

CLARIFICATION NEEDED: FIXING THE JURISDICTION AND VENUE CLARIFICATION ACT

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One hates to seem ungrateful. Judges and scholars frequently call for Congress to fix problems in the law of jurisdiction and procedure, and Congress doesn't usually intervene. In that light, the Jurisdiction and Venue Clarification Act ("JVCA"),¹ signed into law on December 7, 2011, ought to be a welcome improvement. And hopefully, on balance, it will be. But in at least one area that it attempts to clarify, the JVCA leaves much to be desired.

Professor Arthur Hellman has called the JVCA "the most far-reaching package of revisions to the Judicial Code since the Judicial Improvements Act of 1990."² The Act addresses a variety of removal issues—including unrelated federal and state claims, multiple defendants, removal of criminal cases, and the amount in controversy—and makes several major changes to the law of venue. This essay addresses one of those removal issues: the amount in controversy in a case removed from state court. I argue that there are at least three respects in which the JVCA failed to adequately clarify the law of diversity removal jurisdiction.

I. THE REMOVAL PROBLEM

Federal jurisdiction in diversity cases requires that "the matter in controversy exceed[] . . . \$75,000, exclusive of interest and costs."³ When the plaintiff files the lawsuit in federal court in the first instance, this is easy to establish. The complaint must contain "a short and plain statement of the grounds for the court's jurisdiction," and will typically demand at least that much money, plus allege facts sufficient to establish that such a sum might be recoverable.⁴

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1. Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63 (Dec. 7, 2011).

2. Arthur Hellman, *Jurisdiction and Venue Clarification Act*, PRAWFSBLAWG, Dec. 2, 2011, <http://prawfsblawg.blogs.com/prawfsblawg/2011/12/updated-jurisdiction-and-venue-clarification-act.html>. The committee report described Hellman as instrumental in crafting the removal provisions. Report of the House Judiciary Committee, H.R. Rep. 112-10, at 2 [hereinafter "Committee Report"].

3. 28 U.S.C. § 1332(a).

4. Fed. R. Civ. P. 8(a).

But when the defendant seeks to remove a case that has started out in state court (which he can do so long as the case *could* have been filed in federal court, and so long as he acts promptly), two complications arise. One is that the complaint will have been designed to comply with state laws of form, not federal laws. In many states there is no requirement that the complaint demand a particular sum of money.⁵ Even if there is a stated amount, it is not necessarily a binding cap on the plaintiff's recovery.⁶ Some states even *forbid* the naming of a specific sum, apparently believing that lawyers will vie for publicity by naming irresponsible amounts.⁷

The second complication is that the plaintiff has no incentive to establish a large amount in controversy, because it is the defendant who seeks federal jurisdiction. One should therefore not expect the complaint to contain the information necessary to decide whether there is jurisdiction to remove the case. Yet it is not always clear what other evidence there will *be*, or what authority to give such evidence when it exists.

The result has not been a model of jurisdictional simplicity. While two federal appeals court opinions—*McPhail v. Deere* and *Meridian v. Sadowski*—have attempted to bring clarity to the doctrine,⁸ the leading federal practice treatise notes that federal courts have articulated at least eight different ways of analyzing the defendant's burden of establishing federal jurisdiction, optimistically adding that it “is doubtful that these different verbal formulae represent a significant variation in practice.”⁹ The JVCA's Committee Report similarly notes “differing standards” in the federal courts (without the optimism).¹⁰ Even if all courts adjudicate these cases in the same way—which a scan of a hundred district court decisions leads me to doubt—it is surely only after a great deal of effort and some amount of good fortune.

