

Civil Procedure

Amount in Controversy

The Federal Courts Jurisdiction and Venue Clarification Act: One Year Later



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On Jan. 6, 2012, the Federal Courts Jurisdiction and Venue Clarification Act (“JVCA”) became effective, including its provisions for determining the amount in controversy. In particular, 28 U.S.C. § 1446(c)(2) was amended to provide that a sum demanded in the initial pleading shall be deemed the amount in controversy subject to two specific excep-

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tions.¹ The first exception is where the complaint seeks non-monetary relief (such as an injunction), either alone or in conjunction with a demand for monetary relief that is less than \$75,000; the second exception is where the complaint does seek a money judgment, but state law either does not allow a plaintiff to plead a sum certain, or it allows recovery of damages in excess of the amount demanded.

The easy case, then, remains the one where the plaintiff pleads for specific monetary damages and the state law does not allow recovery in excess of that amount. In that instance, the amount pleaded in the complaint controls. The more difficult questions, however, arise where (i) the complaint seeks non-monetary damages, or (ii) the jurisdiction either does not permit a demand for a specific amount, or allows recovery in excess of the amount demanded. In the first instance, the court must determine the amount in controversy by determining the “value” of the non-monetary relief. In the second instance, the court must determine the likely amount of any recovery.

In removing an action, the defendant has to prove the amount in controversy by a preponderance of the evidence. In the past year, several courts have addressed the JVCA and its amendments to the amount in controversy requirement. This article summarizes various cases, and provides suggestions on how a defendant

¹ Section 1446(c)(2) does not apply in the class action context. See *Bolton v. U.S. Nursing Corp.*, No. C 12-04466 LB, 2012 BL 277432, *10 (N.D. Cal. Oct. 21, 2012) (holding that 28 U.S.C. 1446(c)(2) applies only where removal is based on diversity jurisdiction under 28 U.S.C. § 1332(a), and not where the court has jurisdiction under the Class Action Fairness Act of 2005).

should address the amount in controversy to defeat a motion for remand.

1. Remand Denied

a. *Carneal v. Travelers Casualty Ins. of Am.*, 2013 BL 3183 (W.D. Ky. Jan. 7, 2013).

In *Carneal*, the plaintiffs sued under an insurance policy with Travelers Casualty Insurance of America for damage that a storm had caused to their property. They alleged \$67,475 in compensatory/contractual damages, as well as unspecified damages under the Kentucky Unfair Claims Settlement Practices Act. Before removal, however, plaintiffs tendered a settlement offer to defendant to settle all claims for \$65,000.

After defendant removed to federal court, plaintiffs sought remand and argued that their offer to settle for \$65,000 had reduced the amount in controversy to below the jurisdictional requirement. The federal court rejected this argument, stating that plaintiffs' offer to "settle their claims for an amount below the jurisdictional minimum is irrelevant." Rather, the amount in controversy was easily satisfied because plaintiffs had alleged \$67,475 in compensatory damages plus an unspecified amount in punitive damages. Since it was not "apparent to a legal certainty" that plaintiffs could not recover punitive damages in this case, even a 1:1 ratio for punitive damages would result in an amount in controversy of \$134,950. The court thus denied plaintiffs' motion to remand.

b. *Proctor v. Swifty Oil Co.*, 2012 BL 253380 (W.D. Ky. Sept. 28, 2012).

Plaintiff alleged that the defendant wrongfully terminated his employment, withheld previously earned wages, and intentionally inflicted emotional distress upon him. He sought unspecified compensatory and punitive damages, as well as attorneys' fees and other unspecified relief. Following removal, plaintiff filed a motion to remand, and submitted an unsworn statement that he would not "seek or accept" an award in excess of \$74,999.00, inclusive of punitive damages, fees, and the fair value of any injunction.

