[OPINION]

DIVERSITY JURISDICTION DILEMMAS

New pleading rules muddy the water.

BY NEAL A. HOFFMAN

On March 1, 2013, procedural rules governing dismissals and expedited actions took effect in Texas.[1] Those updates were made in response to the passage of House Bill 2741 during the 82nd Session in 2011 and were meant to reduce the expense and delay of litigation while maintaining fairness to litigants.[2] Among other changes, the rules modified the pleading requirements for alleging damages (Rule 47), modified the discovery control plan levels (Rule 190), and set out expedited action procedural rules (Rule 169).[3] While the effect of these changes on the efficiency and cost of litigation remains to be seen, these rules have the potential to impact the ability of defendants to seek removal of cases to federal court on the basis of diversity jurisdiction.

BASICS OF DIVERSITY JURISDICTION

Federal district courts have original jurisdiction of civil actions in which the parties are citizens of different states and the amount in controversy exceeds $75,000.[4] Although establishing diversity between the parties is relatively easy, determining whether the amount in controversy requirement is satisfied is often tricky. The burden[5] to show proper diversity jurisdiction is always placed on the party seeking removal.[6] A party seeking removal can establish the amount in controversy requirement in one of three ways: (1) when the initial pleading seeks recovery of an explicitly stated amount of damages more than $75,000; (2) by showing, under a preponderance of the evidence standard, that it is facially apparent from the pleading that the claims are likely to exceed $75,000; or (3) by presenting summary judgment-type evidence showing, by a preponderance of the evidence, that the amount in controversy is likely to exceed $75,000.[7]

A critical factor to diversity jurisdiction removal, however, is the timing.[8] Under 28 U.S.C. § 1446(b)(1), a case must be removed within 30 days of service of an initial pleading "when that pleading affirmatively reveals on its face that the plaintiff is seeking damages in excess of the minimum jurisdictional amount of the federal court."[9] The petition must be read carefully, because all four federal districts in Texas have issued opinions holding that the removal period can be triggered by receipt of an initial pleading even when that pleading does not identify a specific amount of damages.[10] A plaintiff's pleading can be found facially apparent to exceed $75,000 even if the pleading describes only the general nature of the plaintiff's injuries and identifies the desired categories of damages.[11]

In cases where the amount in controversy cannot be immediately determined, a notice of removal is timely filed within 30 days after receipt by the removing party of an amended pleading, motion, order, or other paper from which it may first be ascertainable that the case is one that is or has become removable.[12] The 5th Circuit follows the rule set forth by the 10th Circuit in *DeBry v. Transamerica Corp.* that the information allegedly starting the time limit for a notice of removal under §1446(b) must be "unequivocally clear and certain."[13] The obvious issue, however, is that the determination of what constitutes "unequivocally clear and certain" information is left solely to the discretion of the district court,[14] and the court's decision to remand a case based upon a defect in removal procedure or lack of subject matter jurisdiction is not reviewable on appeal.[15]

THE NEW RULES OF CIVIL PROCEDURE

Two of these rule changes are important to the issue of removal and diversity jurisdiction.

First, Texas Rule of Civil Procedure 47 was modified to require an original petition to contain a statement that the party seeks:

(1) only monetary relief of $100,000 or less, including damages of any kind, penalties, costs, expenses, pre-judgment interest, and attorney fees; or
(2) monetary relief of $100,000 or less and non-monetary relief; or
(3) monetary relief of more than $100,000 but not more than $200,000; or
(4) monetary relief of more than $200,000 but not more than $1,000,000; or
(5) monetary relief of more than $1,000,000.[16]

The current Rule 47 is a significant departure from its predecessor, which permitted "only the statement that the damages sought are within the jurisdiction limits of the court."[17]

Second, the discovery control plan levels were modified in a significant manner. Prior to the 2013 revisions, a level one discovery control plan applied to suits involving $50,000 or less; a level two discovery plan therefore applied to those suits involving $50,000 or more.[18] Now, a level one discovery control plan applies only to those

cases governed by the Rule 169 expedited action process.[19] Under Rule 169(a), the expedited action process applies to cases in which the claimant affirmatively pleads that they seek only monetary relief aggregating $100,000 or less, including damages of any kind, penalties, costs, expenses, pre-judgment interest, and attorney fees. A level two discovery control plan applies to all other cases, except those in which a level three discovery control plan is sought and ordered by the court.[20]

