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Removal of Diversity Actions When the Amount in Controversy Cannot Be Determined from the Face of Plaintiff's Complaint: The Need for Judicial and Statutory Reform to Preserve Defendant's Equal Access to Federal Courts

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I. INTRODUCTION

The federal removal statute permits the removal from state court to federal court of actions over which the federal courts have original jurisdiction.[1] By giving this option to the defendant, the removal statute ensures that the defendant's access to a federal forum is approximately equal to the plaintiff's.[2] Yet the defendant may not get the benefit of this equal-access policy because the plaintiff's state court complaint often will not establish all of the elements required to invoke federal jurisdiction and, therefore, the federal courts have greater difficulty determining whether they have original jurisdiction. This problem arises with considerable frequency[3] in actions that might be removable

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1. 28 U.S.C. § 1441(a) (1994) provides:

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

2. The defendant's removal right is not fully equal to the plaintiff's right for three reasons. First, the removal statute itself recognizes that some types of removals are expressly prohibited by other statutes. *See, e.g*, 28 U.S.C. § 1445 (1994) (prohibiting removal of actions against a railroad and actions arising under a state's workmen's compensation laws). Secondly, the right to remove a diversity case is limited to *nonresident* defendants while all plaintiffs have the right to file a diversity action in federal court as long as they can satisfy the jurisdictional prerequisites. *See infra* notes 52-54 and accompanying text. Finally, while a plaintiff may seek appellate review when a diversity case is dismissed for lack of jurisdiction, this review is denied to defendants whose removal action is remanded to state courts on the same grounds. *See infra* notes 55-59 and accompanying text. For the reasons discussed in Part II(C) (1), however, these differences are immaterial with respect to the jurisdictional issues discussed in this Article.

3. Indeed, during 1996 alone, the Westlaw database contained more than seven dozen district court decisions addressing the jurisdictional issues described in this Article. At the appellate court level, at least fifteen decisions have addressed the issue since 1991. *See, e.g.*, Harmon v. OKI Sys., 115 F.3d 477 (7th Cir.), *petition for cert. filed*, 66 U.S.L.W. 3178 (U.S. Nov. 10, 1997); Singer v. State Farm Mut. Auto. Ins. Co., 116 F.3d 373 (9th Cir. 1997); Chase v. Shop 'N Save Warehouse Foods, Inc., 110 F.3d 427 (7th Cir. 1997); Gilman v. BHC Secs., Inc., 104 F.3d 1418 (2d Cir. 1997); Sanchez v. Monumental Life Ins. Co., 102 F.3d 399 (9th Cir. 1996); Tapscott v. M.S. Dealer Serv.

on the basis of diversity jurisdiction, which exists when the parties are citizens of different states and the amount in controversy exceeds $75,000.[4] If the plaintiff files the action directly in federal court, these elements generally appear on the face of the complaint because the plaintiff must affirmatively allege and prove that jurisdiction exists.[5] When the action is filed in state court, however, many states' pleading rules do not require the plaintiff to allege a specific dollar

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Corp., 77 F.3d 1353 (11th Cir. 1996); Allen v. R&H Oil & Gas Co., 63 F.3d 1326, 1336 (5th Cir. 1995); De Aguilar v. Boeing Co., 47 F.3d 1404, 1411 (5th Cir.), *cert. denied*, 116 S. Ct. 180 (1995); Burns v. Windsor Ins. Co., 31 F.3d 1092 (11th Cir. 1994); United Food & Commercial Workers Union, Local 919 v. Centermark Properties Meriden Square, Inc., 30 F.3d 298, 304-05 (2d Cir. 1994); Asociacion Nacional De Pescadores a Pequena Escala o Artesanales de Colombia [hereinafter ANPAC] v. Dow Quimica de Colombia, S.A., 988 F.2d 559, 562 (5th Cir. 1993), *cert. denied*, 510 U.S. 1041 (1994); Gafford v. General Elec. Co., 997 F.2d 150, 157 (6th Cir. 1993); Shaw v. Dow Brands, Inc., 994 F.2d 364, 366 n.2 (7th Cir. 1993); Gaus v. Miles Inc., 980 F.2d 564, 566 (9th Cir. 1992); Kliebert v. Upjohn Co., 915 F.2d 142, 147 (5th Cir. 1990), *vacated for reh'g en banc*, 923 F.2d 47 (5th Cir. 1991), *appeal dismissed per stipulation of settlement*, 947 F.2d 736 (5th Cir. 1991).

