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***Dart Cherokee v. Owens***, 135 S. Ct. 547 (2014), has made diversity jurisdiction removal treacherous in slip and fall cases. Here's how to navigate the treachery.

# Removing That Slip and Fall Case to Federal Court

The road to federal court for defendants has become increasingly more treacherous, especially with slip and fall cases. This is due to the United States Supreme Court decision in the *Dart Cherokee Basin Operating Co., LLC*

*v. Owens*, 135 S. Ct. 547 (2014). This article will provide defense counsel with an overview of the federal diversity jurisdiction landscape after the *Dart Cherokee* decision, as well as several strategies that defense counsel should consider using to ensure success when attempting to remove a case to federal court. The pertinent holding from *Dart Cherokee* is particularly important because it relates to the evidence necessary to gain entry to and stay in federal court with a slip and fall case, especially because in such cases an injured plaintiff's claim for damages is often nebulous.

Under 28 U.S.C. §1332, district courts have original jurisdiction over all civil actions when the amount in controversy exceeds a sum or value of \$75,000, excluding interest and costs, and there is complete diversity between all plaintiffs and all defendants. Therefore, pursuant to 28 U.S.C. §1441, once there is original jurisdiction, an action

may be removed by a defendant or the defendants to any federal district court embracing the place where the state court action was originally filed and is pending. Under 28 U.S.C. §1446, a defendant need only provide a short and plain statement of the grounds for removal. While this may seem rather straightforward, the Supreme Court's recent decision really shook things up. In accordance with 28 U.S.C. §1446, defendants have 30 days to file a notice of removal to remove a case from state to federal court. The 30-day time window begins to run from the date of service upon any defendant or when any defendant in an action becomes aware of the ability to remove the case based upon any pleading, motion, order, or other paper.

## ***Dart Cherokee Basin Operating Company LLC v. Owens***

In December of 2014, the United States Supreme Court granted certiorari in *Dart*



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*Cherokee* to resolve a circuit split and address whether or not a defendant must provide evidence to support an averment in a notice of removal that the amount in controversy requirement has been met for the purpose of establishing diversity jurisdiction.

After an analysis of legislative and case history, the Court in *Dart Cherokee* held

## The pertinent holding

from *Dart Cherokee* is particularly important because it relates to the evidence necessary to gain entry to and stay in federal court with a slip and fall case, especially because in such cases an injured plaintiff's claim for damages is often nebulous.

that a defendant does *not* need to submit evidence in a notice of removal and need only include a short and plain statement regarding the amount in controversy. And “when a defendant seeks federal-court adjudication, the defendant’s amount-in-controversy allegation should be accepted when not contested by the plaintiff or questioned by the court.” However, when a defendant’s assertion regarding the amount in controversy is challenged, both sides must submit proof, and the court then must decide “by a preponderance of the evidence, whether the amount-in-controversy requirement has been satisfied.” But “defendants do not need to prove to a legal certainty that the amount in controversy requirement has been met.” Instead, “defendants may simply allege or assert that the jurisdictional threshold has been met.”

Of course, evidence is not an issue when a plaintiff’s state court complaint demands, in good faith, a stated sum. In such a case, the stated sum will then be deemed the amount in controversy. However, in many states where a complaint can state nothing more than a general request for unliquidated damages, it is much more likely that either a plaintiff or a judge will question the amount in controversy, thus invoking the requirement of evidence. While the *Dart Cherokee* decision should have cleared up the differences in the ways that the circuit courts handle removal cases, that does not seem to have happened. Therefore, the following overview of cases that have been decided since the *Dart Cherokee* decision will hopefully assist defense practitioners as they attempt to navigate the new landscape.

### The California Perspective

In *Melanson v. Target Corp.*, No. 2:15-CV-03526-ODW, 2015 WL 4127909, at \*2 (C.D. Cal. July 8, 2015), the plaintiff in this personal injury action argued that the United States District Court for the Central District of California did not have subject-matter jurisdiction because the defendant failed to prove by a preponderance of the evidence that the amount in controversy exceeded \$75,000. The plaintiff was injured while working in a warehouse owned by the defendant. Since the plaintiff challenged the defendant’s “plausible allegation” that the amount in controversy requirement had been met, the court looked to the defendant’s opposition brief to determine whether or not sufficient evidence establishing the amount in controversy had been provided, in accordance with *Dart Cherokee*.

