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Caleb Pittman*

I. INTRODUCTION

Late in December 2011, Congress enacted the Federal Courts Jurisdiction and Venue Clarification Act of 2011 (the "JVCA"),[1] which changed important features of federal court jurisdiction applicable to litigation commencing on or after January 6, 2012.[2] The JVCA—a product of long discussion and negotiation between members of Congress and the federal judiciary—contains a wide range of reforms to the judicial code.[3] While portions of the bill resolve long-standing differences between the federal circuits on key procedural issues, including, for example, codification of the "rule of unanimity" in the removal of cases involving multiple defendants,[4] the bill leaves many obscure issues unresolved. Because of

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[1] Pub. L. No. 112-63, 125 Stat. 758 (2011) (codified in scattered sections of 28 U.S.C.).

[2] *Id.* § 105(a); Paul E. Lund, *The Timeliness of Removal and Multiple Defendant Lawsuits*, 64 BAYLOR L. REV. 50, 98–104 (2012) (discussing § 105(a) at some length).

[3] *See* Arthur Hellman, *The Federal Courts Jurisdiction and Venue Clarification Act: Some Missing Pieces*, JURIST—FORUM, Jan. 4, 2012, http://jurist.org/forum/2012/01/arthur-hellman-jvca-ii.php (discussing, in part, the history behind the bill).

[4] Pub. L. No. 112-63, § 103(a)(3).

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these unresolved issues, some of the JVCA's reforms may raise additional, equally problematic questions of statutory interpretation.[5]

These questions stem from vague statutory provisions governing the procedure of federal removal jurisdiction, particularly the rules that determine whether a case has been timely removed (a question which often decides the success of a plaintiff's motion to remand).[6] Accordingly, this Note will briefly cover the law of federal removal jurisdiction, followed by an examination of the existing case law interpreting the statutory language governing federal removal procedure, an analysis of a potential problem raised by the JVCA, and a brief consideration of how courts might handle that problem. While this discussion will focus primarily on how the JVCA may impact removal under federal question jurisdiction, many of the procedural issues analyzed here will also apply to cases removed under diversity jurisdiction.

II. FEDERAL REMOVAL JURISDICTION AND PROCEDURE

The fact that federal courts are courts of limited jurisdiction is both a fundamental and oft-repeated tenet of the American judicial system.[7] In civil cases, if a plaintiff does not commence the suit in federal court, the defendant has the option of removing the case to federal court if the case could have been brought there initially.[8] Generally, this means that the defendant must determine if the case is one that could fulfill the requirements for either diversity or federal question jurisdiction. Federal question jurisdiction refers to the ability of federal courts to hear cases "arising under the Constitution, laws, or treaties of the United States," regardless of the presence or absence of diversity among parties.[9] Even where a case may "arise under" one of these sources, however, the Supreme Court has held that, for purposes of determining the removability of a case, courts must follow what has come to be known as the "well-pleaded complaint" rule.[10] This rule

[5] *See, e.g.*, William Baude, *Clarification Needed: Fixing the Jurisdiction and Venue Clarification Act*, 110 MICH. L. REV. FIRST IMPRESSIONS 33 (2012); *see also* Hellman, *supra* note 3.

[6] *See generally* 28 U.S.C. § 1446 (2012).

[7] *See, e.g.*, Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 374 (1978). Or, as one district court judge more colorfully worded it, "if the Court had a nickel for every time it stated that 'federal courts are courts of limited jurisdiction,' the U.S. Treasury might start running a surplus." Ramsey v. Kearns, Civ. No. 12-06-ART, 2012 WL 602812, at *1 (E.D. Ky. Feb. 23, 2012).

[8] 28 U.S.C. § 1441(a) (2012).

[9] 28 U.S.C. § 1331 (2012).

[10] Louisville & N.R. Co. v. Mottley, 211 U.S. 149, 153–54 (1908).

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requires that courts consider only whether the plaintiff would be required to plead a proposition of federal law in order to win a judgment, and disregard any issues of federal law that defendants may potentially raise.[11] The doctrine of "complete preemption" provides an important exception to this rule. According to this doctrine, certain federal laws may "completely preempt" state court jurisdiction so that defendants may remove a case brought in state court to federal court, regardless of how the plaintiff framed their complaint, so long as it can be shown that the issues in the case are governed by such a federal law.[12]

Regardless of the grounds for removal, certain procedural rules must be followed in order for removal to be successful, even in cases involving complete preemption. Indeed, these rules must be followed closely, since in situations where a case is removed from state to federal court, it is widely agreed that the statutes governing removal jurisdiction and procedure are to be "strictly construed," with "all doubts . . . resolved against removal."[13] The basic statutory scheme for removal procedure has remained the same even after passage of the JVCA, and it provides two opportunities for defendants to remove a case. Generally, defendants must remove a case within thirty days of receipt "of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based."[14] If the initial pleading is not removable, but the defendant later receives "a copy of an amended pleading, motion, order, or other paper from which it may first be ascertained that the case is one which is or has become removable," the defendant is given another thirty-day window in which to file a notice of removal.[15] Even if a defendant can demonstrate proper grounds for removal, if she has not removed the case within the proper time frame, the plaintiff can successfully move for remand to state court.[16]

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[11] *Id.* at 152 ("Although such allegations show that very likely, in the course of the litigation, a question under the Constitution would arise, they do not show that the suit, that is, the plaintiff's original cause of action, arises under the Constitution.").