Several legal periodicals have published articles alerting practitioners to the problem. *See, e.g.*, Jack E. Karns, *Removal to Federal Courts and the Jurisdictional Amount in Controversy Pursuant to State Statutory Limitations on Pleading Damage Claims*, 29 CREIGHTON L. REV. 1091 (1996); Charles A. Carlson, *Removal to Federal Court on the Basis of Diversity Jurisdiction: The "Amount in Controversy" Controversy*, 69 FLA. B.J., Oct. 1995, at 77; Quentin F. Urquhart, Jr., *Amount in Controversy and Removal: Current Trends and Strategic Considerations*, 62 DEF. COUNS. J. 509 (1995); Lawrence W. Moore, S.J., *Fifth Circuit Symposium—Federal Jurisdiction and Procedure*, 41 LOY. L. REV. 469 (1995); *Law and Motion—Removal—Diversity Jurisdiction—Amount in Controversy*, FED. LITIGATOR, Jan. 1995, at 307; John R. Marley, *1993 Survey of Recent Developments in Indiana Law Civil Procedure—1993 Federal Practice and Procedure Update for Seventh Circuit Practitioners*, 27 IND. L. REV. 813 (1994); John B. White, Note, *Federal Removal—Jurisdictional Amount*, 15 U. MIAMI L. REV. 415 (1961). Most of these articles have merely reviewed recently reported decisions discussing the issue, however. Few commentators have attempted to analyze the genesis of the problem or suggest how courts might reconcile the conflicting case law.

4. 28 U.S.C. § 1332(a) (Supp. 1997) provides: "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—(1) citizens of different States . . . ." Prior to this year, the statute required the amount in controversy to exceed $50,000. The jurisdictional threshold was increased to $75,000 on January 17, 1997, as a result of the Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, 110 Stat. 3847.

5. *See* McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 189 (1936) ("party who seeks the exercise of jurisdiction in his favor" must allege and establish the facts essential to show jurisdiction).

amount of damages. In fact, a number of states prohibit such specificity, particularly in personal injury actions.[6] Moreover, in states that permit specificity, the plaintiff may not be limited to the amount pled in the complaint.[7] Thus, even if a plaintiff alleges an amount that is less than the federal jurisdictional threshold, the plaintiff could ultimately recover a sum greater than the federal minimum.

This mismatch between the federal diversity requirements and state pleading rules has created two types of problems for federal courts. First, great confusion exists among the federal courts as to the proper standard to apply when reviewing the jurisdictional amount in a diversity case removed from state court. This issue is discussed in Part II, which suggests that the best way to eliminate the confusion and to preserve equal access under the removal statute is to apply the same jurisdictional standard that historically has been applied in original jurisdiction diversity cases. The second type of problem, described in Part III, involves procedural questions such as the proper timing for removal of cases pled under state rules and the evidence that will be considered to determine whether jurisdiction exists. The Article concludes in Part IV that Congress should address these procedural issues, as well as the confusion over the jurisdictional standard, by enacting several amendments to the diversity and removal statutes.

II. THE DIFFICULTY OF DETERMINING JURISDICTION IN A REMOVAL CASE

When reviewing jurisdiction in a diversity case, whether filed under the court's original jurisdiction or removed from state court, most courts generally start their analyses by considering the Supreme Court's decision in *St. Paul Mercury Indemnity Co. v. Red Cab Co.*,[8] which enunciated the landmark "legal certainty" test for determining whether diversity requirements have been met. That decision, however, discussed only the easy questions presented by the two classic diversity cases: (1) original jurisdiction diversity actions (when the plaintiff files the action directly in federal court); and (2) removal cases when the plaintiff's state court complaint expressly demands a specific sum in damages that exceeds the federal amount in controversy requirement. Left unanswered are the hard questions presented by removal of diversity actions when the amount in controversy is not clearly expressed in the complaint.

