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An Update from the Pharmaceutical  
and Medical Device Group at Coughlin Duffy LLP

# PRODUCTIVELY Thinking

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## RECENT THIRD CIRCUIT DECISIONS

### EASE DRUG AND DEVICE DEFENDANTS' REMOVAL BURDEN

Removal to federal court based on diversity jurisdiction is an important option for out-of-state defendants sued in New Jersey state courts. Diversity jurisdiction pursuant to 28 U.S.C. § 1332 has two familiar components: (i) diverse citizenship of the parties; and (ii) the matter in controversy exceeds the sum or value of \$75,000. As the party asserting federal jurisdiction, the removing defendant bears the burden of showing that these jurisdictional requirements have been met. Frederico v. Home Depot, 507 F.3d 188, 193 (3d Cir. 2007). Thus, if an out-of-state defendant can establish that the parties are diverse and that the plaintiff seeks damages in excess of \$75,000, that defendant may remove to federal court. But, what if the plaintiff specifically does not seek damages in excess of the \$75,000 jurisdictional amount? Or, what if the plaintiff does not specify the amount sought in the Complaint? Who carries the burden to prove that the damages may exceed \$75,000? And what is the applicable standard of proof?

On December 21, 2007, the United States District Court for the District of New Jersey, in a published opinion authored by the Hon. Dennis M. Cavanaugh, clarified these issues in Raspa v. Home Depot, 2007 U.S. Dist. LEXIS 9372, \_\_\_ F. Supp. 2d. \_\_\_ (D.N.J. 2007). In Raspa, plaintiff had been shopping at a Home Depot when he and a friend were attacked and bitten by a raccoon. In his state court Complaint, plaintiff sought compensatory damages, costs of suit, interest, attorneys fees, and punitive damages. Consistent with New Jersey state law pleading rules, however, plaintiff did not demand a specific amount of damages. Home Depot promptly removed plaintiff's Complaint to the United States District Court for the District of New Jersey, asserting that diversity existed between the parties and that it was "likely" that the amount in controversy exceeded the sum of \$75,000.

Plaintiff responded with a motion to remand, arguing that Home Depot failed to establish

to a "legal certainty" that the amount in controversy exceeded the jurisdictional threshold. The "legal certainty" principle stems from a 1938 United States Supreme Court decision in which the plaintiff, having initially filed in federal court, reduced its claim below the requisite jurisdictional amount in an effort to have the action remanded to state court. The Supreme Court held that when a case is brought in federal court, and no disputes over factual matters are involved, the claim will only be remanded if "it is apparent, to a 'legal certainty,' that the plaintiff cannot recover the amount claimed." St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283 (1938). Since that decision, courts in the Third Circuit have interpreted the "legal certainty" test to apply also to a removing defendant's burden to establish the requisite amount in controversy for diversity jurisdiction. See, e.g., Samuel Bassett v. Kia Motors America, Inc., 357 F.3d 392 (3d Cir. 2004); Dent v. Cingular Wireless, LLC, 2007 U.S. Dist. LEXIS 44612 (D.N.J. 2007); Brownstein v. Allstate Ins. Co., 2006 U.S. Dist. LEXIS 94577 (E.D. Pa. 2006).

Judge Cavanaugh rejected plaintiff's "legal certainty" argument, and instead followed the month-old opinion from the United States Third Circuit Court of Appeals in Frederico v. Home Depot, 507 F.3d 188 (3d Cir. 2007), that provided much-needed clarification on the applicable standard of proof for removal. Specifically, in those cases in which the plaintiff's Complaint expressly limits the claim below the jurisdictional amount, a defendant seeking to remove that case must show, to a legal certainty, that the amount in controversy can exceed the statutory threshold. In other words, if the plaintiff specifically demands a sum below the \$75,000 diversity threshold, the burden rests with the removing defendant to establish, to a legal certainty, that the plaintiff can recover the jurisdictional amount. Failure to do so will result in remand.

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Conversely, in those cases in which the plaintiff's Complaint does not demand a specific amount of damages, a removing defendant may satisfy its burden to establish the requisite amount in controversy by showing "it is more likely than not" that the plaintiff could recover in excess of that amount. Likewise, if a plaintiff seeks remand of the case to state court after such a removal, the case will be remanded only if it appears to a legal certainty that the plaintiff **cannot** recover the jurisdictional amount.

The latter of the two situations was at issue in Raspa. Because plaintiff's Complaint did not specify an exact sum of damages, Judge Cavanaugh considered plaintiffs' demand for compensatory damages, punitive damages and attorney's fees and concluded that "it [was] more likely than not" that damages would be "in excess" of the \$75,000 jurisdictional requirement. Having concluded that plaintiff could recover in excess of the jurisdictional amount, Judge Cavanaugh declined to remand the case to state court, even though Home Depot had not opposed plaintiff's motion.

## IMPACT ON NEW JERSEY DEFENDANTS

The analysis in Raspa and Frederico highlight a defendant's increased ability to both remove to federal court and defeat motions for remand. In the first instance, in those cases in which the plaintiff has not specified a specific amount of damages (which should include, under New Jersey pleading rules, all cases seeking unliquidated damages), a defendant seeking to remove on the basis of diversity jurisdiction need not establish the requisite amount in controversy to a "legal certainty," but instead must meet a much lower "more likely than not" standard. Especially in those cases in which a plaintiff seeks not only compensatory damages, but also punitive damages and attorneys' fees, the aggregation of such damages can easily meet this lower threshold.

Moreover, subsequent motions to remand to state court are now easier to combat. Assuming a defendant can meet the initial removal burden of establishing that a sufficient amount in controversy is "more likely than not," a plaintiff will only be able to force remand by showing to a "legal certainty" that the recoverable damages cannot exceed the jurisdictional minimum. When damages are unliquidated, and given the vagaries of jury awards, it is unlikely that

a plaintiff will be able to carry the burden necessary to obtain remand.

*Authored by H. Lockwood Miller, III, Esq.  
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## *Current Mass Torts in New Jersey*

|                                   |                                       |
|-----------------------------------|---------------------------------------|
| <i>Accutane</i>                   | <i>J. Higbee, Atlantic County</i>     |
| <i>Asbestos</i>                   | <i>J. McCormick, Middlesex County</i> |
| <i>Bextra/Celebrex</i>            | <i>J. Higbee, Atlantic County</i>     |
| <i>Ciba-Geigy</i>                 | <i>J. McCormick, Middlesex County</i> |
| <i>Depo-Provera</i>               | <i>J. Harris, Bergen County</i>       |
| <i>HRT</i>                        | <i>J. Happas, Middlesex County</i>    |
| <i>Mahwah Toxic Dump Site</i>     | <i>J. Harris, Bergen County</i>       |
| <i>Ortho Evra</i>                 | <i>J. Happas, Middlesex County</i>    |
| <i>Risperdal/Seroquel/Zyprexa</i> | <i>J. Happas, Middlesex County</i>    |
| <i>Vioxx</i>                      | <i>J. Higbee, Atlantic County</i>     |
| <i>Zometa/Aredia</i>              | <i>J. Higbee, Atlantic County</i>     |

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## The Coughlin Duffy Pharmaceutical and Medical Device Group

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