

Win remand by challenging the amount in controversy

Your argument is that defendants have failed to carry their burden of proving that the amount in controversy exceeds $75,000

By Bill Foster

After a case is filed in state court, one of the first steps that many defendants take is to look for ways to remove it to federal court. One of the most common grounds for removal is diversity jurisdiction. Under section 1332 of title 28 of the United States Code, district courts have diversity jurisdiction where there is complete diversity between the parties and the amount in controversy exceeds $75,000. Whether complete diversity exists is typically a straightforward question because the citizenship of the parties is generally known at the time the complaint is filed. But determining the amount in controversy can be less clear cut, especially since most complaints are silent as to the amount of damages sought.

A defendant that removes a case to federal court bears the burden of establishing that the amount in controversy exceeds the jurisdictional minimum. Importantly, in claiming that the defendant has failed to carry this burden, you are not arguing that the amount in controversy is less than $75,000. Your argument is that defendants have failed to carry their burden of proving that the amount in controversy exceeds $75,000. This article provides an overview of some of the ways this challenge can be made, in hopes of keeping your case in state court.

The removal notice

The removal process begins when the defendant files a notice of removal in federal court. The notice of removal only "need include a plausible allegation that the amount in controversy exceeds the jurisdictional threshold." (*Dart Cherokee Basin Operating Co., LLC v. Owens* (2014) 574 U.S. 81, 89.) In other words, a defendant's notice of removal does not need to include supporting evidence demonstrating that the amount in controversy requirement is met. But the notice must contain some factual allegations regarding the amount in controversy. (*Leite v. Crane Co.* (9th Cir. 2014) 749 F.3d 1117, 1122.) This typically requires citations to specific paragraphs in the complaint, as well as an explanation as to why these allegations show the amount in controversy exceeds $75,000. The allegations that a defendant makes in its notice are what you will challenge in your motion to remand.

Challenging removal

The Ninth Circuit distinguishes between two types of challenges to removal: facial and factual. Understanding the distinction is important because it can affect how courts evaluate a motion for remand.

A facial challenge accepts the allegations in the notice of removal as true but argues that even if true, they fail to establish federal jurisdiction. (*Leite v. Crane Co.* (9th Cir. 2014) 749 F.3d 1117, 1122.) On the other hand, a factual challenge disputes the truth of the jurisdictional allegations themselves. (*Harris v. KM Indus., Inc.* (9th Cir. 2020) 980 F.3d 694, 700.) This can be done in two ways: by introducing evidence that contradicts the allegations in the removal notice or by making a reasoned argument that the removal notice's assumptions about the amount in controversy are unsupported. (*Ibid.*)

Courts have held that defendants have a lower burden for establishing jurisdiction where a facial challenge is made. For facial challenges, defendants do not have to come forward with evidence to establish that the amount in controversy exceeds the jurisdictional minimum. Instead, whether the amount-in-controversy requirement is met is based on a review of the complaint's allegations. (See, e.g., *Peters v. TA Operating LLC* (C.D. Cal. Jan. 26, 2023) 2023 WL 1070350, at *6.) In contrast, where a factual challenge is made, courts require the removing defendant to establish "by a preponderance of the evidence, that the amount in controversy exceeds the jurisdictional threshold." (*Chavez v. JPMorgan Chase & Co.* (9th Cir. 2018) 888 F.3d 413, 416.) This is a significantly higher standard that requires defendants to establish the amount in controversy with "summary-judgment-type evidence." (*Hembree v. Allstate Ins. Co.* (C.D. Cal. Oct. 19, 2012) 2012 WL 12884890, at *2.)

The reality is that almost all motions to remand are based on a factual challenge. Nonetheless, defendants often argue that the challenge is facial, such that the lower standard of review applies. To head off this argument, the best practice is to highlight in your motion to remand why the removal notice's shortcomings are inherently factual. This can be done in several ways, including pointing out that defendant's damages calculations are incorrect, that defendant's estimates of attorneys' fees are too speculative, or that the value of injunctive relief is without support. Importantly, a plaintiff does not have to introduce evidence to make these attacks. They can be made by "reasoned argument" that points out the shortcomings in defendant's notice. (*Harris*, 980 F.3d at 700.)

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These fact-based attacks put the burden on the defendant to come forward with actual evidence to establish the amount in controversy.

Challenging defendants' evidence

Because complaints are often silent as to the amount of damages sought, defendants typically rely on certain claims or forms of extrinsic evidence to establish that the amount in controversy exceeds the jurisdictional threshold. The following categories of claims and evidence are often at issue in removal disputes.