In the absence of further guidance from the Supreme Court, the lower courts are sharply divided as to whether *St. Paul Mercury*'s legal certainty test

6. *See infra* notes 9-18 and accompanying text.
7. *See infra* notes 19-24 and accompanying text.
8. 303 U.S. 283 (1938).

applies to the hard cases, or whether some other standard should be applied. Section A explains how these hard cases arise in the first place. The various jurisdictional tests are described in Section B. Section C attempts to reconcile the conflicting authorities, suggesting that the courts adopt one uniform standard—the legal certainty test—for reviewing the amount in controversy requirement in all diversity cases.

A. The Incompatibility of State Pleading Rules and Federal Removal Requirements

Jurisdictional dilemmas arise in removal cases under two basic scenarios: (1) cases involving an indeterminate complaint—*i.e.*, when the plaintiff fails to demand a specific amount in damages; and (2) cases involving a "lowball" complaint—*i.e.*, when the complaint demands an amount below the federal jurisdictional threshold but the demand may be deceiving because the plaintiff is not limited to recovery of that amount. Both scenarios arise in large part because of a mismatch between state pleading or procedural rules and the federal jurisdictional requirements for removing a case from state court to federal court.

1. Problems Caused by the Indeterminate Complaint

Although the federal pleading rules require plaintiffs to allege damages in excess of the federal jurisdictional minimum,[9] this requirement generally has been omitted from pleading rules in many states because their courts, unlike federal courts, are courts of general jurisdiction.[10] Thus, these states do not require plaintiffs to request a specific sum in damages or even to allege that damages exceed a minimum sum.[11] As a result, it may be unclear from the face

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9. FED. R. CIV. P. 8(a) provides that "[a] pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it . . . ."

10. *See* OKLA. STAT. ANN. tit. 12, § 2008 (West 1993). The Committee Comment to this rule explains that § 2008, while patterned after the federal rule, deletes the requirement of a statement of the court's jurisdiction because "Oklahoma district courts are courts of general jurisdiction. . . . Thus, there is no need for pleading and proving jurisdiction."

11. Many states have patterned their general pleading requirements upon Rule 8(a) of the Federal Rules of Civil Procedure and, therefore, require the complaint to contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief the pleader seeks. *See, e.g.*, ALA. R. CIV. P. 8(a); FLA. R. CIV. P. 1.110(b); TENN. R. CIV. P. 8.01. As explained by the committee

of a plaintiff's complaint whether the amount in controversy exceeds the federal threshold of $75,000.

Similar difficulties arise in states with rules expressly prohibiting plaintiffs from requesting a specific monetary sum in their prayer for relief[12] or, in a slight variation of this rule, permitting the plaintiff to plead only that the amount in controversy exceeds a minimum amount.[13]

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comments to the Florida rule, this language means that "[a] complaint . . . need demand no specific amount of damages, although it may do so." FLA. R. CIV. P. 1.110(b) cmt. Other states, however, require the plaintiff to specify the exact amount of damages. *See, e.g.*, MINN. R. CIV. P. 8.01 (stating that a complaint "shall contain a short and plain statement of the claim showing that the pleader is entitled to relief and a demand for judgment for the relief sought; *if a recovery of money is demanded, the amount shall be stated*") (emphasis added).

12. *See, e.g.*, COLO. R. CIV. P. 8(a) (requiring pleadings to include "a demand for judgment for the relief to which the pleader claims to be entitled" but further providing that "[n]o dollar amount shall be stated in the prayer or demand for relief"); IND. R. TRIAL P. 8(a) (requiring pleadings to include "a demand for relief to which the pleader deems entitled. . . . However, in any complaint seeking damages for personal injury or death, or seeking punitive damages, no dollar amount or figure shall be included in the demand"); N.J. R. CIV. PRAC. 4:5-2 ("If unliquidated money damages are claimed in any court, other than the Special Civil Part, the pleading shall demand damages generally without specifying the amount."); S.C. R. CIV. P. 8(a) (providing that "[r]elief for a sum certain in money may be demanded for actual damages, but claims for punitive or exemplary damages shall be in general terms only and not for a stated sum, provided however, a party may plead that the total amount in controversy shall not exceed a stated sum which shall limit the claim for all purposes"); WIS. STAT. § 802.02(1m) (1996) (providing that "[w]ith respect to a tort claim seeking the recovery of money, the demand for judgment may not specify the amount of money the pleader seeks. . . . This subsection does not affect any right of a party to specify to the jury or the court the amount of money the party seeks").