The JVCA provides several rules in an attempt to solve this removal problem. As an initial matter, the amount named “in good faith” in the plaintiff's complaint “shall be deemed to be the amount in controversy.”¹¹ However, the defendant can assert a different amount in controversy in the notice of removal if the complaint seeks nonmonetary relief, or if “State practice either does not permit a demand for a specific sum or permits re-

5. See, e.g., Ala. R. Civ. P. 8(a); Fla. R. Civ. P. 1.110(b); Tenn. R. Civ. P. 8.01. The examples are discussed in Alice M. Noble-Allgire, *Removal of Diversity Actions When the Amount in Controversy Cannot Be Determined from the Face of Plaintiff's Complaint: The Need for Judicial and Statutory Reform to Preserve Defendant's Equal Access to Federal Courts*, 62 MO. L. REV. 681, 686–87 (1997).

6. Noble-Allgire, *supra* note 5, at 692.

7. E.g., Colo. R. Civ. P. 8(a); Ind. R. Trial P. 8(a); N.J. R. Civ. Prac. 4:5-2; S.C. R. Civ. P. 8(a); Wis. Stat. § 802.02(1m); see also Noble-Allgire, *supra* note 5, at 688–89.

8. *McPhail v. Deere*, 529 F.3d 947 (10th Cir. 2008); *Meridian v. Sadowski*, 441 F.3d 536 (7th Cir. 2006).

9. 14A WRIGHT, MILLER, & COOPER, FED. PRAC. & PROC. JURIS. § 3702.2 (4th ed.).

10. Committee Report, *supra* note 2, at 15.

11. JVCA § 103(b)(3)(C), to be codified at 28 U.S.C. § 1446(c)(2).

covery of damages in excess of the amount demanded.”¹² If the defendant has asserted an amount in controversy in the notice of removal, the district court must “find[] by the preponderance of the evidence, that the amount in controversy exceeds” \$75,000.¹³

The Act also makes two modifications to the deadlines for removal. It clarifies that if the defendant discovers for the first time that the case is removable through “information relating to the amount in controversy in the record of the State proceeding, or in responses to discovery,” he has thirty days to remove the case. Further, if “the district court finds that the plaintiff deliberately failed to disclose the actual amount in controversy to prevent removal,” it allows a “bad faith” extension to the one-year maximum deadline for notices of removal.¹⁴

II. THE INCOMPLETENESS OF THE JVCA

These provisions are improvements, yet incomplete in at least three important respects. First, the JVCA provides no rule when state law *permits* but does not *require* the plaintiff to name a specific dollar amount. Recall that the JVCA allows the defendant to assert his own assessment of the amount in controversy only if state practice “does not *permit* a demand for a specific sum” or “permits recovery of damages in excess of *the amount demanded*.” When state law is permissive, and the plaintiff doesn’t name a dollar figure, neither provision is triggered: state law does “permit” specific demands, and there is no “amount demanded.” Unfortunately, there are many states whose practice falls into this category.¹⁵

Second, even when the defendant is permitted to assert his own amount in controversy, the statute adopts a “preponderance of the evidence” standard without explaining what that standard means. Some courts treat the preponderance standard as if it expressed a presumption of narrow construction against removal jurisdiction.¹⁶ *McPhail* and *Meridian* criticized 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.”¹⁷ The Committee Report suggests that the bill was intended to codify the rule in

12. *Id.*, to be codified at 28 U.S.C. § 1446(c)(2)(a)(i)–(ii).

13. *Id.*, to be codified at 28 U.S.C. § 1446(c)(2)(B).

14. *Id.*, §§ 103(b)(3)(B), (C), to be codified at 28 U.S.C. § 1446(b)(3), (c)(1), (c)(3)(B). I discuss these deadlines further in a few paragraphs.

15. *See supra* note 5.

16. *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), *abrogated on other grounds by* *Hertz Corp. v. Friend*, 130 S. Ct. 1181 (2010); *Armour v. Transamerica Life Ins.*, No. 11–2034, 2011 WL 1699281 (D. Kan. May 4, 2011); *Buffington v. Home Depot USA*, No. 10-cv-01933, 2010 WL 3307368 (D. Colo. Aug. 19, 2010); *see also* *Meridian v. Sadowski*, 441 F.3d 536, 542 (7th Cir. 2006) (noting other district courts that had imposed such a burden).