In its opposition, the defendant offered proposed damages calculations. Specifically, the defendant argued that the plaintiff’s complaint sought “special damages, general damages (to include emotional distress), punitive damages, loss of income, attorney’s fees, interest and restitution.” The defendant argued that the plaintiff’s lost wages alone would exceed \$75,000. The defendant also argued that several of the statutory causes of action pleaded by the plaintiff authorized attorney’s fees, which would likely have reached \$40,000 by the time that the case went to trial. The plaintiff also cited cases in which punitive dam-

age awards ranged between \$60,000 and \$40 million. Therefore, the court held that the defendant had established by a preponderance of the evidence that the amount in controversy exceeded \$75,000.

In *McGill v. Home Depot, Inc.*, No. 15-CV-03029-KAW, 2015 WL 5441032, at \*1 (N.D. Cal. Sept. 15, 2015), the plaintiff filed a personal injury action after experiencing an injury after a fall in the defendant’s store. The plaintiff’s complaint did not initially specify an amount in controversy. However, when the plaintiff filed his case management conference statement, he “stated that his damages [for lost wages, medical expenses, general damages, and compensatory damages], exceeded \$100,000.” Following that court filing, and more than five months after the filing of the initial complaint, the defendant “removed the case to federal court on the grounds that, prior to the filing of the case management statement, it was unaware that the amount in controversy exceeded \$75,000, such that federal jurisdiction exist[ed]” because there was complete diversity of citizenship between the parties. Under Section 1446, there are essentially two 30-day periods during which a defendant can remove an action, and the second applies when the case, based upon the initial pleading, is not on its face removable. While the plaintiff argued that the notice of removal was untimely, the court held that even though the nature of the plaintiff’s injuries as outlined in the complaint provided a clue that the case may have been removable, the filing of the notice within 30 days of the filing of the case management statement was timely.

### The Louisiana Perspective

In *Hodnett v. Logan’s Roadhouse, Inc.*, No. CIV.A. 15-2158, 2015 WL 5675854, at \*2 (W.D. La. Sept. 25, 2015), the United States District Court for the Western District of Louisiana questioned whether a removing defendant could still “satisfy its burden of supporting federal jurisdiction by establishing that it was facially apparent from the petition that the claims probably exceed \$75,000” after the *Dart Cherokee* decision. The court granted the plaintiff’s motion to remand after holding that both the severity of the plaintiff’s injuries and damages remained ambiguous and thus did not support removal. However, the

court noted that the case could become removable at a later point in time if the severity of the plaintiff's injuries and the amount of damages became more certain in a way that would establish that the amount in controversy exceeded \$75,000.

Alternatively, in *Akins v. Ace Am. Ins. Co.*, No. CIV.A. 14-653-SDD-SC, 2015 WL 566678, at \*3 (M.D. La. Feb. 10, 2015), the court held that based upon the plaintiff's claimed injuries, it was facially apparent that her claims exceeded the \$75,000 threshold, exclusive of interest and costs. The plaintiff was injured after a ceiling tile fell on her while she was dining in a fast food restaurant owned by one of the defendants. The plaintiff alleged some non-specific injuries to her neck, but she also alleged specific injuries to her back, including "annular tears and bulging discs at L4-5 and L5-S1." The court held that the plaintiff's injuries were serious and could require surgery if more conservative treatment and medication was not successful, and as a result, the court also held that the defendant adequately established that the amount in controversy exceeded \$75,000. Similarly, in *Simpson v. Dollar Tree Stores, Inc.*, No. CIV.A. 15-2107, 2015 WL 5566704, at \*2 (W.D. La. Sept. 21, 2015), the court held that the circumstances surrounding the plaintiff's injury, as well as the nature of those injuries, made it facially apparent that the defendant had satisfied by a preponderance of the evidence that the amount in controversy exceeded \$75,000. The husband and wife plaintiffs filed a complaint against the defendant store for injuries suffered by the wife plaintiff during a robbery on the defendant's premises. The wife plaintiff was injured by a blow to the head with a weapon, which caused her to fall to the pavement. She was bleeding from a head wound while she crawled to the door of the defendant's business. None of the store employees inside would open the door, and they refused to provide her with any assistance. To quote from the decision, "Plaintiffs allege[d] severe physical injuries and medical expenses, as well as mental anguish from the traumatic event."

