Senate Judiciary Committee, some minor amendments were made to the House version of the bill.³⁰ One of the more controversial strikes made by the Senate was to maintain the status quo on derivative jurisdiction.³¹ Prior to 1986, the derivative jurisdiction doctrine meant that if a state court lacked jurisdiction over an exclusively federal matter, removal to federal court under 28 U.S.C. § 1441(f) was nonetheless barred because the United States district court's jurisdiction was not "derivative" of the jurisdiction that attached in state court.³² The Department of Justice attorneys said that although it is infrequently used, they sometimes invoke the doctrine of derivative jurisdiction when suits involving federal officers and agencies are removed to federal court.³³

4. *Passage of the JVCA*

With the Senate changes, the bill was reintroduced in January 2011 as House Bill 394.³⁴ The bill quickly passed the House, unanimously supported on February 28, 2011.³⁵ The final version of the JVCA passed the Senate on November 30, 2011, and was signed by President Obama on December 7, 2011.³⁶

III. REMOVAL AND VENUE: THE KEY AMENDMENTS

After taking six years to pass through Congress, the JVCA was a significant accomplishment for the House Judiciary Committee and the Administrative Office of the United States Courts. The JVCA included several amendments to Title 28 of the judicial code.³⁷ The most significant amendments for federal litigants are: (1) timely removal for multiple defendants; (2) amount in controversy requirements; and (3) clarification of federal venue selection.

29. *Id.*

30. *Id.*

31. H.R. REP., *supra* note 3.

32. *Id.*

33. *Id.*

34. Federal Courts Jurisdiction and Venue Clarification Act of 2011, H.R. 394, 112th Cong. (as introduced in House, Jan. 24, 2011).

35. Lund, *supra* note 7, at 102.

36. *Id.*

37. 28 U.S.C. § 1446 (2011).

A. TIMELY REMOVAL FOR MULTIPLE DEFENDANTS

The United States Constitution makes no explicit reference to removal of cases from state to federal court; however, ever since the federal courts were first created, Congress has provided for removal.³⁸ The theory underlying removal is that when a case properly falls within the federal courts' limited jurisdiction, the defendant should have the opportunity to consider the benefits of federal jurisdiction, as the plaintiff(s) had the first opportunity to determine where to file suit.³⁹

Usually, the statutory right to remove exists when the plaintiff(s) could have brought their suit in federal court.⁴⁰ The suit is one that would have fallen within the original jurisdiction of the federal court, but the plaintiff chose to file in state court instead. This normally involves cases where the plaintiffs have asserted claims that arise under federal law or diversity of citizenship exists between plaintiffs and defendants.⁴¹

Removal remains a major point of controversy for several reasons. First, removal disrupts the usual rule that the plaintiff gets to choose the forum in which the plaintiff's claims will be heard.⁴² Second, removal involves taking a case from the state court's hands even though the state court had entirely proper jurisdiction over the case.⁴³ Third, removal creates the potential of upsetting the state court's proceedings after the court has devoted substantial time and attention to the case.⁴⁴

1. *The Problem: A Circuit Split on Section 1446(b) and Removal for Multiple Defendants*

Prior to the enactment of the JCVA, the time limitation on removal for cases involving multiple defendants was a significant procedural limitation. The limitation, before the recent amendment was found in the first paragraph of 28 U.S.C. § 1446(b):

The notice of removal of a 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 the service of summons upon the

38. See ERWIN CHEMERINSKY, FEDERAL JURISDICTION §5.5, at 354 (5th ed. 2007) (discussing Judiciary Act of 1789, ch. 20, §12, 1 Stat. 73, 79-80).

39. Lund, *supra* note 7, at 56.

40. *Id.*

41. *Id.*

42. *Id.* at 58.

