

July 2008

Contact

New York Office

200 Park Avenue, 52nd Floor
New York, New York 10166
(212) 309-1000
(212) 309-1100 fax

[Brian V. Otero](#)

(212) 309-1020
botero@hunton.com

[Stephen R. Blacklocks](#)

(212) 309-1052
sblacklocks@hunton.com

Tenth Circuit Holds Settlement Demands Can Establish Amount In Controversy

The Tenth Circuit has added its voice to the circuit courts that have held that a defendant may rely on settlement amounts discussed with the plaintiff to establish that the amount in controversy required for diversity jurisdiction is satisfied. *McPhail v. Deere & Co.*, 2008 WL 2514157, *8 (10th Cir. June 25, 2008).

The plaintiff filed suit in Oklahoma state court to recover for the death of her husband, who was killed when an allegedly defective tractor slipped into gear and ran over him. The plaintiff did not seek specific damages, instead demanding an amount "in excess of Ten Thousand Dollars." *Id.* at *8.

Defendant Deere removed the case and won summary judgment on all claims. On appeal, the Tenth Circuit reversed summary judgment, but affirmed the district court's denial of the plaintiff's motion to remand to state court. *Id.* at *1.

Addressing the remand issue, the Court noted that "determinations of sufficiency of the amount in controversy are governed by an odd set of rules." *Id.* at *4. The court observed that a defendant must establish the minimum \$75,000 amount in controversy by a preponderance of the evidence. However, because of the 30-day statutory

removal period, a defendant's task is complicated by the fact that "in most removal cases, there is little evidence one way or another." *Id.* at *5.

Quoting a Seventh Circuit decision that "clarified this jurisprudential mess," the Tenth Circuit held: "The preponderance of the evidence standard applies to jurisdictional facts, not jurisdiction itself... [W]hat the proponent of jurisdiction must prove is contested factual assertions... jurisdiction itself is a legal conclusion, a *consequence* of facts rather than a provable fact." *Id.* (quoting *Meridian Security Ins. Co. v. Sadowski*, 441 F.3d 536, 540-43 (7th Cir. 2006)) (emphasis in original). Once the defendant has met this burden, a remand is justified only if the plaintiff can establish to a "legal certainty" that recovery will not exceed \$75,000. *Id.* at *7.

In support of removal, Deere relied on letters and emails in which the parties discussed settlement. The plaintiff's counsel had stated in those letters that damages "may very well be" in excess of \$75,000. *Id.* That was enough for the court, which observed that the "nature of the damages sought" may have been enough, standing alone, to warrant removal, but the settlement discussions tipped the balance decisively in favor of the defendants;

“the correspondence between counsel that was incorporated in the notice of removal demonstrates that [the plaintiff’s] attorneys also believed the amount in controversy ‘very well may be’ in excess of \$75,000.” *Id.* at *9.

In considering the settlement discussions, the court was not troubled by Fed. R. Evid. 408, which prohibits litigants from introducing evidence of settlement offers to establish the

“liability for or invalidity of the claim or its amount.” Agreeing with a Ninth Circuit opinion allowing consideration of settlement offers, the court held that “[t]he amount in controversy is not proof of the amount the plaintiff will recover. Rather, it is an estimate of the amount that will be put at issue in the course of the litigation. To this end, documents that demonstrate plaintiff’s own estimation of its claim are a proper means of supporting the allegations in

the notice of removal, even though they cannot be used to support the ultimate amount of liability.” *Id.* at *8 (citing *Cohn v. Petsmart, Inc.*, 281 F.3d 837, 840 (9th Cir. 2002)).

The court’s approval of using settlement discussions to establish federal jurisdiction may undermine the willingness of plaintiffs to engage in early settlement discussions, if they are concerned about removal.

© 2008 Hunton & Williams LLP. Attorney advertising materials. These materials have been prepared for informational purposes only and are not legal advice. This information is not intended to create an attorney-client or similar relationship. Please do not send us confidential information. Past successes cannot be an assurance of future success. Whether you need legal services and which lawyer you select are important decisions that should not be based solely upon these materials.