In denying the motion, the court concluded that the amount in controversy exceeded \$75,000 based on "[t]he assertions in the initial pleadings and the evidence attached to the parties' briefs on the motion to remand . . ." Specifically, plaintiff claimed that he was wrongfully discharged from his job. If successful, he would be entitled to front and back pay. The court calculated that lost wages could amount to approximately \$34,000 in compensatory damages, and noted that the Supreme Court has endorsed awarding punitive damages in a ratio of 4 to 1 to compensatory damages. *Id.* at 7. The court thus concluded that because the plaintiff sought punitive damages, even a 2:1 estimate would result in approximately \$68,000 in punitive damages, and a total amount in controversy exceeding \$100,000. *Id.* Accordingly, the court denied plaintiff's motion to remand.

The court further noted that post-removal stipulations lowering the amount in controversy "are generally disfavored" because they would allow plaintiffs to "unfairly manipulate the proceedings." *Id.* at *9. Post-removal stipulations that state the amount in controversy for the first time, however, will be treated as clarifications of the amount of controversy, and—if unequivocal—may suffice to limit the amount in controversy. *Id.* at *9-10. Here, the court held that the stipulation at issue was too equivocal to effectively limit the amount in controversy. *Id.* at *10.

2. Remand Granted

a. *Butler v. Target Corp.*, 2012 BL 286742 (D. Kan. Oct. 31, 2012).

In *Butler*, the plaintiff filed a slip-and-fall case in state court in Kansas, seeking \$60,000 and "any other relief the Court may deem just and proper." *Id.* at *1. Kansas requires plaintiffs to plead a specific sum of damages when plaintiffs seek \$75,000 or less in non-contract actions. *Id.* at *6-7. However, because Kansas law also "permits recovery of damages in excess of the amount demanded," the court considered whether the amount in controversy actually exceeded \$75,000. The court concluded that it was not "facially apparent from the face of the slip-and-fall petition that the plaintiff's recoverable damages are likely to exceed \$75,000." The court noted that the defendant did not offer any basis for inferring that the injuries, emotional distress, and lost wages were serious enough to exceed \$75,000, and held that defendant must "do more than point to the theoretical availability of certain categories of damages or possible medical expenses." *Id.* at *11. Additionally, while the plaintiff refused to stipulate that damages would remain under the jurisdictional threshold, *id.* at *11, the court held that a refusal to stipulate and waive additional relief does not satisfy the defendant's burden of proving the jurisdictional amount. *Id.* at *13.

b. *Firmin v. Richard Construction*, 2012 BL 344034 (E.D. La. Oct. 26, 2012).

Plaintiff claimed that he was terminated in retaliation for OSHA and EEOC complaints he had filed, and also that he was discriminated against under the ADA. After obtaining new employment, plaintiff sought and received a temporary restraining order in state court forbidding the defendant from intimidating or interfering with his new employment. However, after plaintiff received the TRO, his new employer told him not to report to work, and eventually withdrew the job offer.

The defendant removed the petition for the TRO and moved to dissolve it. The plaintiff then sought remand back to state court. Since plaintiff had sought an injunction rather than monetary damages, the amount in controversy was determined by the "value of the right to be protected or the extent of the injury to be prevented," which the court defined as "unimpeded employment" with a new employer. Defendant argued that plaintiff's anticipated hourly rate was \$14.50, and that if plaintiff worked 2,000 hours per year at this rate, the value of his

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employment would exceed \$75,000 between the second and third year of his employment.

The court, however, rejected this argument. It noted that plaintiff's offer of employment was at-will, and in fact was withdrawn before he ever started. Thus, defendant's amount in controversy calculation was based on an hourly rate for a position plaintiff had never held, and also assumed he would hold that position for at least two to three years at 2,000 hours per year. Plaintiff also was not seeking back pay or punitive damages, which could increase the amount in controversy. Accordingly, the court concluded that defendant's arguments were "too speculative to satisfy its burden of demonstrating the amount in controversy," and granted plaintiff's motion to remand.

c. *Washington-Thomas v. Dial Am. Marketing Inc.*, No. EP-12-CV-00340-DCG., 2012 BL 277366 (W.D. Tex. Oct. 23, 2012).