43. *Id.*

44. *Id.*

defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.⁴⁵

Former section 1446(b) was the only removal statute to refer to the defendant in the singular.⁴⁶ The statute was simple enough to apply when all defendants were served on the same date, but ambiguity arose in the common situation of service on different dates. It is this ambiguity that had given rise to a split among the circuit courts.⁴⁷

Because of the reference to the defendant in the singular, three different circuit court approaches were developed.⁴⁸ First, the most stringent interpretation was the Fifth Circuit's "first-served" defendant rule.⁴⁹ This rule requires all defendants who have been served at that point to file or join in a removal notice within thirty days of service on the first defendant.⁵⁰ Second, several circuits, concerned about the possibility of "inequitable results" with the first-served defendant rule, adopted the "last-served" defendant rule.⁵¹ Under this rule, removal is timely as long as the removal notice is filed and joined in by all defendants within thirty days of service on the last-served defendant.⁵²

Finally, the Fourth Circuit adopted an "intermediate" rule between the two, polar-opposite rules in the other circuits.⁵³ The Fourth Circuit's approach bears some resemblance to the first-served defendant rule, in that it requires that a notice of removal be filed within thirty days of service on the first-served defendant.⁵⁴ If the first-served defendant does not file a notice, the case cannot be removed.⁵⁵ However, the intermediate rule does provide some relief to later-served defendants.⁵⁶ If a timely notice of removal has been filed by the first-served defendant, the subsequently served defendants do not need to join with notice within the initial thirty-day period; instead, each defendant has thirty days from the date of service to file its own notice of removal or join in a previously filed notice.⁵⁷

45. 28 U.S.C. § 1446(b) (2006).

46. Howard B. Stravitz, *Re-cocking the Removal Trigger*, 53 S.C. L. REV. 185, 200 (2002).

47. *Id.*

48. Lund, *supra* note 7, at 64.

49. *Id.* at 64-65.

50. *Id.* at 65.

51. *Id.* at 69-70.

52. *Id.* at 69.

53. *See* McKinney v. Board of Trustees, 955 F.2d 924 (4th Cir. 1992).

54. Lund, *supra* note 7, at 77.

55. *Id.*

56. *Id.*

57. *Id.*

2. *The Solution: The Last-Served Defendant Rule*

The JVCA specifically addresses this conflict among the circuit courts. First, 28 U.S.C. § 1446(b) previously consisted of two, unnumbered paragraphs. The JVCA preserves the current language of the first paragraph as new subsection (b)(1).⁵⁸ The language previously found in the second paragraph of section 1446(b), with some changes, has been renumbered as subsection (b)(3);⁵⁹ the new subsection will govern the timing of removal of cases that are not removable as originally filed but become removable later. Between those two subsections, an entirely new subsection (b)(2) has been added to address multiple-defendant cases.⁶⁰

Second, the JVCA expressly adopts the last-served defendant rule.⁶¹ If any defendant elects to file a notice of removal, the previously served defendants can join, even if they previously made a conscious decision not to seek removal.⁶² Finally, the JVCA purports that the last-served defendant rule is necessitated by considerations of “[f]airness to later-served defendants” and that it would “not allow an indefinite period for removal.”⁶³ The question remains, however, whether these revisions have actually resulted in more ambiguity and inefficiency.

B. AMOUNT IN CONTROVERSY

From the earliest days of the federal courts, there has been a statutory requirement applicable to some cases that a certain amount is in controversy in order to bring an action in the federal district courts. In most diversity cases, the amount in controversy is governed by the more than \$75,000 requirement in 28 U.S.C. § 1332.⁶⁴ The problem often encountered by federal judges and litigants is how to calculate the proper amount in controversy because the rules for measurement are complex. Additionally, federal courts take various views and opinions on how to calculate the amount in controversy.⁶⁵

58. Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, § 103(b)(3)(A), 125 Stat. 758 (enacted Dec. 7, 2011).

59. *Id.*

60. *Id.*

61. *See* H.R. REP., *supra* note 3, at 13-14.

62. *Id.* at 14.

63. *Id.*

64. 14 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD COOPER, FEDERAL PRACTICE AND PROCEDURE § 3701 (4th ed. 2011).

65. *Id.*

1. *The Problem: Mixed Calculations*

*Mississippi Railroad Company v. Ward*⁶⁶ is the leading United States Supreme Court precedent supporting the plaintiff-viewpoint rule.⁶⁷ The plaintiff-viewpoint rule can be warranted in terms of the long-standing principle that the burden of establishing the subject matter jurisdiction of a federal court is on the plaintiff, and the plaintiff must do so in the complaint.⁶⁸ Testing the adequacy of the amount in controversy from the perspective of the plaintiff's viewpoint can be efficient and can promote a straight-forward approach in terms of deciding the jurisdictional amount question.