[12] *See, e.g.*, Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 63–64 (1987) ("One corollary of the well-pleaded complaint rule developed in the case law, however, is that Congress may so completely preempt a particular area that any civil complaint raising this select group of claims is necessarily federal in character.").

[13] Fajen v. Found. Reserve Ins. Co., 683 F.2d 331, 333 (10th Cir. 1982).

[14] 28 U.S.C. § 1446(b)(1) (2012).

[15] *Id.* § 1446(b)(3).

[16] 28 U.S.C. § 1447(c) (2012).

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The precise meaning of these provisions (including vague terms such as "setting forth" and "ascertained") are often litigated upon the removal of a case, due to the strong preference of most plaintiffs for litigating in state court and the equally strong preference of most defendants for litigating in federal court.[17] Conceptually, there are two separate issues involved in these debates: (1) whether removal was prompted by the receipt of an appropriate item (an initial pleading, amended pleading, motion, order, or other paper), and (2) which, if any, of the items in question first informed the defendant that the case was removable (either by "setting forth" grounds for removal, or by making those grounds "ascertainable"). The next section will examine the most puzzling of the items involved in the first issue (i.e., the "other paper"), followed by a discussion of the terms involved in the second issue.

III. THE "OTHER PAPER"

Although courts have not, by any means, come to a consensus with respect to what exactly constitutes "other paper," generalities appear across the federal circuits. For example, although most courts have given the phrase a broad construction,[18] judges almost universally require that the "other paper" be related to the state proceeding.[19] Yet even this generality must be qualified, as some courts have accepted that a judicial decision in a separate case may be considered an "order or other paper" when the facts of the two cases are sufficiently similar.[20]

Deviating from the usual trend of giving "other paper" a broad interpretation, some courts have applied the canon of *ejusdem generis* to find that the "other paper" provision refers only to documents filed formally with the state court.[21] This

[17] Regarding the strategic selection of a federal or state forum for litigation, see Howard B. Stravitz, *Recocking the Removal Trigger*, 53 S.C. L. REV. 185, 185–86 (2002) ("Most plaintiffs prefer to litigate in state court and most defendants prefer to litigate in federal court. Their reasons are personal, practical, and tactical, and, based on recent scholarly research, also empirical.").

[18] Indeed, the Fifth Circuit has even ruled that a post-complaint demand letter, which is most plausibly construed as facetious in nature, can be used to establish the amount in controversy requirement for diversity jurisdiction. *See* Addo v. Globe Life & Acc. Ins. Co., 230 F.3d 759, 762 (5th Cir. 2000).

[19] *See, e.g.*, Rynearson v. Motricity, Inc., 626 F. Supp. 2d 1093, 1097 (W.D. Wash. 2009) ("[N]othing . . . suggests that the definition of 'other paper' is so embracive as to encompass a filing by a party's firm in another case where the litigants are entirely different.").

[20] *See, e.g.*, Green v. R.J. Reynolds Tobacco Co., 274 F.3d 263, 268 (5th Cir. 2001).

[21] *See* Adam C. Clanton, *Uncertainty in Federal Removal Procedure: The Riddle of the "Other Paper,"* 71 DEF. COUNSEL J. 388, 389 (2004).

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remains a minority approach, however, and no federal appellate courts have embraced the rule. Even where district courts have followed this approach, other courts within the same circuit have not always followed suit.[22]

While most courts have not imposed such strict requirements on what constitutes "other paper," many have nonetheless held that the "other paper" requirement must be construed in light of the "voluntary act" rule set forth by the United States Supreme Court in *Powers v. Chesapeake and Ohio Railway Company*,[23] which requires that the removal period be triggered by a voluntary act by the plaintiff. Two approaches toward applying this rule to the interpretation of § 1446(b) have been identified in Adam C. Clanton's article, *Uncertainty in Federal Removal Procedure*, which he refers to as "intent" and "source" based analyses.[24] The "intent" based analysis provides that a court ought to inquire into whether the defendant's receipt of "other paper" was the result of the voluntary intentions of the plaintiff, potentially excluding items such as deposition testimony when information in the deposition is given reluctantly.[25] By contrast, the "source" based analysis provides that the voluntary act rule is satisfied so long as the "other paper" is an item that comes from the plaintiff, regardless of whether it was delivered to the defendant begrudgingly.[26] The "source" based analysis seems to predominate outside of the Tenth Circuit, and even within the Tenth Circuit, the "intent" based analysis is usually not a substantial obstacle to removal.[27] Also, the Sixth Circuit has rejected the voluntary act requirement when cases are removed under federal question jurisdiction, ruling that, in such cases, the "other paper" can be a defendant's own personal files.[28]

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[22] *Compare* Mill-Bern Assocs., Inc. v. Dallas Semiconductor Corp., 69 F. Supp. 2d 240, 244 (D. Mass. 1999) (finding that "other paper" includes only formal documents filed with the court), *with* Estate of Combas Martinez v. Barros & Carrion, Inc., 668 F. Supp. 2d 334, 342 (D. P.R. 2009) (finding that "other paper" includes "an extensive array of documents arising during the course of litigation").

[23] Powers v. Chesapeake & Ohio R.R. Co., 169 U.S. 92, 99 (1898).

[24] Clanton, *supra* note 21, at 393.

[25] *Id.* at 393–94.

[26] *Id.* at 394.