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

McPhail and *Meridian* (a welcome solution by my lights).¹⁸ But that intention is expressed only in the Committee Report, and many judges are reluctant to give too much weight to such legislative history instead of to the statute's text.¹⁹ If Congress really meant it, they could have inserted the holding of those cases explicitly into the statute.

Third, however one interprets the preponderance of the evidence standard, the JVCA does little to address the problem that such evidence can be hard to come by within the schedule of the removal deadlines. As *McPhail* explained,

in most removal cases, there is little 'evidence' one way or another. In most cases, the defendant must file a notice of removal within thirty days after receiving the complaint. Pre-removal discovery in state court is unlikely to have produced helpful information by then . . . And if the plaintiff moves quickly to challenge removal in federal court, there may not be time to produce more evidence in federal discovery before the court decides to rule.²⁰

The evidence problem is exacerbated by the fact that the defendant must work within a set of shifting deadlines and two discovery regimes. The defendant's deadline to file a notice of removal is thirty days from the point at which he first discovers that the case is removable—perhaps from reading the initial complaint, perhaps from subsequent discovery about the plaintiff's case in state court.²¹ When the complaint does not demand a specific sum (or demands a "lowball," nonbinding sum), the defendant is in a bit of a bind. The defendant is only supposed to wait for additional information "if the case stated by the initial pleading is not removable."²² Yet the case stated by the initial pleading may well be removable (it certainly does not *rule out* damages above \$75,000); the problem is that the defendant may not be sufficiently certain that he will be able to prove it. So if the defendant waits to remove until subsequent interrogatories in state court confirm the extent of the plaintiff's claim, he may well be too late.²³

The JVCA's solution to this problem is inadequate. The section providing that "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 [§ 1446](b)(3)"²⁴ (which would restart the removal clock) helps resolve a split over whether depositions and similar documents

18. Committee Report, *supra* note 2, at 16.

19. See, e.g., *Exxon Mobil Corp. v. Allapattah Services*, 545 U.S. 546, 568 (2005).

20. *McPhail*, 529 F.3d at 953–54.

21. JVCA § 103(b)(3)(B), to be codified at 28 U.S.C. § 1446(b)(2)(B), (b)(3).

22. *Id.*, to be codified at 28 U.S.C. § 1446(b)(3).

23. E.g., *TIC-The Indus. v. Liberty Mut. Ins.*, No. 09-763, 2009 WL 1796071 (D. Colo. June 23, 2009) (defendant should have removed earlier).

24. JVCA § 103(b)(3)(C), to be codified at 28 U.S.C. § 1446(c)(1), (c)(3)(B).

constitute “other paper.”²⁵ But it does not deal with the fundamental deadline problem, because it is triggered only if “the case stated by the initial pleading is not removable.”²⁶ The other section creating a bad faith exception to the one-year outside deadline for removal²⁷ will presumably rein in some abusive practices, but it is still an exception only to the outside deadline. Defendants must also comply with the thirty-day deadline, which has no bad faith exception, and which is uncertain even when there is no bad faith.

III. CLARIFYING THE CLARIFICATION

A better version of the bill would not have left these gaps. It would have explicitly dealt with states that neither forbid nor require demanding a specific sum, presumably by including them in the new section 1446(c)(2)(a)(ii). It would have clarified its use of the preponderance standard, ideally by providing that only *facts* (and presumably only facts not found in the complaint) need be proven by the preponderance of the evidence, and that the ultimate amount in controversy is any amount that it is legally possible to collect on the basis of those facts. And it would have given the defendant a firmer opportunity to obtain evidence to prove the amount in controversy to the district court—perhaps by saying that the defendant need not try to remove the case right away if the complaint does not name an amount in controversy,²⁸ by providing the defendant a right to discovery in federal court before the removal petition is resolved,²⁹ or both.