### The Florida Perspective

First, let us briefly review the history of diversity jurisdiction. The removal statute,

28 U.S.C. §1441(b), specifies that "[a]ny civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties." "Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought."

Federal courts are courts of limited jurisdiction. The presumption is that a federal court lacks jurisdiction in a particular case until it has been demonstrated that jurisdiction over the subject matter exists. *Fitzgerald v. Seaboard System Railroad, Inc.*, 760 F.2d 1249 (11th Cir. 1985); 28 U.S.C. §1441(b). Original jurisdiction exists in any suit involving amounts in controversy of more than \$75,000 between citizens of different states. 28 U.S.C. §1332(a). However, most complaints do not mention the amount of damages sought for a plaintiff's injury. When a party seeks to remove an action on the basis of diversity in a case, if the complaint does not make clear that more than \$75,000 is in controversy, the removing party must prove by a preponderance of the evidence that the amount in controversy meets the jurisdictional threshold. *Williams v. Best Buy Co.*, 269 F.3d 1316, 1319-20 (11th Cir. 2001); *Matheson v. Progressive Specialty Ins. Co.*, 319 F.3d 1089, 1090 (9th Cir. 2003).

The burden of proof for removal, when a plaintiff's complaint does not state the amount of damages sought, is discussed in *Leonard v. Enterprise Rent a Car*, 279 F.3d 967, 972 (11th Cir. 2002). The decision explains,

A removing defendant bears the burden of proving proper federal jurisdiction. Where a plaintiff fails to specify the total amount of damages demanded... a defendant seeking removal based on diversity jurisdiction must prove by a preponderance of the evidence that the amount in controversy exceeds the \$75,000 jurisdictional requirement. "A conclusory allegation in the notice of removal that the jurisdictional amount is satisfied, without setting forth the underlying facts supporting such an assertion, is insufficient to meet the defendant's burden."

*Id.* (internal citations omitted).

The decision stated that the defendants in *Leonard* "failed to carry their burden" because their notice of removal contained only unsupported assumptions that the amount in controversy had been met. The *Leonard* court relied on the *Williams* court's ruling from the previous year.

The decision in *Williams v. Best Buy Co.*, 269 F.3d 1316, 1319-20 (11th Cir. 2001), pre-

**A failed removal and subsequent remand can carry significant financial penalties.**

viously had explained the burden of proof that a court should require, at least in the Eleventh Circuit, when considering the amount in controversy requirement when a plaintiff's complaint does not include the amount of damages requested. *Williams* established the preponderance of evidence standard. The plaintiff in *Williams* filed a complaint in a state court in Georgia, alleging personal injuries and requesting the damages, which included "substantial medical expenses, suffered lost wages, and experienced a diminished earning capacity." *Williams* alleged that she would "continue to experience each of these losses for an indefinite time into the future. For these injuries, the complaint seeks general damages, special damages and punitive damages in unspecified amounts."

The defendant in *Williams* removed the case, alleging diversity jurisdiction, but failed to provide any additional evidence about the amount in controversy. The court held that "[a] conclusory allegation in the notice of removal that the jurisdictional amount is satisfied, without setting forth the underlying facts supporting such an assertion, is insufficient to meet the defendant's burden."