[27] *See* Huffman v. Saul Holdings Ltd. P'ship, 194 F.3d 1072, 1078 (10th Cir. 1999).

[28] Holston v. Carolina Freight Carriers Corp., No. 90-1358, 1991 WL 112809, at *3 (6th Cir. June 26, 1991) (Curiously, this opinion is unpublished and referenced only in a table within the federal reporter, despite its important holding.).

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Courts are similarly divided over whether the term "other paper" should be interpreted broadly to include information conveyed orally (such as deposition testimony), or more narrowly to include only *written* documents (such as the transcription of deposition testimony). This can potentially have a serious practical impact when considering the time constraints on removal; if a defendant does not realize that a plaintiff divulged grounds for removal until reading the deposition transcript, the time remaining for her to remove the case will depend on whether the court interprets "other paper" to literally mean *paper*.

Many federal district courts, and two federal circuit courts, have interpreted the language broadly to not require an actual written document, despite the language of the statute. This is generally justified by the policy concern that, if the defendant could discern that the case was removable through some non-written means without the thirty-day time limit's commencement, it would "provide a windfall for the defendant which is clearly contravened by the removal statute's emphasis on effecting removal as soon as possible."[29] The Sixth and Tenth Circuits have adopted this view.[30]

While no circuit court has explicitly endorsed the view that "other paper" must be some form of written documentation, this view has been endorsed by many district courts in the absence of binding circuit court precedent.[31] This interpretation is generally justified by an appeal to the plain language of the statute as well as to efficiency and other policy grounds, such as the fear that broadening the scope could "have the effect of chilling informal settlement negotiations."[32]

It is worth noting, however, that at least some of these same courts have been willing to recognize a limited exception in cases where it is "highly likely" that the oral notice was "reduced to writing simultaneously by a court reporter."[33] This exception diminishes the practical difference between these two interpretations of the statute, since the non-written "other papers" that most defendants attempt to use

[29] *Huffman*, 194 F.3d at 1078.

[30] Peters v. Lincoln Elec. Co., 285 F.3d 456, 465–66 (6th Cir. 2002); *Huffman*, 194 F.3d at 1078.

[31] *See, e.g.*, State Farm Fire and Cas. Co. v. Valspar Corp., 824 F. Supp. 2d 923, 934 (D. S.D. 2011) ("A majority of courts have strictly construed the language of § 1446(b) to require a written document."); Williams v. Litton Loan Servicing, L.P., No. 2:10-CV-951-WKW, 2011 WL 521624, at *4 (M.D. Al. Feb. 15, 2011) (endorsing this interpretation, and noting that "numerous" other courts have done so).

[32] *Williams*, 2011 WL 521624, at *5.

[33] *State Farm*, 824 F. Supp. 2d at 936.

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as a basis for removability tend to be deposition testimonies or statements made in court.[34] When conducting research for this Note, the author did not find any case in which a defendant successfully used a non-recorded oral statement as the basis for removal, though the author did find unsuccessful attempts to do so.[35]

IV. WHEN IS REMOVABILITY "ASCERTAINABLE"?

Even if a defendant, who wishes to litigate in federal court, receives an item that would surely be considered "other paper" (or an amended pleading, motion, or order, for that matter) for purposes of removal, a problem still arises in interpreting the rest of § 1446(b)(3), which requires that the item be a paper "from which it may first be ascertained that the case is one which is or has become removable."[36] This leaves open the important question of how much information the paper must convey before removability is "ascertainable."

Not every circuit court has decided the issue of what it means for an initial pleading to "set forth" a removable case,[37] or for one to be able to "ascertain" the removability of a case upon receipt of a later document. The majority of circuit courts have agreed that the document in question must provide evidence of removability that is "unambiguous" or "plainly stated."[38] Even with this much agreement, however, differences remain with respect to both the degree to which a paper must be "unambiguous" and the proper test by which a court should make this determination.

Some circuit courts have sought to clarify the amount of information that must be divulged by distinguishing between the wording of the two statutory periods for removal.[39] In *Bosky v. Kroger Texas, LP*, the Court of Appeals for the

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[34] *See, e.g.*, *Lincoln Elec. Co.*, 285 F.3d at 465–69 (holding that deposition testimony can be used to establish jurisdiction under ERISA and reviewing cases from other circuits making similar holdings).

[35] *See, e.g.*, MacKinnon v. IMVU, Inc., No. C11-4840 PJH, 2012 WL 95379 (N.D. Cal. Jan. 11, 2012).

[36] 28 U.S.C. § 1446(b)(3) (2012).

[37] *Id.* § 1446(b)(1).

[38] Moltner v. Starbucks Coffee Co., 624 F.3d 34 (2d Cir. 2010); Regional Emp'rs' Assurance Leagues Voluntary Emps.' Beneficiary Assoc. Trust v. Truax, 346 F. Supp. 2d 741 (3d Cir. 2004); Lovern v. Gen. Motors Corp., 121 F.3d 160 (4th Cir. 1997); Bosky v. Kroger Tex., L.P., 288 F.3d 208 (5th Cir. 2002); *Holston*, 1991 WL 112809; *In re* Willis, 228 F.3d 896 (8th Cir. 2000); Harris v. Bankers Life and Cas. Co., 425 F.3d 689 (9th Cir. 2005); Huffman v. Saul Holdings L.P., 194 F.3d 1072 (10th Cir. 1999); Lowery v. Ala. Power Co., 483 F.3d 1184 (11th Cir. 2007).