Stipulations

After the case is removed to federal court, defense counsel may offer to withdraw the removal petition if you agree to stipulate that damages are under $75,000. Ignoring or declining the offer does no harm. The refusal to stipulate that the amount in controversy is below the jurisdictional threshold does not establish that the amount in controversy exceeds the threshold. (*Gonzalez v. Gen. Ins. Co. of Am.* (E.D. Cal. Feb. 20, 2019) 2019 WL 698057, at *4.) If the refusal to stipulate were dispositive, defendants in every removal dispute "would force plaintiffs to make a choice between stipulating against their future remedies and remaining in federal court." (*Valle v. State Farm Mutual Auto. Ins. Co.* (N.D. Cal. 1997) 1997 WL 564047, at *2.)

In some cases, plaintiffs have been willing to cap their damages at an amount below the jurisdictional threshold. If you're willing to so stipulate, the stipulation is best entered before removal proceedings begin. The U.S. Supreme Court has stated that post-removal stipulations cannot oust the district court of jurisdiction. (*St. Paul Mercury Indemnity Co. v. Red Cab Co.* (1938) 303 U.S. 283, 292.) In other words, once the case has been removed to federal court, the court will make its own assessment of whether the amount-in-controversy is met, regardless of any stipulation. This could leave you in the unfortunate position of being stuck in federal court, with a stipulation that your damages do not exceed $75,000.

Settlement demands

Settlement demands may be used against you in disputes over removability. If you've sent a demand to settle for more than the jurisdictional threshold, defendants will often point to the demand as evidence of the amount in controversy. Because a demand can represent a concrete statement of a plaintiff's claimed damages, the court may find that the demand can be considered in determining the amount in controversy. (See, e.g., *Woolsey v. State Farm Gen. Ins. Co.* (C.D. Cal. 2023) 672 F.Supp. 3d 1018, 1025; *Fawcett v. Ford Motor Co.* (C.D. Cal. Sept. 21, 2023) No. 5:23-CV-1443-SP, 2023 WL 6161030, at *4.)

The formality of settlement demands can matter. Courts generally give greater weight to written demands supported by evidence or analysis as opposed to more informal settlement offers. (See, e.g., *Owens v. Westwood Coll. Inc.* (C.D. Cal. Aug. 12, 2013) 2013 WL 4083624, at *4.) Moreover, while a demand may be considered in determining the amount in controversy, defendants typically must do more than point to the existence of a demand letter. The defendant must also show why the demand provides reliable evidence of the amount in controversy, in light of the claims being made in the case. (See, e.g., *Nunez v. Alibaba Grp. (U.S.), Inc.* (S.D. Cal. Sept. 4, 2024) 2024 WL 4048875, at *5.)

Punitive damages

Defendants often argue that punitive damages claims should be included in the amount in controversy. But whether a punitive damages claim will be included depends on the evidence that the defendant can muster. Because plaintiffs carry a higher burden to establish punitive damages, courts have repeatedly explained that defendants cannot simply point to the claim and contend that "any damages awarded under such a claim *could* total a large sum of money." (*Conrad Assocs. v. Hartford Acc. & Indem. Co.* (N.D. Cal. 1998) 994 F.Supp. 1196, 1201.) The "mere possibility of a punitive damages award is insufficient to prove that the amount in controversy requirement has been met." (*Hill v. Avis Budget Car Rental, LLC* (C.D. Cal. Apr. 2, 2014) 2014 WL 1325556, at *3.)

Instead, establishing that a punitive damages claim should be considered requires the defendant to cite analogous cases in which punitive damages have been awarded. (See, e.g., *Conrad* 994 F.Supp. at 1200-01; *Villegas v. Ford Motor Co.* (E.D. Cal. Apr. 28, 2023) 2023 WL 3144540, at *10.) For the cases to carry weight, "the cases must be factually identical or, at a minimum, analogous to the case at issue." (*Mireles v. Wells Fargo Bank, N.A.* (C.D. Cal. 2012) 845 F. Supp.2d 1034, 1055.)

This burden can make it difficult for defendants to use a claim for punitive damages to establish the amount in controversy. Simply citing to one or two cases is often not enough. (*Hembree v. Allstate Ins. Co.* (C.D. Cal. Oct. 19, 2012) 2012 WL 12884890, at *2.) Courts usually expect the defendant to show why the case at issue is analogous to cases where courts have awarded punitive damages. Given the relatively small number of punitive damage verdicts, this showing is not easy to make, and courts often decline to consider punitive damage claims in determining the amount in controversy. (See, e.g., *MIC Philberts Invs. v. Am. Cas. Co. of Reading, Pa.* (E.D. Cal. June 11, 2012) 2012 WL 2118239, at *7; *Reyes v. Staples Off. Superstore, LLC* (C.D. Cal. Sept. 3, 2019) 2019 WL 4187847, at *4.)