However, cases are never this clear and simple, particularly when assessing damages.⁶⁹ A significant number of other lower federal courts, on the other hand, have found that jurisdiction exists if more than the statutory amount is involved from the viewpoint of *either* the plaintiff or the defendant.⁷⁰ There is also a third viewpoint on the amount in controversy calculation, supported by several district court decisions and a dictum by one court of appeals.⁷¹ These cases view the amount in controversy from the point of view of the party seeking to invoke federal jurisdiction, and as such, would look to the plaintiff's viewpoint in a case within the federal courts' original jurisdiction, and to the defendant's viewpoint in a case brought to the federal courts by way of removal from a state court.⁷²

2. *The Solution: Defining the Equation*

Because of these various interpretations of how to calculate the amount in controversy, one of the amendments included in the JVCA directly addressed this issue. 28 U.S.C. § 1446 was amended by the JVCA by adding new sections related to the calculation of the amount in controversy when local statutes do not require or allow the plaintiff to allege damages

66. 67 U.S. 485 (1862).

67. WRIGHT & MILLER, *supra* note 64, § 3703.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Hatridge v. Aetna Cas. & Sur. Co.*, 415 F.2d 809 (8th Cir. 1969) (dictum), *Sasensbury v. Barnes-Jewish Hosp.*, 2010 WL 1912913, *2 (S.D. Ill. 2010) (quoting *Smart v. Local Int'l Brotherhood of Elect. Workers*, 562 F.3d 798, 802 (7th Cir. 2009)). "When a defendant removes an action where a plaintiff had sought to recover some 'unspecified amount that is not self-evidently greater or less than the federal amount-in-controversy requirement,' the Sixth Circuit has held that the removing defendant must show that the action 'more likely than not' satisfies the \$75,000 requirement." *Cleveland Housing Renewal Project v. Deutsche Bank Trust Co.*, 606 F. Supp. 2d 698, 710 (N.D. Ohio 2009) (quoting *Gafford v. Gen. Elec. Co.*, 997 F.2d 150, 158 (6th Cir. 1993)).

72. *Id.*

over a threshold amount.⁷³ The new 28 U.S.C. § 1446(c)(2) allows a defendant, in the notice of removal, to assert that the actual or true amount in controversy exceeds \$75,000, even if the plaintiff's pleadings are silent on the issue.⁷⁴ If the district judge finds by a preponderance of the evidence that the amount in controversy exceeds the jurisdictional minimum, federal court jurisdiction will apply.⁷⁵ In addition, under 28 U.S.C. § 1446(c)(3)(A) and 28 U.S.C. § 1446(b)(3), if a defendant later finds that the amount in controversy is greater than \$75,000 because of discovery or an amended pleading, a new thirty day window for removal will open.⁷⁶ The result is a hybrid approach between the current methods of calculations for amount in controversy.

The legislative history encourages looking to *McPhail v. Deere & Company*,⁷⁷ and *Meridian Security Insurance Company v. Sadowski*,⁷⁸ for the appropriate application of what must be pled or alleged in order to reach the jurisdictional threshold. In addition, removal to federal court can happen more than one year after the action was filed if the plaintiff acted in bad faith by attempting to disguise the true amount of damages claimed.⁷⁹

The new amount in controversy requirements allows the defendant to assert his own assessment of the amount in controversy only if state practice “does not permit demand for a specific sum or permits recovery of damages in excess of the amount demanded.”⁸⁰ When state law is permissive, and the plaintiff does not name a dollar figure, neither provision is triggered: state law does “permit” specific demands, and there is no “amount demanded.”⁸¹ Unfortunately, there are many states whose practice falls into this category.

The defendant is permitted to assert his own amount in controversy, and the statute adopts a “preponderance of the evidence” standard.⁸² Some courts treat the preponderance standard as if it articulated a presumption of narrow construction against removal jurisdiction.⁸³ *McPhail* and *Meridian*

73. William Baude, *Clarification Needed: Fixing the Jurisdiction and Venue Clarification Act*, 110 MICH. L. REV. FIRST IMPRESSIONS 33, 34 (2012).

74. 28 U.S.C. § 1446(b)-(c) (2011).

75. *Id.*

76. *Id.*

77. 529 F.3d 947 (10th Cir. 2008).

78. 411 F.3d 526 (7th Cir. 2006).

79. 28 U.S.C. § 1446(c)(3)(B) (2011).

80. 28 U.S.C. § 1446(c)(2)(A)(ii) (2011) (emphasis added).