[39] 28 U.S.C. §§ 1446(b)(1), (3) (2012) (noting that the first timeframe begins upon receipt by the defendant of an initial pleading "setting forth" a claim which is removable, whereas the second

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Fifth Circuit found that "'[s]etting forth,' the key language of the first paragraph [of § 1446(b)(3)], encompasses a broader range of information that can trigger a time limit based on notice than would 'ascertained,' the pivotal term in the second paragraph."[40] The court explained that "[t]o 'set forth' means to 'publish' or 'to give an account or statement of['],'' whereas "'ascertain' means 'to make certain, exact, or precise' or 'to find out or learn with certainty.'"[41]

Curiously, some courts within the Eighth Circuit have held that the opposite is true. The Eighth Circuit ruled in *In re Willis* that the initial thirty-day window "begins running upon receipt of the initial complaint only when the complaint explicitly discloses [that] the plaintiff is seeking damages in excess of the federal jurisdictional amount."[42] The Western District of Missouri has since ruled that *In re Willis* stands only for the proposition that the "*initial pleading* must 'explicitly disclose'" the grounds for removal, and that the case "does not apply to a 'motion, order, or other paper,'" thus using the distinction within the statute to reach the opposite conclusion (though without the degree of textual analysis employed by the Fifth Circuit).[43] Some district courts within the First Circuit have also followed *Bosky*'s reasoning in this respect, in the absence of precedent from their own circuit on the degree of information required to trigger removal.[44] District courts in the Seventh Circuit, by contrast, have remained split on this issue.[45]

The Eleventh Circuit has since followed the Fifth Circuit's reasoning about the distinction created by this language.[46] In a dispute over the amount in

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timeframe begins upon receipt of an amended pleading, motion, order, or other paper "from which it may first be ascertained that the case is one which is or has become removable").

[40] *Bosky*, 288 F.3d at 211.

[41] *Id.*

[42] *Willis*, 228 F.3d at 897.

[43] Fun Servs. of Kan. City, Inc. v. Love, No. 11-0244-CV-W-ODS, 2011 WL 1843253, *1 (W.D. Mo. May 11, 2011).

[44] *See, e.g.*, *Estate of Combas Martinez*, 668 F. Supp. 2d at 340–41.

[45] *Compare* Turner v. Goodyear Tire & Rubber Co., 252 F. Supp. 2d 677, 680 (N.D. Ill. 2003) (finding that a defendant "is on notice that the plaintiff is seeking above $75,000 only after the plaintiff makes an explicit statement to that effect"), *with* Gallo v. Homelite Consumer Prods., 371 F. Supp. 2d 943, 947–48 (N.D. Ill. 2005) ("This request did not foreclose the possibility that the amount in controversy met the federal jurisdictional requirement, nor did it explicitly confirm it. However, a reasonable reading of the allegations of the complaint does make clear that more than $75,000 is at issue.").

[46] Pretka v. Kolter City Plaza II, Inc., 608 F.3d 744 (11th Cir. 2010).

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controversy in a given case, the court found that, when removing within the first window for removal, defendants may use their own documents to demonstrate the removability of the case.[47] According to the court, this was the traditional rule before the second window for removal was added by legislative amendment in 1949.[48] According to the court, the voluntary act rule only restricts defendants to using documents created by the plaintiff when removing within the second window, as it was intended to apply only to cases that were not initially removable, but became removable at a later date.[49]

While the Eleventh Circuit made that decision under the context of removal under the Class Action Fairness Act of 2005,[50] the issue whether a defendant is restricted to information received from the plaintiff, and of how "unambiguous" that information must be, is particularly pressing when considering cases subject to federal question jurisdiction and the complete preemption doctrine. In these cases (such as cases governed by the Employee Retirement Income Security Act of 1974 ("ERISA")),[51] the defendant may be the one in the best position to determine whether the plaintiff's claims are completely preempted by federal law, since the defendant is often the insurance company or the employer with full access to the relevant records. If the defendant is restricted to using its own records within the first-frame only, the plaintiff may be able to avoid litigating in federal court through artful pleading.

The implications of this issue are well illustrated in *B.C. v. Blue Cross of California*.[52] In that case, the defendant removed the case more than three months subsequent to filing the initial complaint after a search through its records indicated that the plaintiff was enrolled in an ERISA health plan, and her claims were thus subject to complete preemption.[53] The plaintiff moved to remand, arguing that the defendant could have ascertained this information (from its own records) at the

[47] *Id.* at 759.

[48] *Id.*

[49] *Id.* at 761.

[50] Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.).

[51] Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001–1461 (2012).

[52] B.C. v. Blue Cross of Cal., No. CV 11-08961, 2012 WL 12782 (C.D. Cal. Jan. 3, 2012).

[53] *Id.* at *3.

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time that it received the initial complaint, making removal untimely.[54] Alternatively, plaintiff argued that removal had to be based on an "other paper" generated by the plaintiff, according to the voluntary act rule, and so defendant's attempt at removal was "premature," since she had not yet delivered such a paper to the defendant.[55] The defendant countered that, since the complaint did not mention an ERISA plan, and the plaintiff never conveyed this fact to the defendant, the removal "clock" never began, meaning removal could not be untimely.[56]

While the court sided ultimately with the plaintiff's argument that removal was "premature" (leaving the possibility open in the future, should a valid "other paper" arise revealing the existence of the ERISA plan), it also discussed the variety of approaches that courts have taken to this question.[57] If removal must be premised on a document generated by the plaintiff that unambiguously reveals the facts that give rise to removability, and if courts restrict their inquiry to the four corners of the document,[58] it might be impossible for a defendant to remove a case in this sort of situation, even when it possesses clear evidence from its own records that the case is indeed removable. Allowing this sort of situation to occur arguably contradicts the policy behind the complete preemption doctrine.