PLEADINGS AND THE AMOUNT IN CONTROVERSY

Given that Rule 47's pleading requirements now obligate plaintiffs to allege, at minimum, that they seek monetary relief of $100,000, one issue that has arisen is whether Rule 47 has the practical effect of making every case automatically removable. Although the 5th Circuit has yet to address this issue, several district courts have concluded that a Rule 47(c)(1) pleading, by itself, does not automatically support removal.[21]

For example, Chief U.S. District Judge Ron Clark of the Eastern District of Texas found that the language of Rule 47(c)(1) did not establish that a plaintiff's damages were more than $75,000; merely that the damages were less than $100,000.01.[22] According to Clark, because a claim for $100,000 or less was not an assertion of an explicitly stated amount of damages, the defendant had the burden to show that damages were likely to exceed $75,000 under either the facially apparent or the summary judgment-type evidence standard.[23] Similarly, Judge John McBryde of the Northern District of Texas found that a plaintiff's allegation that they were seeking monetary relief of $100,000 or less "is not tantamount to a claim that the party is seeking 'at least $75,000' ... as required to establish diversity jurisdiction.[24,25]

The takeaway from Rule 47(c)'s current pleading requirements is that if a plaintiff asserts recovery by pleading the language of Rule 47(c)(3)-(5), the amount in controversy requirement would be satisfied under the "facially apparent" removal standard, and the 30-day removal deadline begins to run from the date of service. Claims pled under Rule 47(c)(1)-(2), however, are most likely not automatically removable; the defendant should be able to do more than just point to a Rule 47(c)(1) or (2) pleading to show that damages are likely to exceed $75,000. Further, a plaintiff's act of pleading for damages of $100,000 or less should not bar a defendant from seeking removal beyond 30 days from service, so long as it becomes ascertainable that the amount in controversy is likely to exceed $75,000.

THE EFFECT OF LEVEL TWO DISCOVERY CONTROL PLANS

Under Rule 47(c), there are only two instances when a petition can properly contain a plea for damages of $100,000 or less: when the claim is simply for monetary damages of no more than $100,000 or when the claim seeks up to $100,000 and non-monetary relief.[26] The first instance is governed by a level one discovery control plan. The second instance is governed by a level two discovery control plan or, upon court order, a level three plan.

To this author's knowledge, one issue yet to be addressed by district courts is whether the act of pleading for a level two discovery control plan, without a claim for non-monetary relief and without alleging any information about damages, makes the claim removable. In those circumstances, a defendant could argue that the plaintiff's petition could only be seeking damages in excess of $100,000, and therefore, by virtue of a plea for a level two discovery control plan alone, it is facially apparent that the petition seeks damages in excess of $75,000. The above position finds support within the revised rules of procedure; a claim simply for monetary relief of less than $100,000 cannot be governed by a level two plan, and a level two plan seeking less than $100,000 requires the inclusion of non-monetary damages.[27] Furthermore, at least one district court, albeit under the old pleading rules, seems to support such an interpretation.[28]

Given that federal courts have yet to weigh in on this scenario, defendants contemplating removal should be aware of the issues present in this situation. If a defendant declines to remove a case, there is the possibility that federal courts could determine that the removal deadline for this type of petition scenario began running immediately upon service of the lawsuit. While it may be harsh to penalize a defendant for not removing a case when the plaintiff failed to comply with the pleading rules, the federal court's inquiry is not whether the plaintiff complied with the pleading rules, but rather whether it was ascertainable from the petition that the amount in controversy was likely to exceed $75,000 at the time the petition was served.[29]

Even though the removing party in this scenario may risk having the case remanded back to state court, there may be several benefits to seeking removal: (1) the defendant may obtain clarification regarding the amount in controversy without waiving their right to seek removal; (2) if the case is remanded, the defendant obtains a court order that the amount in controversy was not established by the plaintiff's pleading, therefore preserving the defendant's right to later seek removal if additional information is obtained regarding damages; or (3) the district court may find that removal was proper under the facially apparent removal standard.