81. *Id.*

82. Baude, *supra* note 73, at 35.

83. See, e.g., *Menendez v. Wal-Mart Stores, Inc.*, 364 F. App'x 62, 65 (5th Cir. 2010), *Gafford v. Gen. Elec. Co.*, 997 F.2d 150, 158 (6th Cir. 1993); see also *Meridian v. Sadowski*, 441 F.3d 536, 542 (7th Cir. 2006) (noting other district courts that had imposed such a burden).

analyzed that view, and instead interpreted the standard to apply only to “contested facts” that might be relevant to the amount in controversy, whereas “once those underlying facts are proven, a defendant . . . is entitled to stay in federal court unless it is ‘legally certain’ that less than \$75,000 is at stake.”⁸⁴ The Committee Report does suggest the bill was intended to codify the rule in *McPhail* and *Meridian*, but that intention is expressed only in the Committee Report.⁸⁵

C. CLARIFYING VENUE

The JVCA also addressed issues of venue. Venue refers to location; the place where a lawsuit should be filed and heard according to the applicable statutes or rules.⁸⁶ As courts have observed, the fundamental aspect of venue is “primarily a matter of choosing a convenient forum.”⁸⁷ The principal focus of a venue inquiry is the “convenience of litigants and witnesses,” although it is more concerned with the litigant who has not chosen the forum than with the litigant who has chosen the forum.⁸⁸

1. *The Problem: Where Do Claims Belong?*

Although venue may appear to be one of the more clear topics in federal jurisdiction, it is one of the more complex portions of the federal judicial code. The word “convenience” alone is enough to muddy the jurisdictional waters on venue. Other problems arise with fraudulent joinder and forum shopping among parties.⁸⁹

While complex, venue is also an absolutely critical aspect of litigation. Venue can have a major impact on court costs, time to trial, and the attitudes of the judge handling the case.⁹⁰ As such, venue is a crucial component in federal cases.

Prior to 1990, venue for certain civil claims was permitted in the primary judicial district in which the claim arose.⁹¹ This language created difficulties for the lower federal courts because they struggled with exactly how to establish the single judicial district in which the claim arose.⁹² With

84. *McPhail*, 529 F.3d at 954; accord *Meridian*, 441 F.3d at 543.

85. Baude, *supra* note 73, at 36.

86. WRIGHT & MILLER, *supra* note 64, § 3801.

87. *Id.*

88. *Id.*

89. *Id.*

90. Li Zhu, *Taking Off: Recent Changes to Venue Transfer of Patent Litigation in the Rocket Docket*, 11 MINN. J.L. SCI. & TECH. 901, 904 (2010).

91. WRIGHT & MILLER, *supra* note 64, § 3804.

92. Mitchell G. Page, *After the Judicial Improvements Act of 1990: Does the General Venue Statute Survive as a Protection for Defendants?*, 74 U. COLO. L. REV. 1153, 1155 (2003).

the Judicial Improvements Act of 1990, however, the general venue statute was amended to authorize venue in any district in which a “substantial part of the events or omissions giving rise to the claim occurred.”⁹³ In drafting this amendment to the federal venue statute, Congress meant to eliminate “wasteful litigation” concomitant with ascertaining the single district “in which the claim arose.”⁹⁴

Notwithstanding the intent of Congress to curtail litigation over venue, the 1990 Act truncated the ability of 28 U.S.C. § 1391 to protect a defendant from having to defend a claim brought in an unfair or inconvenient district.⁹⁵ As a result of the 1990 Act, Congress created a situation where plaintiffs in diversity cases used the amended language of 28 U.S.C. § 1391(a)(2) to influence the law applied to resolve their claim.⁹⁶ This consequence went beyond Congress’ stated intent of trying to decrease litigation over venue.⁹⁷ Moreover, this result also ran against the general judicial doctrine and statutory provisions that seek to discourage forum shopping for the ideal court to try a case.⁹⁸

2. *The Solution: A Unitary Approach*

One of the more significant amendments by the JVCA included changing the general definition of venue to help clarify some of the confusion created by the 1990 Act.⁹⁹ In the revised 28 U.S.C. § 1390(a), venue now distinguishes the geographic specification of the appropriate forum from other federal law provisions, which restrict subject-matter jurisdiction.¹⁰⁰

The amendment also abolished the distinction in venue between “local” and “transitory” actions.¹⁰¹ The local action rule had limited certain kinds of actions involving real property to the district where the property was located. This created problems in quarrels over property suits if a court could not exercise personal jurisdiction over the defendant in the place where the property was located.¹⁰² Changes to 28 U.S.C. § 1391(a)(2)

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. Hellman, *supra* note 1.