Some courts have tried to resolve this issue by the use of a convenient legal fiction: if the defendant had knowledge of removability, but could not legally acquire that knowledge from its own records, it must have "received" the knowledge from the initial complaint (regardless of the text of the complaint).[59] This approach would allow a defendant to remove the case using information from its own investigations or records, but only within thirty days of receiving the initial complaint. The alternative approach, favored by the court in *Blue Cross of California*, is to consider any attempt at removal prior to the receipt of a valid

[54] *Id.*

[55] *Id.* at *7.

[56] *Id.* at *3. The issue whether removal can even be "premature" has not frequently been litigated, so it is unclear whether defendants are allowed to remove a case prior to one of the statutory time frames.

[57] *Id.* at *3.

[58] The Ninth Circuit has held that courts must employ such a restriction. *See* Harris v. Bankers Life & Cas. Co., 425 F.3d 689, 694 (9th Cir. 2005) ("[N]otice of removability under § 1446(b) is determined through examination of the four corners of the applicable pleadings, not through subjective knowledge or a duty to make further inquiry.").

[59] *Blue Cross of Cal.*, 2012 WL 12782, at *6.

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document "premature."[60] Under this latter approach, a defendant could not remove based only on its own knowledge or investigation into the facts, but must wait for (or somehow prompt) the plaintiff to provide a document that unambiguously reveals the factual basis for removal.

V. ASCERTAINABILITY AS IT APPLIES TO COMPLETE PREEMPTION

As demonstrated, disagreement exists with respect to the process by which courts must determine whether an initial pleading "sets forth" a claim that is removable, or whether an "other paper" is one from which it can be "ascertained" that a case is or has become removable. As *Blue Cross of California* makes clear, this confusion presents a particularly difficult problem in cases where federal law completely preempts state law. That is, if a plaintiff's claim makes no mention of any federal law, yet it is a claim that is preempted by federal law (such as ERISA), does a defendant have a duty to investigate the relevant facts within her possession that might demonstrate complete preemption, lest she lose her right to remove the case?

As mentioned earlier, the Sixth Circuit in *Holston v. Carolina Freight Carriers Corporation*[61] explicitly endorsed the view that a defendant's subjective knowledge can trigger removal. There, the defendant removed the case more than four months after it commenced, asserting that the claims were preempted by the Labor Management Relations Act (the "LMRA"),[62] after the plaintiff revealed in a deposition that he was employed in a position covered by a collective bargaining agreement.[63] The Sixth Circuit ruled, however, that since there was evidence that the defendant knew of the agreement more than thirty days prior to removal, removal was untimely.[64] Under such an approach, a defendant may be able to use its own records as proof of the removability of a case, but the court would be required to determine whether the defendant filed for removal within a thirty-day period after it obtained "solid and unambiguous information" that the case was

[60] *Id.* at *7.

[61] 1991 WL 112809.

[62] Labor Management Relations Act, 1947, 29 U.S.C. §§ 141–187 (2012).

[63] *Holston*, 1991 WL 112809, at *1.

[64] *Id.* at *6–7.

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removable.[65] While this may provide some protection for a defendant from losing the opportunity to remove a case due to a plaintiff's artful pleading, it also (in the Sixth Circuit's eyes at least) prevents a defendant "with greater resources than the plaintiff" from discovering "very soon after filing the complaint that the case is removable, yet forc[es] the plaintiff to exhaust his resources in state court until [asking] the plaintiff the questions that would establish removability in a deposition or interrogatory."[66]

The Third, Fourth, Fifth, Ninth, and Eleventh circuits have indicated that the subjective knowledge of the defendant cannot start the thirty-day time period for removal pursuant to receipt of an "amended pleading, motion, order or other paper."[67] While the Eighth Circuit has not ruled specifically on this issue, at least one district court, ruling in an ERISA case, has followed suit.[68] Looking to *In re Willis*, combined with the weight of precedent outside of the circuit, the court found that "the receipt of information through the processes and papers of litigation is what triggers the thirty-day time limit for purposes of § 1446(b)," and not the subjective knowledge of the defendant, regardless of the defendant's ability to determine the nature of the plaintiff's health plan.[69]

Within these jurisdictions, a defendant may be effectively forced to conduct an investigation of the records within its possession upon receipt of a complaint if there is any chance that the claim might be completely preempted, as its records cannot be the source of removal later than thirty days after receipt of the complaint.[70] In most of these jurisdictions, this possibility is tempered by the fact that defendants can use the tools of discovery to compel a plaintiff to reveal the

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[65] *Id.* at *3 ("We hold that § 1446(b) starts the thirty-day period running from the date that a defendant has solid and unambiguous information that the case is removable, even if that information is solely within its own possession.").

[66] *Id.* at *4.

[67] *Truax*, 346 F. Supp. 2d 741; *Lovern*, 121 F.3d 160; *Bosky*, 288 F.3d 208; *Pretka*, 608 F.3d 744.