RULES OF THUMB FOR PARTIES REGARDING REMOVAL

When contemplating the allegations in a petition, plaintiffs and defendants should also remember four additional things:

1) At least according to the Southern District of Texas, Rule 47(c)'s damage ranges seeking $100,000 or less do not prevent a case from being removed to federal court.[30] Simply complying with Rule 47(c), without more, is likely insufficient to guarantee a case remains in state court. Counsel need to be aware of the proper, legally binding methods to prevent a defendant from removing a case if the plaintiff wishes to avoid federal court.
2) Specifying an amount of money in an ad damnum clause, even one that states the claimant seeks damages for less than $75,000, may not bar a case from being properly removed to federal court.[31] Texas law has never permitted a plaintiff to plead that he or she seeks damages not to exceed $75,000, and federal courts have almost universally rejected or disregarded those pleading provisions when evaluating whether removal was proper or whether remand was required.
3) Categories of damages can permit removal of a case just as easily as allegations regarding the range of damages or the amount in controversy. Defendants must pay attention to the general allegations regarding injuries contained within a petition and the categories of damages sought. The 5th Circuit has already sustained the removal of a case under the facially apparent standard based solely on these factors.[32] Plaintiffs seeking to remain in state court should avoid pleading allegations describing the injuries, treatment, or damages received and should stick to basic statements about the claim. The plaintiff's petition only needs to provide the defendant with fair notice of the basis for liability against the defendant under the pled cause(s) of action. Plaintiffs should also be aware, in advance, of the types of damages they will seek and avoid pleading categories of damages, such as lost earnings, if those damages aren't applicable or desired.
4) The simplest way for a plaintiff to avoid removal of a claim to federal court is to file a separate stipulation document or affidavit along with her petition, or at any time prior to removal, stating that she will not seek or accept an award of more than $75,000.[33] Any plaintiff seeking to avoid removal should file such a stipulation or affidavit because this will bar removal as a matter of law. In contrast, one of the simplest ways for a defendant to gather evidence that the amount in controversy may exceed $75,000 is to send a timely correspondence asking the plaintiff to stipulate that he or she will not seek or accept an award of more than $75,000. Federal courts evaluating amount-in-controversy issues have taken a plaintiff's refusal to stipulate damages of $75,000 or less as some evidence (although not dispositive by itself) that the amount in controversy exceeds $75,000.[34] **TBJ**