13. *See, e.g.*, CONN. GEN. STAT. § 52-91 (1996) ("When money damages are sought in the demand for relief, the demand for relief shall set forth: (1) That the amount, legal interest or property in demand is fifteen thousand dollars or more, exclusive of interest and costs; or (2) that the amount, legal interest or property in demand is two thousand five hundred dollars or more but is less than fifteen thousand dollars, exclusive of interest and costs; or (3) that the amount, legal interest or property in demand is less than two thousand five hundred dollars, exclusive of interest and costs."); FLA. STAT. ANN. § 768.042 (West 1996) ("In any action brought in the circuit court to recover damages for personal injury or wrongful death, the amount of general damages shall not be stated in the complaint, but the amount of special damages, if any, may be specifically pleaded and the requisite jurisdictional amount established for filing in any court of competent jurisdiction."); GA. R. CIV. PRAC. CODE § 9-11-8(a) (requiring complaint to include "[a] demand for judgment for the relief to which the pleader deems himself entitled; provided, however, that in actions for medical malpractice . . . in which a claim for unliquidated damages is made for $10,000.00 or less, the pleadings shall contain a demand for

judgment in a sum certain; and, in actions for medical malpractice in which a claim for unliquidated damages is made for a sum exceeding $10,000.00, the demand for judgment shall state that the pleader 'demands judgment in excess of $10,000.00' and no further monetary amount shall be stated"); 735 ILL. COMP. STAT. 5/2-604 (West 1996) ("Every complaint and counterclaim shall contain specific prayers for the relief to which the pleader deems himself or herself entitled except that in actions for injury to the person, no ad damnum may be pleaded except to the minimum extent necessary to comply with the circuit rules of assignment where the claim is filed."); IOWA R. CIV. P. 69(a) ("Except in small claims and cases involving only liquidated damages, a pleading shall not state the specific amount of money damages sought but shall state whether the amount of damages is more or less than the jurisdictional amount."); KAN. R. CIV. P. § 60-208 ("Every pleading demanding relief for damages in money in excess of $50,000, without demanding any specific amount of money, shall set forth only that the amount sought as damages is in excess of $50,000, except in actions sounding in contract. Every pleading demanding relief for damages in money in an amount of $50,000 or less shall specify the amount of such damages to be recovered."); KY. R. CIV. P. 8.01(2) ("In any action for unliquidated damages the prayer for damages in any pleading shall not recite any sum as alleged damages other than an allegation that damages are in excess of any minimum dollar amount necessary to establish the jurisdiction of the court; provided, however, that all parties shall have the right to advise the trier of fact as to what amounts are fair and reasonable as shown by the evidence."); LA. CODE CIV. PROC. ANN. art. 893(A) (West Supp. 1996) ("No specific monetary amount of damages shall be included in the allegations or prayer for relief of any original, amended, or incidental demand. The prayer for relief shall be for such damages as are reasonable in the premises. If a specific amount of damages is necessary to establish the jurisdiction of the court, the right to a jury trial, the lack of jurisdiction of federal courts due to insufficiency of damages, or for other purposes, a general allegation that the claim exceeds or is less than the requisite amount is sufficient."); MICH. R. CIV. P. 2.111(B) ("If the pleader seeks an award of money, a specific amount must be stated if the claim is for a sum certain or a sum that can by computation be made certain, or if the amount sought is $10,000 or less. Otherwise, a specific amount may not be stated, and the pleading must include allegations that show that the claim is within the jurisdiction of the court."); MINN. R. CIV. P. 8.01 ("If a recovery of money for unliquidated damages is demanded in an amount less than $50,000, the amount shall be stated. If a recovery of money for unliquidated damages in an amount greater than $50,000 is demanded, the pleading shall state merely that recovery of reasonable damages in an amount greater than $50,000 is sought."); MO. SUP. CT. R. 55.05 ("If a recovery of money be demanded, the amount shall be stated, except that in actions for damages based upon an alleged tort, no dollar amount shall be included in the demand except to determine the proper jurisdictional authority, but the prayer shall be for such damages as are fair and reasonable. A party may argue at trial that a specific amount of damages should be awarded even though the prayer is for a fair and reasonable amount."); NEV. R. CIV. P. 8(a) ("Where a claimant seeks damages of more than $10,000, the demand shall be for damages 'in excess of $10,000' without further specification of amount."); N.Y. C.P.L.R. § 3017 (McKinney 1996) ("In an action for medical or dental malpractice or in an action against a municipal corporation . . . , the complaint, counterclaim, cross-claim, interpleader complaint, and