[68] Machany v. Healthy Alliance Life Ins. Co., No. 4:08CV721-DJS, 2008 WL 3875335 (E.D. Mo. Aug. 15, 2008).

[69] *Id.* at *1.

[70] It is important to note, however, that the Fifth Circuit has ruled that the receipt of an "other paper" revealing the basis for removability prior to receipt of the initial complaint does not begin the time window for removal. *See* Chapman v. Powermatic, Inc., 969 F.2d 160, 164 (5th Cir. 1992) ("The plain language of the second paragraph of § 1446(b) requires that if an 'other paper' is to start the thirty-day time period, a defendant must receive the 'other paper' after receiving the initial pleading.").

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relevant information.[71] This is not necessarily the case in the Ninth Circuit, however, where (absent a future ruling clarifying the issue at the circuit level) some district courts may rule that any knowledge gained from a defendant's own records at a later date were effectively present *within the initial complaint*.[72] In such a context, the defendant would not even be able to force the plaintiff to reveal information regarding the removability of a case through a deposition (as the Sixth Circuit feared).

Several district court decisions outside these circuits appear to agree that there is at least some limited duty to investigate in cases involving complete preemption, albeit sometimes on different theories. Within the First Circuit's jurisdiction, the United States Court for the District of Massachusetts in *Davidson v. Life Insurance Company of North America* ruled that removal more than thirty days after the initial complaint was untimely when that complaint alleged a claim related to an insurance policy purchased by the plaintiff's employer (though it did not specifically mention ERISA).[73] There, the court ruled that the very fact that the claim was completely preempted by ERISA (and not the fact that the defendant possessed information about the plaintiff's health plan) meant that the initial pleading had to be "considered as a federal claim subject to removal."[74] Since the initial pleading had to be viewed as setting forth a federal claim, the defendant had to remove within thirty days of receiving the complaint for removal to be timely.[75] Within the same circuit, however, other courts have not followed this reasoning consistently.[76]

In *Hoover v. Allied Van Lines, Incorporated*, the United States District Court for the District of Kansas ruled that the defendant's removal of a case after receiving the plaintiff's amended complaint, which made claims under the

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[71] *See, e.g.*, *id.*

[72] *See, e.g.*, KDY, Inc. v. Hydroslotter Corp., 08-4074 SC, 2008 WL 4938281, at *2 (N.D. Cal. Nov. 17, 2008) ("Although Defendants argue that removal was not apparent on the face of the Complaint, they also concede that they did not receive any subsequent pleadings or documents from Plaintiff that would have indicated the citizenship of Defendants. . . . Thus, between Plaintiff's filing of the Complaint and Defendants' filing of the Notice of Removal, the only pleading from which Defendants might garner sufficient information to determine that there was indeed diversity jurisdiction was the original Complaint.").

[73] Davidson v. Life Ins. Co. of N. Am., 716 F. Supp. 674, 675 (D. Mass. 1989).

[74] *Id.* at 675.

[75] *Id.*

[76] *See, e.g.*, Estate of Combas Martinez v. Barros & Carrion, Inc., 668 F. Supp. 2d 334 (D. P.R. 2009).

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Carmack Amendment to the Interstate Commerce Act, was untimely.[77] The court reasoned that, since the Carmack Amendment completely preempted the plaintiff's complaint, the time period for removal began to run upon receipt of the initial complaint.[78] Similarly, the same court ruled in *MiraCorp, Incorporated v. Big Rig Down, L.L.C.*, that a defendant's removal was untimely where the defendant removed the case after the plaintiff filed a separate (though factually-related) case in federal court alleging a violation of the Copyright Act.[79] The court did not decide whether the Copyright Act completely preempts related state law claims, but reasoned that, if it did, the defendants should have been able to ascertain this from the state law claims, which alleged that the defendants "misappropriated and removed confidential, proprietary[,] and trade secret information."[80] The court also reasoned that a factually-related federal court case between the same parties could not be considered an "other paper" for the purposes of triggering the removal period within a state court case (though it did not rely on this holding).[81]

Within the Fourth Circuit, in *Link Telecommunications Incorporation v. Sapperstein*, the court ruled that the defendant's removal, claiming complete preemption by the federal Copyright Act, was untimely.[82] The court reasoned that the case was removable based on the initial complaint.[83] Although the complaint did not mention the Copyright Act, but only claimed that the defendant had misappropriated plaintiff's "business plan," it indicated that this plan was in a tangible form (and thus potentially protected by the Copyright Act).[84] Although the defendant would not have been under a duty to investigate its own records, this case arguably stands as precedent for that principle in the context of claims governed by statutes such as ERISA or the LMRA.

Most courts seem to at least agree that, where the facts are stated sufficiently within the complaint, the defendant has a duty to determine whether those facts

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[77] Hoover v. Allied Van Lines, Inc., 205 F. Supp. 2d. 1232 (D. Kan. 2002).

[78] *Id*.

[79] MiraCorp, Inc. v. Big Rig Down, L.L.C., No. 09-2049-KHV, 2009 WL 790189 (D. Kan. 2009).

[80] *Id.* at *5–6.

[81] *Id.* at *5 ("Indeed, although courts have broadly construed the definition of 'other paper,' they have generally found that it refers to documents generated within state court litigation.").

[82] Link Telecomms. Inc. v. Sapperstein, 119 F. Supp. 2d. 536 (D. Md. 2000).