A failed removal and subsequent remand can carry significant financial penalties. See *Gray v. New York Life Ins. Co.*, 906 F. Supp. 628 (N.D. Ala. 1995). Federal statute 28 U.S.C. §1447(c) explains that "[a]n order remanding the case may require payment



of just costs and any actual expenses, including attorney fees, incurred as a result of the removal.” The potential financial penalties may operate to streamline the federal court dockets and reduce the amount of improperly removed cases. In *Gray*, the U.S. District Court for the Northern District of Alabama sanctioned counsel, observing that “[a] cursory examination of the appli-

Because this is an evolving area of law, you may want to create an alert in your legal research engine to remain aware of changes as new decisions are released in your jurisdiction.

cable law would have revealed that the federal district court does not have jurisdiction over the case.” The *Gray* court further explained:

The Judicial Improvements and Access to Justice Act of 1988 (Pub. L. 100-702) made substantial changes in 28 U.S.C. §§1446 and 1447. Plainly, one of the Congressional purposes was to narrow the removal opportunity. The message was: “Remove at your peril!” This Congressional intent must be kept in mind as the 1988 changes are construed and applied to concrete situations. For instance, while doing away with the long-required removal bond, the new §1446(a) expressly requires that the notice of removal be signed pursuant to Rule 11, F. R. Civ. P. This reference to Rule 11 is redundant because Rule 11 would apply anyway, but the reference constitutes an extra-special warning to removing defendants that they are subject to sanctions if the averments in their notice of removal are not well grounded in fact and warranted by law.

Fast forward to 2015. After the *Dart Cherokee* decision, federal courts within the jurisdiction decided a number of cases.

The following two may be especially helpful to defense practitioners in Florida.

In *Hernandez v. Burlington Coat Factory of Florida, LLC*, No. 2:15-CV-403-FTM-29CM, 2015 WL 5008863, at \*1 (M.D. Fla. Aug. 20, 2015), a premises liability action, the plaintiff challenged whether the defendant store owner had established that the amount in controversy exceeded \$75,000. As evidence of the amount in controversy, the defendant cited a pre-suit demand letter “in which Plaintiff offered to resolve her claim in full in exchange for \$400,000.” In support of the \$400,000 demand, the letter stated that the plaintiff suffered permanent damage to her right knee, left shoulder, and left foot as a result of her slip and fall. The letter also stated that the plaintiff required surgery as a result of her injuries and continued to experience ongoing pain. The court held that while settlement offers commonly reflect some “puffing and posturing,” a letter supported by documented medical bills and specific diagnosis information “may be sufficient to plausibly allege that the amount in controversy exceeds \$75,000.”

Similarly, in *Mangano v. Garden Fresh Rest. Corp.*, No. 215CV477FTM99MRM, 2015 WL 5953346, at \*1 (M.D. Fla. Oct. 13, 2015), the defendant in this slip and fall case filed its notice of removal after receiving the plaintiff’s document production of medical bills. The court held that the combination of the plaintiff’s medical bills (\$39,289 of which were paid by Medicare), her husband’s loss of consortium claim, her potential pain and suffering, and other general damages made it plausible that the amount in controversy exceeded \$75,000.

### The Pennsylvania Perspective

Pennsylvania, similar to many other states, does not allow plaintiffs to specify a sum for unliquidated damages in a complaint. Under Pennsylvania Rule of Civil Procedure 1021(b), “[a]ny pleading demanding relief for unliquidated damages shall not claim any specific sum.” Thus, when a plaintiff demands damages in an amount in excess of a specified sum, the demand falls within the exception to the diversity jurisdiction rule, and the defendant must establish “by the preponderance of the evidence, that the amount in controversy exceeds the amount specified in section 1332(a).” A de-

fendant must submit evidence to satisfy the evidentiary requirement. See *Vizant Technologies, LLC v. Ocean State Jobbers, Inc.*, No. CIV.A. 14-6977, 2015 WL 500480, at \*2 (E.D. Pa. Feb. 5, 2015). If a court is required to guess whether or not the amount in controversy has been met, the defendant in the case has failed to establish the requisite evidence for a determination in the defendant’s favor. See *Stevenson v. Wal-Mart Stores, Inc.*, No. CIV.A. 14-4073, 2015 WL 158811, at \*3 (E.D. Pa. Jan. 13, 2015). A subjective appraisal of a plaintiff’s claims based upon the seriousness of the alleged injuries is not sufficient to meet the preponderance burden.