These rules were adopted as a means of protecting defendants from the publicity generated by multi-million dollar claims for damages.[14] But they have had the unintended effect of making it difficult for federal courts to determine whether

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third-party complaint shall contain a prayer for general relief but shall not state the amount of damages to which the pleader deems himself entitled. If the action is brought in the supreme court, the pleading shall also state whether or not the amount of damages sought exceeds the jurisdictional limits of all lower courts which would otherwise have jurisdiction."); N.C. R. CIV. P. 8(a) ("In all negligence actions, and in all claims for punitive damages in any civil action, wherein the matter in controversy exceeds the sum or value of ten thousand dollars ($10,000), the pleading shall not state the demand for monetary relief, but shall state that the relief demanded is for damages incurred or to be incurred in excess of ten thousand dollars ($10,000)."); OHIO R. CIV. P. 8(a) ("If the party seeks more than twenty-five thousand dollars, the party shall so state in the pleading but shall not specify in the demand for judgment the amount of recovery sought, unless the claim is based upon an instrument required to be attached pursuant to Civ. R. 10."); OKLA. STAT. ANN tit. 12, § 2008(A) (West 1993) ("Every pleading demanding relief for damages in money in excess of Ten Thousand Dollars ($10,000.00) shall, without demanding any specific amount of money, set forth only that the amount sought as damages is in excess of Ten Thousand Dollars ($10,000.00), except in actions sounding in contract. Every pleading demanding relief for damages in money in an amount of Ten Thousand Dollars ($10,000.00) or less shall specify the amount of such damages sought to be recovered."); R.I. R. CIV. P. 8(a) ("In an action for personal injury, injury to property, or wrongful death, the pleading shall not state the amount claimed, but only that the amount is sufficient to establish the jurisdiction of the court."); TEX. R. CIV. P. 47(b) ("An original pleading which sets forth a claim for relief, whether an original petition, counterclaim, cross-claim, or third party claim, shall contain (a) a short statement of the cause of action sufficient to give fair notice of the claim involved, (b) in all claims for unliquidated damages only the statement that the damages sought are within the jurisdictional limits of the court, and (c) a demand for judgment for all the other relief to which the party deems himself entitled.").

14. Illinois, for example, adopted a statutory ban on pleading specific damages in personal injury cases in 1976 because "many people are embarrassed by the high amount of the [*ad damnum*] clause and in many cases, the judgement [sic] no where [sic] reaches that figure." House Debates, 79th General Assembly (June 11, 1976) (statements of Rep. Washington regarding House Bill 3957), *microformed on* Debates, Fiche 177, 161st Legislative Day, at 18 (Illinois General Assembly, House); *see also* Senate Debates, 79th General Assembly (June 21, 1976) (statements of Sen. Glass explaining that House Bill 3957 "eliminates ad damnum provisions so that someone suing a doctor or hospital does not state the total amount of the claim and thereby eliminates some adverse publicity for doctors who are inadvertently sued for large amounts of money and, in fact, later settle for . . . much less or are found not guilty"), *microformed on* Debates, Fiche 124, 146th Legislative Day, at 137 (Illinois General Assembly, Senate); *cf.* S.C. R. Civ. P. 8(a) (notes accompanying the rule explain that the ban on pleading a specific sum in claims for punitive or exemplary damages was added "to eliminate prayers for exaggerated and sensational claims for damages").