100. *Id.*

101. *Id.*

102. 28 U.S.C. § 1391 (2011).

clarify that only subject matter and personal jurisdiction restrictions apply and repeals 28 U.S.C. § 1392.¹⁰³

The JVCA amendments were also designed to eliminate the distinction between diversity and federal question action venue to a “unitary” approach.¹⁰⁴ It establishes, regardless of how subject-matter jurisdiction is obtained, 28 U.S.C. § 1391 as the general venue statute. Venue is based on residence of the defendant, and fallback venue can be used if there is no other district in which the case may be brought.¹⁰⁵

The new fallback provision directs that venue for both diversity and federal question matters fall on the district “in which any defendant is subject to the court’s personal jurisdiction with respect to such action.”¹⁰⁶ The new subsection of 28 U.S.C. § 1391(c)(1) also clarifies that “resides” should have the same meaning as domicile, and a natural person is deemed to reside in the judicial district where they are domiciled.¹⁰⁷ Additionally, the JVCA allows for transfer of venue to any district, with the consent of all parties.¹⁰⁸ 28 U.S.C. § 1404(a) had previously only permitted transfer to a venue where the action could be brought; those types of transfers are possible when all parties agree and the court determines it is for the convenience of the parties and witnesses and in the interest of justice.¹⁰⁹

IV. CLARIFYING THE CLARIFICATION: NEW CONCERNS FOR FEDERAL LITIGANTS

Although the JVCA was passed by Congress to address the growing confusion and frustration with parts of the federal judicial code, the question remains as to whether the JVCA actually provides clarification to federal judges and litigants. There is also concern the JVCA will create new ambiguities and questions in the federal judicial code. Omitted provisions, ambiguity, and new strategy issues are only a handful of the concerns raised by the JVCA.

A. PLAYING POLITICS: OMITTED PROVISIONS

As referenced earlier, when the JVCA was being vetted in Congress, a critical part of the process included consulting with critical legal stakeholders in the process, including federal judges and respected legal

103. *Id.*; 28 U.S.C. § 1392 (2011).

104. Hellman, *supra* note 1.

105. 28 U.S.C. § 1391.

106. *Id.*

107. *Id.*

108. 28 U.S.C. § 1404(a) (2011).

109. *Id.*

professionals. While on its face the legislative process appeared to be a showing of due diligence and bipartisanship by Congress, the political process still removed several controversial provisions from the JVCA.¹¹⁰

Two controversial provisions in particular were removed from the JVCA. The first would have allowed a plaintiff to avoid removal based on diversity by filing a “declaration” reducing the amount in controversy below the minimum specified in 28 U.S.C. § 1332(a).¹¹¹ This provision was appealing because it offered a way of avoiding satellite litigation, which increases litigation costs in cases where the amount at stake is relatively small by the modern standard.¹¹²

The second controversial provision cut from the JVCA focused on “derivative jurisdiction.”¹¹³ Several years ago, the United States Supreme Court articulated a rule that the jurisdiction of a district court on removal is “derivative:” if the state court from which a case was removed had no jurisdiction, the federal court also lacked jurisdiction.¹¹⁴ Essentially, this meant if a defendant removed a case within the exclusive jurisdiction of the federal courts, the district court is required to remand the case to the state court.¹¹⁵ This rule was revoked by Congress, and the current version of the abrogation statute, 28 U.S.C. § 1441(f), is limited to removals under the general removal statute, 28 U.S.C. § 1441(a).¹¹⁶ Other removals however are still governed by the derivative jurisdiction rule.

When the JVCA was introduced, it included a provision repealing the derivative jurisdiction rule for all removal cases, which appeared to be a welcomed change by federal litigators.¹¹⁷ However, the derivative jurisdiction rule was jettisoned from the bill, when the Department of Justice (“DOJ”) objected to its presence.¹¹⁸ Derivative jurisdiction is sometimes invoked by the DOJ when suits involving federal officers and agencies are removed to federal court.¹¹⁹ As such, the DOJ did not want to abolish derivative jurisdiction and opposition by DOJ would have stopped the bill in its tracks.¹²⁰

110. Arthur Hellman, *The Federal Courts Jurisdiction and Venue Clarification Act: Some Missing Pieces*, JURIST (Jan. 4, 2012), <http://jurist.org/forum/2012/01/arthur-hellman-jvca-ii.php>.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. 28 U.S.C. § 1441(f) (2011).