Attorneys' fees

After years of district courts being split on the issue, the Ninth Circuit recently held that future attorneys' fees can be included in the amount in controversy. (*Fritsch v. Swift Transportation Co. of Arizona, LLC* (9th Cir. 2018) 899

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F.3d 785, 794.) Previously, many district courts held that only fees incurred at the time of removal – which were typically modest – could be considered. (*Gonzales v. CarMax Auto Superstores, LLC* (9th Cir. 2016) 840 F.3d 644, 649.) Defendants' ability to include future fees has made attorneys' fees an increasing issue in removal actions.

Like punitive damages, defendants cannot simply point to a claim for attorneys' fees and contend that the amount in controversy is met. The bare assertion that "attorneys' fees could be significant" does not "constitute the sort of summary judgment like evidence the court can consider in resolving" the motion to remand. (*Neilsen v. State Farm Mutal Auto. Ins. Co.* (D. Nev. July 10, 2024) 2024 WL 3387377, at *2.) Defendants must "make a reasonably specific showing as to why the projected fee award is appropriate." (*Sley v. USAA Cas. Ins. Co.* (N.D. Cal. May 16, 2017) 2017 WL 2114773, at *3.) The calculation of attorneys' fees must be "'reasonable,' 'conservative,' and based upon 'evidence,'" including "a survey of relevant decisions from other courts." (*Id*. citing *Sasso v. Noble Utah Long Beach, LLC* (C.D. Cal. Mar. 3, 2015) 2015 WL 898468, at *5.)

The defendant's fee estimates must be tied to "specific factors present in the case." (See, e.g., *Elias v. Integon Preferred Ins. Co.* (C.D. Cal. May 28, 2024) 2024 WL 2732228, at *2.) In many cases, the motion opposing remand will include a declaration from defense counsel with an estimate of the amount of work that will be done in the case. Bare bones declarations are easy to poke holes in. At a minimum, the declaration should break out work by task and explain why the work is likely to be performed. The defendant must also introduce evidence demonstrating the reasonableness of the hourly rates it used to calculate fee awards. (*Gonzalez v. Gen. Ins. Co. of Am.* (E.D. Cal. Feb. 20, 2019) 2019 WL 698057, at *3.) This typically requires the defendant to cite to analogous cases where courts have awarded attorneys' fees. (*Sley*, 2017 WL 2114773, at *3.)

How attorneys' fees are calculated may also be worth calling out. As one example, attorneys' fees are recoverable in a bad-faith action, but the recoverable fees are limited to those incurred to recover policy benefits. (*Brandt v. Superior Court* (1985) 37 Cal.3d 813, 815.) Fees incurred in pursuit of extra-contractual damages (e.g., emotional distress damages) cannot be recovered. To recover attorneys' fees, plaintiffs bear the burden of establishing what work was performed to recover policy benefits, as opposed to work performed to recover extra-contractual benefits. The same rule applies at removal. The defendant cannot identify an undifferentiated amount of work that it expects to be performed. Instead, the defendant's estimates of attorneys' fees at issue in a bad-faith action must differentiate between work performed to recover policy benefits versus work performed to recover extra-contractual damages. (*Clark v. Chartis Glob. Serv., Inc.* (C.D. Cal. July 29, 2011) 2011 WL 13220406, at *5.)

Injunctive relief

In the Ninth Circuit, courts apply the "either viewpoint" rule to measure the value of injunctive relief. (*In re Ford Motor Co./Citibank* (*South Dakota*), *N.A.* (9th Cir. 2001) 264 F.3d 952, 958.) Under this rule, the value of injunctive relief can be determined from either the plaintiff's viewpoint (the benefit to be gained) or the defendant's viewpoint (the cost of compliance). (*Ibid*.) If either the value to the plaintiff or cost to the defendant exceeds the jurisdictional threshold, the amount in controversy may be satisfied.

In determining the value or cost of injunctive relief, courts focus on readily quantifiable economic impacts. For example, in cases seeking to enjoin an unfair business practice, courts may consider the cost of implementing new policies and procedures. (*Gonzalez v. CarMax Auto Superstores, LLC* (9th Cir. 2016) 840 F.3d 644, 648-49.) Whatever the facts may be, the defendant must establish the economic impact of an injunction with actual evidence. Unsupported assertions about anticipated expenses of complying with an injunction are insufficient. (*Doe v. Aetna, Inc.* (N.D. Cal. Apr. 4, 2018) 2018 WL 1614392, at *6.) Defendants must provide detail and explanation regarding the methodology and assumptions used to value injunctive relief.

Conclusion

A removal to federal court does not mean your case has to stay there. Defendants bear the burden of establishing removability by a preponderance of the evidence. Speculation and conclusory assertions are not enough. If the defendant fails to provide the required evidence, you have a good chance of having your case returned to state court.


Foster

Bill Foster is an associate at Pillsbury & Coleman LLP, *who represents clients in insurance coverage and bad faith actions.*

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