they have jurisdiction over the state-pleaded complaint because the complaint either is silent as to the amount in controversy or is ambiguous as to whether the amount exceeds the federal minimum.[15]

This predicament intensified after Congress increased the federal jurisdictional amount to $50,000 in 1988[16] and to $75,000 in 1997.[17] Before then, the $10,000 federal threshold was either the same as or lower than the minimum required under many of these state pleading rules. For example, if the state's minimum was set at $15,000, a pleading that alleged damages in excess of that amount also would exceed the $10,000 federal minimum. Today, however, if a state-pleaded complaint seeks "in excess of $15,000," it is unclear whether the pleading also seeks damages in excess of the current $75,000 federal threshold or whether the alleged damages are somewhere between $15,000 and $75,000.

A few states have acknowledged this problem and have attempted to correct it in a variety of ways.[18] In the absence of a state resolution, however, the federal courts have been forced to adapt their jurisdictional inquiries to account for the pleading ambiguity.

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15. In Illinois, for example, the plaintiff is prohibited from pleading a specific amount of damages in a personal injury case but the complaint must indicate whether the amount exceeds the jurisdictional minimum for certain types of courts. *See supra* notes 13-14. Thus, to have a case heard in the law division courts of most counties, the complaint must allege damages in excess of $15,000; for Cook County, the jurisdictional minimum is $30,000. Both of these figures, however, are less than the federal jurisdictional minimum. Therefore, a state-pleaded complaint that alleges damages "in excess of $30,000" is ambiguous with respect to federal jurisdiction because it is unclear whether the amount in controversy falls somewhere between $30,000 and $75,000, or whether it also exceeds the federal $75,000 threshold.

16. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 311, 102 Stat. 4642, 4646 (1988).

17. Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, 110 Stat. 3847. *See also supra* note 4.

18. Arkansas, for example, provides in its pleading rules that "[i]n claims for unliquidated damage, a demand containing no specified amount of money shall limit recovery to an amount less than required for federal court jurisdiction in diversity of citizenship cases, unless language of the demand indicates that the recovery sought is in excess of such amount." ARK. R. CIV. P. 8(a). Louisiana, while generally prohibiting plaintiffs from pleading a specific amount of damages, has provided that "[i]f a specific amount of damages is necessary to establish . . . the lack of jurisdiction of federal courts due to insufficiency of damages . . . a general allegation that the claim . . . is less than the requisite amount is sufficient." LA. CODE CIV. PROC. art. 893(A). South Carolina similarly prohibits specific damage requests for punitive damages but provides that "a party may plead that the total amount in controversy shall not exceed a stated sum which shall limit the claim for all purposes." S.C.R. CIV. P. 8(a).

2. Problems Caused by the Lowball Complaint

The second category of difficult removal cases arises when the plaintiff pleads a specific amount of damages that falls below the federal jurisdictional amount. Although such complaints would appear on their face to be nonremovable, defendants have argued that if the plaintiff is not bound by that demand under the particular state's procedural rules, then the demand should not control the federal court's jurisdiction.[19] As a result, this scenario raises more difficult questions than those presented by the indeterminate complaint because it pits the defendant's right to remove against a plaintiff's right to avoid federal court.

The plaintiff's right to avoid removal was established in *St. Paul Mercury*, in which the Supreme Court stated that "[i]f [the plaintiff] does not desire to try his case in the federal court he may resort to the expedient of suing for less than the jurisdictional amount, and though he would be justly entitled to more, the defendant cannot remove."[20] Thus, the plaintiff is said to be the master of his or her complaint because the plaintiff can dictate the removability of the action through the allegations of the complaint.[21]

This principle makes sense if the plaintiff is bound by the amount of damages requested in the complaint—*i.e.*, if the plaintiff can recover no more than the amount specified in his or her pleading.[22] In that circumstance, there can be no question that the amount in controversy is established by the specific

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19. *See, e.g.*, Burns v. Windsor Ins. Co., 31 F.3d 1092, 1094-95 (11th Cir. 1994) (defendant argued that plaintiff's request for damages was "illusory" because state law "allows a fact finder to give a plaintiff any relief she is entitled to, even if she asked for less").

