

## Advocate's VIEW

# Removing cases when the amount in controversy is unclear

Rather than specify a dollar amount, state court plaintiffs may plead damages “in an amount to be determined at trial” or “in excess of the jurisdictional limits of all lower courts.” These statements do not establish an amount in controversy. If the defendants wish to remove to federal court under a statute imposing an amount-in-controversy requirement — most commonly the diversity jurisdiction statute, which requires an amount in controversy exceeding \$75,000, “exclusive of interest and costs,” 28 U.S.C. § 1332(a) — they must supply the amount in controversy themselves.

To do so, the defendants must file a notice of removal containing “a plausible allegation that the amount in controversy exceeds the jurisdictional threshold.” *Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547, 554 (2014). Both the plaintiffs and the court, which has “a duty to inquire [into its] subject matter jurisdiction sua sponte, even when the parties do not contest the issue,” may challenge the defendants’ damages allegation. *Estate of Gallo v. Bob Evans Rest.*, 2019 WL 350163, at \*1 (W.D.N.Y. Jan. 29, 2019) (Vilardo, J.) (quoting *D’Amico Dry Ltd. v. Primera Mar. (Hellas) Ltd.*, 756 F.3d 151, 161 (2d Cir. 2014)). If damages are contested, “both sides submit proof and the court decides, by a preponderance of the evidence, whether the amount-in-controversy requirement has been satisfied,” with the removing defendant bearing the



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burden of proof. *Id.* at \*2 (quoting *Owens*, 135 S. Ct. at 554).

In *Estate of Gallo*, the court addressed an attempt to remove a personal injury action, noting that “New York state law prohibits plaintiffs from demanding a specific sum” in such actions. *Id.* (citing CPLR 3017(c)). In a Report and Recommendation that Judge Vilardo adopted, Magistrate Judge McCarthy “found that the amount in controversy did not exceed \$75,000,” requiring remand. *Id.* at \*3. Judge Vilardo held that the description of the case given by plaintiff’s counsel — the 85-year-old plaintiff suffered a spine fracture that required surgery, but also suffered from lung and brain cancer and died about a year later, and the plaintiff did not allege “that his death was the result of the fall” — established an amount in controversy that “did not exceed \$75,000.” *Id.* at \*2-3. The court rejected the defendants’ attempts to prove an amount in controversy that would permit removal:

• The plaintiff had made a settlement demand of \$137,000. Agreeing with the magistrate judge’s observation “that settlement offers can often be wildly unrealistic,” the court concluded that “initial

settlement demands can be more of a wish than a value” and thus did not establish the amount in controversy. *Id.* at \*3 (internal quotation marks omitted).

• The defendants claimed that a New York jury verdict in a comparable action exceeded \$75,000. In addition to finding that the other action was not similar due to the plaintiffs’ age differences, the court held that “verdicts in other cases are ‘not dispositive of whether the amount in controversy requirement is satisfied in this particular case.’” *Id.* (quoting *United Food & Commercial Workers Union v. CenterMark Props. Meriden Square, Inc.*, 30 F.3d 298, 305 (2d Cir. 1994)).

• The court noted that the defendants declined “the option of requesting discovery to develop the record.” *Id.* (citing *Owens*, 135 S. Ct. at 554). If the defendants truly believed they could uncover information that would get them into federal court, they had the opportunity to obtain it.

The court also observed that the plaintiff had stipulated to limiting his damages to \$75,000. *Id.* This fact alone could have been sufficient to require remand, as “federal courts permit individual plaintiffs ... to avoid removal to federal court, and to obtain a remand to state court, by stipulating to amounts at issue that fall below the federal jurisdictional requirement.” *Standard Fire Ins. Co. v. Knowles*, 568 U.S. 588, 595 (2013).

If the plaintiff does not specify dam-

ages in the complaint, the defendant may receive additional time to remove the action. While a defendant typically has thirty days from receipt of an initial pleading to remove, the Second Circuit follows “a bright line rule requiring service of a document explicitly stating the amount in controversy” to start the 30-day period. *Cutrone v. Mortgage Elec. Registration Sys., Inc.*, 749 F.3d 137, 143 (2d Cir. 2014). The defendant may request a damages number in discovery or, in a personal injury action, through a CPLR 3017(c) supplemental demand. The 30-

day clock begins to run when the defendant receives a “paper,” such as a written response from the plaintiff, establishing a sufficient amount in controversy. 28 U.S.C. § 1446(b)(3). Absent bad faith by the plaintiff, however, a defendant cannot remove an action on diversity grounds more than one year after its commencement. *Id.* § 1446(c)(1).

If the parties are diverse, the plaintiff cannot defeat removal by failing to plead a damages figure. Nor can the defendant invent an amount in controversy that contradicts the evidence. Instead, the de-

fendant can take discovery — including post-removal discovery, if there is a plausible basis for removal in the first place — to find out what the case is really worth.

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