117. Hellman, *supra* note 110.

118. *Id.*

119. *Id.*

120. *Id.*

The vetting process for the JVCA had some successes and some unfortunate losses of controversial provisions; if these controversial provisions were to have been included, it is likely the JVCA would not have been passed. However, as the stated intent behind the JVCA was to provide clarity to federal jurisdiction, it is noteworthy that in an effort to promote clarity, the often-unclear political process still ruled the day.

B. VENUE AND AMBIGUITY

One of the more significant amendments to the JVCA was on venue. Partly in response to the confusion created by the 1990 Act, the JVCA looked to create a unitary approach to venue to help eliminate problems with forum-shopping and fraudulent joinder.¹²¹ Most of the amendments to venue have been seen as positive changes, but some ambiguities still remain.

It is possible that the new amendments may create a greater incentive to litigate issues of venue, particularly for complex litigation cases. 28 U.S.C. § 1391(b) now states venue is proper if civil action is brought in:

(1) a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located, or (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, or (3) if there is no district in which an action may otherwise be brought, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action.¹²²

These provisions, however, are prime provisions to be tested by litigation. The "substantial part of the events or omissions" language provides much discretion to the parties to decide venue. At first, this may seem attractive to litigators; however, this discretion creates an opportunity for creativity. The new venue provisions may actually increase the amount of forum shopping particular litigants can do in a given case, and as a result, future federal litigants will need to carefully consider how to use these new venue provisions to their advantage.

C. NEW STRATEGY CONCERNS FOR FEDERAL LITIGANTS

The JVCA also presented new strategy concerns for federal litigants. Although the JVCA resolves some conflicts in the lower courts, the

121. See H.R. REP., *supra* note 3, at 17-20.

122. 28 U.S.C. § 1391(b) (Supp. 2012).

statute's approach is less than ideal. It is always complicated to superimpose a handful of statutory procedures on a complex network of rules established through court decisions.¹²³ When dealing with jurisdictional matters, an added challenge exists in developing procedures that will integrate smoothly with the great diversity of practices and procedures adopted by state systems for asserting and valuing claims.¹²⁴

No matter the subject area or party represented, changes will require all federal practice litigators to reconsider longstanding litigation strategies.¹²⁵ Specifically, federal litigation strategy for federal defendants will require creative and innovative approaches under the JVCA. Under the JVCA, any newly added defendant has its own thirty-day time period to seek removal.¹²⁶ This does away with plaintiffs in some circuits simply serving other defendants in complex litigation cases well after the first defendant in an attempt to run the thirty days, thus keeping the case in state court.¹²⁷ The JVCA made significant changes litigators will want to utilize to best represent their clients; however, defendants should have easier access to federal courts.¹²⁸

V. CONCLUSION

The JVCA, after almost a decade of discussion and debate, has presented some of the most expansive revisions to the judicial code since 1990. It has been touted by some scholars as one of the more "real" accomplishments by Congress; however, the JVCA is not without imperfections. Judge Cardozo once said, "[T]he legislature, informed only casually and intermittently of the needs and problems of the courts, without expert or responsible or disinterested or systematic advice . . . patches the fabric here and there, and mars often when it would mend."¹²⁹ The JVCA, by contrast, was prepared with extensive expert advice and makes some definite progress. Even experts, however, are subject to political compromise.¹³⁰

The provisions of the JVCA that Congress ultimately adopted are the best that can be produced under the limitations of the political process. Because controversial proposals are dead in the water when placed in

123. See Baude, *supra* note 73, at 36-37.

124. Hellman, *supra* note 1.

125. *Id.*

126. Lund, *supra* note 7, at 54.

127. See *id.*

128. Hellman, *supra* note 1.

129. Benjamin N. Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113, 113-14 (1921).

130. See discussion, *supra* Part IV.

legislation, it is much easier to remove the provisions than find a way to modify the provisions and incorporate them into the legislation.¹³¹ Yet, at what cost is the political process confusing, instead of clarifying, federal jurisdiction? Perhaps it is time to embrace some more controversial reforms to restore efficiency and clarity to the federal courts and federal court jurisdiction.

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131. *See* discussion, *supra* Part II and IV.

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