20. St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 294 (1938).

21. Burns v. Windsor Ins. Co., 31 F.3d 1092, 1095 (11th Cir. 1994); Gafford v. General Elec. Co., 997 F.2d 150, 157 (6th Cir. 1993). This principle initially was recognized in removal cases based upon federal question jurisdiction. In that situation, courts applied the "well-pleaded complaint rule," finding a case removable only if a federal question appears on the face of the plaintiff's complaint. As a result, the plaintiff is said to be the master of the claim. *See* Caterpillar, Inc. v. Williams, 482 U.S. 386, 392 (1987) (stating that the well-pleaded complaint rule "makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law"); *see also* Fair v. Kohler Die & Specialty Co., 228 U.S. 22, 25 (1913) ("Of course, the party who brings a suit is master to decide what law he will rely upon.").

22. *See, e.g.*, MISS. R. CIV. P. 54(c) ("[E]very final judgment shall grant the relief to which the party in whose favor it is rendered is entitled by the proof and which is within the jurisdiction of the court to grant, even if the party has not demanded such relief in his pleadings; *however, final judgment shall not be entered for a monetary amount greater than that demanded in the pleadings or amended pleadings.*") (emphasis added).

sum pled in the complaint. The plaintiff, in effect, is waiving any claim to a greater amount of damages. The defendant, therefore, has no right to have the case tried in federal court because his or her exposure is clearly limited to an amount that falls below the federal jurisdictional threshold.

The issue is controversial, however, in jurisdictions that do not limit the plaintiff to the amount of damages pled in the complaint. A majority of the states has adopted rules patterned after Rule 54(c) of the Federal Rules of Civil Procedure, which allows a fact finder to award the plaintiff any relief to which he or she is entitled, even if the plaintiff's complaint asked for less.[23] As a result, the specific amount of damages requested in the plaintiff's complaint is not necessarily a true indication of the amount in controversy. Although the plaintiff requests a specific sum that falls below the federal jurisdictional threshold, the plaintiff is not bound by that figure. Therefore, the defendant's exposure may in fact be much greater than the federal jurisdictional cut-off.[24] The federal court's dilemma, then, is to determine whose interests should prevail.

B. Confusion Over the Proper Standard—Legal Certainty or Preponderance of Evidence?

The federal courts are splintered in their response to the jurisdictional dilemmas posed by indeterminate and lowball complaints. To conduct their jurisdictional review, many courts have adopted standards based upon the "legal certainty" test enunciated in the *St. Paul Mercury* decision. Others, however, have crafted a "preponderance of evidence" standard based upon the Court's earlier decision in *McNutt v. General Motors Acceptance Corp.*[25] Beyond that, the courts within each of the camps disagree as to the requirements of their particular standard. The end result is a muddled array of tests that vary from jurisdiction to jurisdiction. The various tests are described briefly below,

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23. Rule 54(c) provides, in pertinent part: "Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings." FED. R. CIV. P. 54(c).

24. This assumes, however, that the defendant has appeared to contest the action. In the case of a default judgment, the plaintiff would be bound by the relief requested in the complaint. *See, e.g.*, FED. R. CIV. P. 54(c) ("A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment."). The theory underlying this limitation "is that once the defending party receives the original pleading he should be able to decide on the basis of the relief requested whether he wants to expend the time, effort, and money necessary to defend the action." 10 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE 139 (2d ed. 1993).

25. 298 U.S. 178 (1936).

beginning with those applied to indeterminate complaints and concluding with tests that have been applied to lowball complaints.

1. Standards Applied to the Indeterminate Complaint

A majority of the district courts have favored some form of the *St. Paul Mercury* legal certainty standard in removal cases involving indeterminate complaints. The appellate courts, on the other hand, have rejected the legal certainty test and adopted a preponderance test instead.