In *Jones v. Gemalto, Inc.*, No. CIV.A. 15-00673, 2015 WL 3948108, at \*1 (E.D. Pa. June 29, 2015), the plaintiff, John R. Jones, filed a complaint against his previous employer, defendant, Gemalto, Inc., for discrimination and an alleged assault that occurred while he was working for the company. To determine whether or not the requisite amount in controversy for federal jurisdiction based upon diversity of citizenship had been met, the court examined the plaintiff’s motion for remand and the defendant’s initial notice of removal. The court held that the defendant established that the amount in controversy had been satisfied. The defendant was able to satisfy that the amount in controversy had been met by calculating the plaintiff’s potential back pay award and by providing documentation to support the calculation. Specifically, the defendant provided a declaration with its notice of removal that confirmed the plaintiff’s hourly wage and the average number of hours worked per week from the date of termination.

Should you encounter this issue in Pennsylvania, you may have success by reviewing jury verdicts and including summaries of those cases that have similar injuries, and if possible, factual situations in your response to an amount in controversy challenge. We suggest that you stick to federal court cases and only use state court decisions, which will only be persuasive, if you cannot find cases from a federal court in your jurisdiction. For example, the following cases may be helpful if your plaintiff has a tibial plateau fracture.

Recently in *Jacoby v. Admiral Merchants Motor Freight, Inc. et al.*, 2010 PA Jury Ver-

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dicts Review Lexis 190 (W.D. Pa. 2010), a jury awarded \$750,000 to a plaintiff who suffered a tibial plateau fracture as a result of a tractor-trailer collision. The plaintiff had to undergo three surgeries as a result of his accident-related injuries. In this case, “[t]he jury found the defendants 100 percent negligent and awarded the plaintiff \$750,000 in damages.”

In *Cannavine v. CSX Transportation, Inc.*, 2006 Jury Verdicts Lexis 41112 (W.D. Pa. 2006), the jury awarded the plaintiff, a freight conductor for the defendant, \$395,000 in damages for injuries that he suffered, which included a tibial plateau fracture that required surgical intervention, as a result of a train collision.

Finally, in *Gonzales v. U.S. et al.*, 2007 Jury Verdicts Lexis 36728 (D.N.J. 2007), the jury awarded the plaintiff \$100,000 for knee injuries that he suffered when he fell on accumulated ice and snow while placing mail on an outdoor conveyor belt at the Newark Liberty International Airport. The plaintiff was required to undergo surgery for partial medial meniscectomy and chondroplasty of the tibial plateau, medial femoral condyle and patella with partial synovectomy. The plaintiff sued the United States Postal Service, his employer at the time of the accident, and various other defendants. The case went to trial against the U.S. Postal Service, and the jury ruled that the U.S. Postal Service failed to keep its facility in a reasonably safe condition and that failure was a proximate cause of the plaintiff’s injury.

### Tips for Defense Practitioners

Based upon the case law overview above, we have put together the following list of tips that we believe may help you navigate the new landscape created by the *Dart Cherokee Basin Operating Company, LLC* decision. Because this is an evolving area of law, you may want to create an alert in your legal research engine to remain aware of changes as new decisions are released in your jurisdiction.

1. Provide a court with summaries of jury verdicts in cases in which a plaintiff’s injuries are analogous to the injuries in your case.
2. Wait until a plaintiff files a case management conference statement, or a similar paper that sets forth a specified sum for

the plaintiff’s damages, and base your notice of removal on the damages claim in the statement or other document.

3. Conduct discovery as early as possible: the more support you can provide in your initial notice of removal, the easier it will be if your removal attempt is challenged.
4. Consider seeking a stipulation signed by a plaintiff establishing that the amount in controversy has been met. Of course, if you can get a plaintiff to sign a stipulation that the amount in controversy has been met, it will make your life much easier.
5. Finally... if at first you don’t succeed... try, try, again—as soon as you have sufficient evidence to support your notice of removal and can file it in good faith. 