Plaintiff sued his former employer for discrimination on the basis of disability, age, and race, and the intentional infliction of emotional distress. Plaintiff sought "actual damages . . . exemplary damages, compensatory damages, back and front pay, and punitive damages." *Id.* at *2. In her complaint, plaintiff stipulated that she would not accept damages over \$74,999. Simultaneous with her petition, plaintiff filed an affidavit stating that the amount in controversy was less than the jurisdictional amount, and that she would not seek or ask for damages, including attorneys' fees, in excess of that amount. *Id.* at *9.

Following removal, plaintiff argued that the federal court lacked jurisdiction because plaintiff's stipulation and affidavit limited damages to less than the jurisdictional amount. Under Texas law, a plaintiff is prohibited from pleading a specific or maximum amount of damages. Therefore, the plaintiff bears the burden of proving to a legal certainty that maximum damages will be less than \$75,000. Texas law allows a plaintiff to meet this burden, however, by filing a binding stipulation or affidavit stating that (i) the plaintiff affirmatively seeks less than \$75,000; and (ii) the plaintiff will not accept any damages over that amount. *Id.* at *6. Such stipulations constitute a binding contract. *Id.* at *10.

While Plaintiff's stipulation and affidavit contained some inconsistencies, the stipulation (in plaintiff's complaint) did state that the plaintiff would not accept damages in excess of \$74,999. *Id.* The court held that the stipulation sufficed to limit the amount in controversy to less than \$75,000. *Id.* at *18. Nevertheless, the court noted it would have been better for the plaintiff to state in the affidavit—not merely in the complaint—that she would not accept damages in excess of the jurisdictional amount.

d. *Warren v. Mac's Convenience Stores LLC*, No. 3:11-CV-00572-TBR., 2012 BL 272552 (W.D. Ky. Oct. 17, 2012).

Plaintiff filed a slip-and-fall suit and, before the suit was removed to federal court, declined to stipulate that she would seek damages less than \$75,000. Although defendant claimed that plaintiff's counsel had stated that damages would exceed \$75,000, plaintiff's counsel denied it and defendant offered no evidence of such a statement.

The court held that defendant failed to meet its burden of proof. *Id.* at *7. Kentucky does not allow the pleading of a sum certain, but does allow recovery beyond what is demanded in the pleadings. Following the law of the Sixth Circuit, the court held that the refusal to stipulate, by itself, did not prove that the plaintiff's damages would exceed \$75,000. *Id.* at *8-9. Rather, such a finding would "force the plaintiffs to choose between stipulating against their future remedies and remaining in federal court." *Id.* at *9 (quotation and citation omitted). Thus, plaintiff's refusal to stipulate did not suffice to demonstrate diversity jurisdiction. *Id.*

Important Take-Aways

This is still a developing area of the law. However, based on the cases to date, where (i) a complaint seeks non-monetary relief, (ii) does not plead a specific monetary demand, or (iii) state practice permits recovery in excess of the pleaded amount, a removing defendant should provide the court with specific evidentiary support through an affidavit demonstrating that the amount in controversy exceeds \$75,000. This support should include specific calculations of likely damages, including punitive damages (if sought and where legally available). It is also helpful to provide the court with recoveries that were obtained in similar previous cases. For example, the court in *Butler* remanded because the defendant offered "nothing but a conclusory allegation that 'a reasonable reading of the Petition shows that the amount Plaintiff has placed in controversy exceeds \$75,000.00.'" The *Butler* court contrasted that case with the evidence in *Eatinger v. BP America Production Co.*, 524 F. Supp. 2d 1342 (D. Kan. 2007), which included "affidavits with figures and percentages that 'moved beyond conclusory statements, and instead provided the reasonable probability that the amount in controversy would exceed the jurisdictional amount.'"

Additionally, attorneys' fees will be considered if they are provided for by contract or statute. *See Francis v. Allstate Ins. Co.*, No. 12-1563, 2013 BL 60101, *4 (4th Cir. Mar. 7, 2013). However, attorneys' fees calculations must be reasonable in light of the facts of the case.

The bottom line is that your removal petition is more likely to be successful if you are able to support it with sufficient factual support to show that your case satisfies the amount in controversy requirement.