It is not *impossible* for creative judicial interpretations of the JVCA to fill in these gaps as Congress should have. Courts might think the purpose of section 1446(c)(2)(a)(ii) is sufficiently obvious that it should be extended to states whose practice does not forbid the naming of specific sums; they might find the Committee Report’s endorsement of *McPhail* and *Meridian* sufficiently persuasive to adopt those cases’ explication of the confusing preponderance of the evidence standard; and they might hold that a complaint with no named sum is “not removable” for purposes of the time limit,³⁰ or that it is an abuse of discretion for a district court to refuse removal without giving

25. See Briant S. Platt, *Section 1446(b) Federal Removal Jurisdiction and the Thirty-Day Clock: Should A Motion To Amend Trigger the Time Bomb?*, 4 NEV. L.J. 120, 135 n.136 (2003) (describing split).

26. JVCA § 103(c), to be codified at 28 U.S.C. § 1446(c)(3)(A).

27. *Id.*, to be codified at 28 U.S.C. §§ 1446(c)(1), (c)(3)(B).

28. See, e.g., Noble-Allgire, *supra* note 5, at 750–51 (proposing statutory language).

29. See Committee Report, *supra* note 2, at 16 (“[D]iscovery may be taken with regard to [the amount in controversy].”); *McPhail v. Deere*, 529 F.3d 947, 954 (10th Cir. 2008) (encouraging jurisdictional discovery). But see *Pub. Emps. Ret. Ass’n of N.M. v. Clearlend Sec.*, 798 F. Supp. 2d 1265 (D.N.M. 2011) (dismissing *McPhail* as “dicta”).

30. See, e.g., *Harshey v. Advanced Bionics Corp.*, No. 09-905, 2009 WL 3617756 (S.D. Ind. Oct. 29, 2009) (“The better approach is to require more of a removing defendant and to give that defendant a reasonable opportunity to learn more about the scope of the plaintiff’s claim.”).

adequate federal discovery. I do not wish to make the case against those interpretations here, because I hope that courts will indeed find a way to adopt them. My point is just that a statute aimed at jurisdictional “clarification” should not have left those matters up for grabs.

To be sure, my criticisms are tentative and limited to just one of the JVCA’s several provisions. But if I am right that the JVCA does not adequately solve the problem of the amount in controversy in removal, I worry that it may have similar shortcomings in other areas. To paraphrase Ed Hartnett’s criticism of the restyled rules of civil procedure, “I don’t have the chutzpah to claim that I caught everything [Congress] missed. If [Congress’s] distinguished members [and] advisors . . . missed things that I caught, I have to believe that others will catch things that we all missed.”³¹

Judge Cardozo once lamented that “the 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.”³² The JVCA, by contrast, was prepared with extensive expert help and makes real progress. But even experts are subject to political compromise. As the Committee Report explained, more far-reaching reforms were contemplated as part of the JVCA—one welcome reform would have allowed the plaintiff to make a binding “declaration” that he sought no more than \$75,000³³—but those proposals were rejected after a “vetting process” designed to eliminate “provisions that were considered controversial by prominent legal experts and advocacy groups.”³⁴ The apparent goal was to limit the bill to pareto-efficient changes—ones to which nobody could raise a principled objection. But if the removal provisions that Congress ultimately adopted are the best that can be produced under such limitations, then maybe we cannot really restore rationality to the law of federal jurisdiction without embracing some more “controversial” proposals.

31. Edward A. Hartnett, *Against (Mere) Restyling*, 82 NOTRE DAME L. REV. 155, 164–65 (2006).

32. Benjamin N. Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113, 114 (1921).

33. See 109 H.R. 5440, § 6 (2006); 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>.

34. Committee Report, *supra* note 2, at 2–3.