NOTES

1. *See* Misc. Docket No. 13-9022.
2. *See* Misc. Docket No. 12-9191.
3. *See* Misc. Docket No. 13-9022.
4. 28 U.S.C. § 1332(a)(1).
5. The initial notice of removal needs to include only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold; evidentiary submissions are not necessary. *See Dart Cherokee Basin Operating Co., LLC v. Owens*, 135 S. Ct. 547, 549 (2014). The burden arises only when federal jurisdiction is challenged. *See id.* at 550.
6. *Allen v. R & H Oil & Gas, Co.*, 63 F.3d 1326, 1335 (5th Cir. 1995).
7. *Gebbia v. Wal-Mart Stores, Inc.*, 233 F.3d 880, 883 (5th Cir. 2000).
8. *See* 28 U.S.C. § 1446(b)(1); 28 U.S.C. § 1446(b)(2)(B).
9. *Bosky v. Kroger Texas, LP,* 288 F.3d 208, 210 (5th Cir. 2002) (referencing a standard articulated by *Chapman v. Powermatic, Inc.*, 969 F.2d 160, 163 (5th Cir. 1992)).
10. *See, e.g., Napier v. Humana Marketpoint, Inc.*, 826 F.Supp.2d 984, 987-88 (N.D. Tex. 2011); *Salomon v. Wells Fargo Bank*, 2010 WL 2545593, at *3-4 (W.D. Tex. June 21, 2010); *Century Assets Corp. v. Solow*, 88 F.Supp.2d 659, 662-63 (E.D. Tex 2000); *Carleton v. CRC Indus., Inc.*, 49 F.Supp.2d 961, 963 (S.D. Tex. 1999).
11. *See, e.g., Gebbia,* 233 F.3d at 881, 883.
12. *See* 28 U.S.C. §1446(b)(3).
13. *Bosky,* 288 F.3d at 211 (referencing 601 F.2d 480, 488-90 (10th Cir. 1979)).
14. *See, e.g., Vielma v. ACC Holding, Inc.*, 2013 WL 3367494, at *1-4 (W.D. Texas April 16, 2013) (in which the district court concluded that it was readily ascertainable that a case was removable immediately after being filed, despite both parties agreeing that the case was not removable at that time).
15. 28 U.S.C. § 1447(d); *see Kircher v. Putnam Funds Trust,* 547 U.S. 633, 640-41 (2006).
16. *See* TEX. R. CIV. P. 47(c) (2013).
17. *See* TEX. R. CIV. P. 47(b) (2012).
18. *Compare,* TEX. R. CIV. P. 190.2 (2012), *with* TEX. R. CIV. P. 190.3 (2012).
19. TEX. R. CIV. P. 190.2 (2013).
20. TEX. R. CIV. P. 190.3(a) (2013).
21. *See, e.g., Nielson v. Communications Components, Inc.*, 2013 WL 6253647, at *1 (E.D. Tex. Dec. 3, 2013); *Wilson v. JPMorgan Chase Bank Nat. Ass'n,* 2013 WL 5952576, at *3 (N.D. Tex. Nov. 7, 2013).
22. *Nielson,* 2013 WL 6253647, at *1.
23. *Id.*
24. *Wilson,* 2013 WL 5952576, at *3.
25. To the author's knowledge, the Southern and Western districts of Texas have not yet addressed this issue.
26. TEX. R. CIV. P. 47(c)(1)-(2).
27. *Compare,* TEX. R. CIV. P. 190.2 *and* TEX. R. CIV. P. 169(a), *with* TEX. R. CIV. P. 190.3.
28. *See Dean v. Accenture Federal Services, LLC,* 2011 WL 6355298, at *3 (W.D. Tex. Dec. 19, 2011) (Rodriguez, J.) (level two discovery plan's requirement of a minimum of $50,000 in damages, along with other general allegations, supported removal).
29. *See, e.g., Vielma,* 2013 WL 3367494, at *5 (alleged $75,000 damage limitation was improper, and defendant should have known the amount in controversy was likely to exceed $75,000 based on the alleged damages).
30. *See, e.g., Garcia v. Kellogg USA, Inc.*, 2013 WL 4735169, at *1 n.17 (S.D. Tex. Sept. 3, 2013).
31. *See, e.g.,* 28 U.S.C. § 1446(c)(2)(ii) (the sum demanded in good faith is deemed the amount in controversy, unless state practice does not permit the demand for the specific sum or permits recovery of damages in excess of the amount demanded); *De Aguilar v. Boeing Co.*, 47 F.3d 1404, 1410 (5th Cir. 1995); *Penn v. Home Depot U.S.A., Inc.*, 2013 WL 6859119, at *2 (S.D. Tex. Dec. 30, 2013); *Wilson v. Hibu, Inc.*, 2013 WL 5803816, at *5 (N.D. Tex. Oct. 28, 2013); *Garcia,* 2013 WL 4735169, at *1; *Hernandez v. Sikorsky Support Services, Inc.*, 2013 WL 4479065, at *1 (S.D. Tex. Aug. 19, 2013); *Vielma,* 2013 WL 3367494, at *6 n.4; *Martin v. Southwest PCS, LP,* 2003 WL 22477692, at *3 (W.D. Tex. Nov. 3, 2003).
32. *See, Gebbia,* 233 F.3d at 881, 883.
33. *See, e.g., De Aguilar,* 47 F.3d at 1411-12; *Wilson,* 2013 WL 5803816, at *6 *Hernandez,* 2013 WL 4479065, at *2; *Williams v. Companion Prop. & Casualty. Ins. Co.*, 2013 WL 2338227, at *2-3 (S.D. Tex. May 27, 2013); *Blanco v. Wal-Mart Stores Tex., L.L.C.*, 2011 WL 3681560, at *1 n.2 (W.D. Tex. July 15, 2011).
34. *Calloway v. BASF Corp.*, 810 F.supp. 191, 193 (S.D. Tex 1993); *Johnson v. Dillard Dept. Store,* 836 F. Supp. 390, 394 (N.D. Tex. 1993); *Noyola v. State Farm Lloyds,* 2013 WL 3353963, at *4 (S.D. Tex. July 3, 2013); *Rawlings v. Travelers Property Casualty Ins. Co.*, 2008 WL 2115606, at *9 (N.D. Tex. 2008); *Fredrichs v. Time Ins. Co.*, 2007 WL 1624310, at *3 (E.D. Tex. 2007).

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