[83] *Id.*

[84] *Id.* at 542–43.

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may be sufficient to implicate any federal law that could completely preempt the plaintiffs' claims. That is, the complete preemption doctrine not only *allows* a defendant to remove in cases where the initial complaint does not mention the relevant federal law, but it imposes a duty for the defendant to do so (or risk losing the ability to remove entirely).

Yet this raises the more difficult issue of what constitutes a sufficient amount of facts for the defendant to reasonably conclude that the case is removable. In *Rossetto v. Oaktree Capital Management, L.L.C.*, the court ruled that the defendant's removal (alleging complete preemption under the LMRA) more than two months after the initial complaint was not untimely, where the initial complaint did not reveal that the plaintiff was a member of a union and made no mention of the collective bargaining agreement (despite the fact that the defendant arguably had this information in its possession).[85] This case was raised within the Ninth Circuit, however, which (as mentioned above) has already foreclosed the possibility of inquiring into the subjective knowledge of defendants, and, rather than rule that removal was untimely, or that the defendant's own answer (which raised the issue of complete preemption) created grounds for removal, the court ruled that removal was premature.[86]

While few cases specifically address this issue, it seems that the likelihood of a court imposing a duty to investigate is linked to the standard that the jurisdiction imposes on which documents trigger the time period for removal, and how ascertainability is to be determined. Those jurisdictions that follow (to some extent) the Fifth Circuit in finding that the term "ascertainable" is a more stringent requirement than "set forth" also seem to find that a defendant's own subjective knowledge cannot be used after the first time period for removal. By contrast, where the Ninth Circuit has paired its strong voluntary act requirement with a requirement that courts look to the "four corners" of a document to determine removability in general, the trend seems to be to *prevent* a defendant from removing based on its own investigation of the facts by ruling that such attempts are premature. Finally, where the Sixth Circuit has rejected the application of the voluntary act rule to federal question cases, it has also ruled that the defendant can use her own subjective knowledge as grounds for the removal of a case as an "other paper."[87] These cases of complete preemption illustrate the need for greater clarity

[85] Rossetto v. Oaktree Capital Mgmt., L.L.C., 664 F. Supp. 2d 1122, 1136 (D. Haw. 2009).

[86] *Id.* at 1130–31.

[87] Of course, the Sixth Circuit's rule has the side effect of forcing the defendant to show that the relevant documents were discovered within 30 days prior to the removal of the case, which may prove to be a

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in the standard for what type of information makes the removability of a case ascertainable. Particularly because, in many cases of complete preemption (such as the LMRA and ERISA), the defendant may be in the best position to know the relevant facts.

VI. THE JVCA

While the JVCA made many important changes to federal removal jurisdiction and procedure, including extensive changes to 28 U.S.C. § 1446,[88] these changes have unfortunately failed to resolve the issues discussed throughout this Note. If anything, certain of the changes added to the confusion, due to the unfortunate inclusion of an amendment that "clarifies" what counts as an other paper in certain contexts. The relevant provision is the newly rewritten subsection (c),[89] which provides, in part, that:

> [i]f the case stated by the initial pleading is not removable solely because the amount in controversy does not exceed the amount specified in section 1332(a), 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 subsection (b)(3).[90]

Given that most courts have given "other paper" a broad interpretation so as to include state trial records and information found through discovery in all cases,[91] it is unclear why Congress would desire to explicitly provide for this. One might, reasoning along the lines of the canon *expressio unius est exclusion alterius*, assume that by explicitly stating that these sources qualify as an "other paper" for purposes of determining the amount in controversy, Congress intended "other paper" to not include these sources in any other contexts. This logic is bolstered further by the fact that, since Congress was already rewriting § 1446 substantially,

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significant burden in some cases. For an example of how district courts have attempted to apply the Sixth Circuit's decision, see *Gascho v. Global Fitness Holdings, L.L.C.*, 863 F. Supp. 2d 677 (S.D. Ohio 2012).

[88] Pub. L. No. 112-63, § 103 (2012).

[89] Former subsection (c) of § 1446 dealt solely with criminal prosecutions and was moved to the new § 1455.

[90] 28 U.S.C. § 1446(c)(3)(A) (2012).

[91] *See, e.g.*, Clanton, *supra* note 21, at 390.

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it is difficult to imagine any reason why it would not simply amend § 1446(b)(3) to explicitly clarify that these sources qualify as an "other paper" in general.[92]

This reading would, of course, drastically alter the ability of defendants to remove cases under federal question jurisdiction. Indeed, even in the context of diversity jurisdiction, the citizenship of defendants might not be easily ascertained except through interrogatories,[93] and the fraudulent joinder of a party would generally be difficult to ascertain within a reasonable time period without the use of discovery tools.[94] This interpretation of the statute would essentially codify an extreme version of the earlier-mentioned "intent" based approach to the voluntary act rule in situations when removal relies on anything other than proving the amount in controversy, so that even a plaintiff's voluntary statement made in a deposition would not be valid grounds for removal. Furthermore, defendants within jurisdictions that have previously held that the voluntary act rule applies to both windows for removal would be nearly incapable of removing a case involving claims that are preempted by federal law, so long as the plaintiff is sufficiently artful in crafting her pleading. Such a result is arguably so absurd that courts should be dissuaded from following this interpretation, as it would entail a drastic reduction in a defendant's ability to exercise its right to a trial in a federal forum, in both federal question and diversity cases.

The legislative history of the JVCA provides some (albeit limited) insight into Congress's reasoning behind this provision. The House Report makes clear that this section was added as part of an overall effort to make it easier for defendants to remove a case when a claim is filed in a state that "either does not require or permit the plaintiff to assert a sum claimed or allows the plaintiff to recover more than an amount asserted."[95] The report explains that this particular section was added for situations where "the defendant lacks information with which to remove within the thirty days after the commencement of the action . . . to clarify that the defendant's right to take discovery in the state court can be used to help determine the amount in controversy."[96]

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[92] A closer look at the history of the JVCA's precursors, however, may provide some clue as to the patchwork of negotiations that went into crafting the bill. *See, e.g.*, Hellman, *supra* note 3.

[93] *See, e.g.*, Vasquez v. Americano U.S.A., L.L.C., 536 F. Supp. 2d 1253 (D. N.M. 2008).

[94] *See, e.g.*, Jamison v. Kerr-McGee Corp., 151 F. Supp. 2d 742 (S.D. Miss. 2001) (holding that a plaintiff's lack of service on a non-diverse defendant did not, on its own, show fraudulent joinder).

[95] H.R. REP. NO. 112-10, at 15 (2011).

[96] *Id.* at 16.

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The use of "clarify" implies that Congress was not attempting to codify a new class of items that could be used to justify the removal of a case, but was instead making explicit a preexisting right belonging to defendants. It is true that the House Report states only that it is clarifying the defendant's right to take discovery "to help determine the amount in controversy," and not for other purposes. Yet if this right preexisted the legislative amendment, it must already be codified in § 1446(b)(3), which makes no distinction between the amount in controversy and other bases for removal jurisdiction. This is, of course, a tempting reading, and one might argue that Congress was attempting to legislatively overrule the minority of courts who have held that "other paper" should be read only to include documents filed formally with the state court.

But this reading is undermined by the fact that most of the cases applying this minority approach do not involve disputes over the amount in controversy.[97] For example, in *Mill-Bern Associates Incorporated v. Dallas Semiconductor Corporation*, the court interpreted the phrase "other paper" to determine whether information regarding the alleged fraudulent joinder of a defendant could be used to trigger the second window for removal.[98] The courts comprising the minority approach were largely motivated by the imperative to construe statutes according to their "plain meaning," and there is little reason within the text of the new § 1446(c)(3)(A) to construe it as anything other than a narrow exception to a general rule that "other paper" should only include documents filed formally with the state court.[99]

To illustrate this point, the court in *Mill-Bern Associates* recognized that, by construing the term "other paper" according to its "plain meaning" and the canon *ejusdem generis*, it was drawing a line that was "to some degree artificial" which would "exclude[] some 'papers' that are, as a practical matter, the way parties may learn about whether a suit may be subject to removal."[100] The court, nonetheless, reasoned that "an artificial line is often, as here, a distinct line, and distinct lines are easy to follow."[101] Such an artificial line is only bolstered by the enactment of an

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[97] *See* Clanton, *supra* note 21, at 389 n.2 (listing the more frequently cited cases constituting this approach).

[98] Mill-Bern Assocs. Inc. v. Dallas Semiconductor Corp., 69 F. Supp. 2d 240 (D. Mass. 1999).

[99] A plausible text-based argument can be made for the opposite claim, however, by examining the use of the phrase "through service or otherwise." *See* Clanton, *supra* note 21, at 390.

[100] *Mill-Bern Assocs.*, 69 F. Supp. 2d at 244.

[101] *Id.*

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apparent statutory exception to the general rule that "other paper" does not include, among other items, deposition transcripts. For a court already persuaded to read the statute in this light, the legislative history seems sufficiently ambiguous as to be of little help.

There is, however, more to the legislative history that might shed light on the overall purpose of the JVCA beyond the stated intent behind this particular section. For example, the House Report shows that the amendments to § 1441(c) were made "to clarify the right of access to Federal court upon removal for the adjudication of separate Federal law claims that are joined with unrelated state law claims."[102] The report goes on to list the specific cases to which the amendment responds. Similarly, in the section explaining the new provision governing the timing of removal in lawsuits involving multiple defendants,[103] the report provides a list of cases it addresses, providing that the new paragraph "clarifies the rule of timeliness and provides for equal treatment of all defendants in their ability to obtain Federal jurisdiction over the case against them."[104] In general, the report tends to mention specific cases or doctrines the law seeks to overturn (or to address in other ways), and reiterates time and again that the purpose of this law is not only to clarify issues, but to protect the right of defendants to have access to federal courts. Any interpretation that would so substantially limit the ability of defendants to access a federal forum plainly contradicts the purpose behind the law.

VII. CONCLUSION

Ultimately, the JVCA does nothing to clear up the confusion regarding what constitutes "other paper," nor what it means for information about removability to be "ascertainable," except in the one area where such confusion was at its least. Fortunately, most courts will likely be persuaded by the potentially disastrous result for defendants to not read the new § 1446(c)(3)(A) as a limit on what may be counted as "other paper," and may use the information given in the House Report, and the purpose that is apparent when looking at the report as a whole, to conclude that this should be read as nothing more than a reinforcement of preexisting doctrine.

[102] H.R. REP. NO. 112-10, at 12 (2011).

[103] 28 U.S.C. § 1446(b)(2)(B) (2012).

[104] H.R. REP. NO. 112-10, at 14 (2011).

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