Under the *St. Paul Mercury* standard, courts have required the defendant, as the party seeking to invoke the jurisdiction of the federal courts, to prove that "it does not appear to a legal certainty" that the plaintiff's claim is for less than the jurisdictional amount.[26] Considerable disagreement exists, however, as to the requirements of this test. Some courts have attempted to untangle the legal certainty test by restating it in a simplified or affirmative manner.[27] Thus, some

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26. *See, e.g.*, Chouest v. American Airlines, Inc., 839 F. Supp. 412, 414 (E.D. La. 1993) ("The party invoking the federal court's jurisdiction must show to a legal certainty that each plaintiff's claim is not less than the jurisdictional amount."); Kennedy v. Commercial Carriers, Inc., 739 F. Supp. 406, 410 (N.D. Ill. 1990) ("If challenged, the party seeking to invoke the jurisdiction of the federal courts has the burden of proving that it does not appear to a legal certainty that the claim is for less than the jurisdictional amount."); Hale v. Billups, Inc., 610 F. Supp. 162, 164 (M.D. La. 1985) (same); Melkus v. Allstate Ins. Co., 503 F. Supp. 842, 845 (E.D. Mich. 1980) (to remand case, "the court must find that Plaintiff is incapable to a legal certainty of recovering the jurisdictional amount"); 14A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE 18-19 (2d ed. 1985) ("Once challenged, the party seeking to invoke the jurisdiction of the federal courts has the burden of proving its existence by showing that it does not appear to a legal certainty that its claim is for less than the jurisdictional amount."); 1 JAMES W. MOORE, MOORE'S FEDERAL PRACTICE 844-45 (2d ed. 1995) ("Courts require the plaintiff to show, by a preponderance of the evidence, that it is *not* clear to a legal certainty that she will not recover less than the jurisdictional requirement; stated affirmatively, the plaintiff generally is required to show that it is probable that she would recover at least the jurisdictional minimum.") (footnotes omitted).

27. One district court in Louisiana has gone to the opposite extreme, however, advising against any attempt to restate the test in affirmative language. In that court's view, the "awkward negative phrasing" is necessary to avoid putting the defendant in the position of having to prove the plaintiff's case. Atkins v. Harcros Chem., Inc., 761 F. Supp. 444, 446 n.5 (E.D. La. 1991). "The negative phrasing compensates for what would otherwise require a defendant to act against his own interest by forcing him to prove that damages are in excess of the jurisdictional amount." *Id.* The court stated that "if the defendants can show that the plaintiffs' claims are not less than the jurisdictional amount, they have also implicitly shown that the plaintiffs would, if successful, each recover at least the jurisdictional amount." *Id.* at 446. But the court declined to rephrase the test to reflect this interpretation.

opinions have suggested that the test is satisfied if a "possibility"[28] exists that the value of the matter in controversy exceeds the jurisdictional amount or, stated another way, that the plaintiff's damages "could" exceed the jurisdictional threshold.[29] Other courts have interpreted the test to mean just the opposite: rather than requiring the defendant to show that "it does *not* appear to a legal certainty that the claim is *for less than* the jurisdictional amount," these courts would require the defendant to prove "to a legal certainty that the plaintiff's claim *equals or exceeds* the requisite jurisdictional amount."[30] In the middle are courts that have interpreted the legal certainty test as requiring "a probability"[31]

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28. *See, e.g.*, De Aguilar v. Boeing Co., 47 F.3d 1404, 1411 (5th Cir.) (reviewing district court opinion which required the removing defendant to establish "some possibility" that the plaintiff could recover in excess of the federal minimum), *cert. denied*, 116 S. Ct. 180 (1995); Marcel v. Pool Co., 5 F.3d 81, 83 (5th Cir. 1993) (holding that the defendant satisfied the legal certainty test where "[t]he plaintiff has alleged that he was seriously injured and the jurisprudence as set forth above indicates there is the possibility he may be awarded significant damages, exclusive of the punitive damages he seeks"); Beckerman v. Sands, 364 F. Supp. 1197, 1200 (S.D.N.Y. 1973) (holding, in an original jurisdiction case, that dismissal is improper "if there is any possibility whatever that the [plaintiffs] could recover either compensatory or punitive damages" in excess of the federal jurisdictional minimum); *cf.* Ball v. Hershey Foods Corp., 842 F. Supp. 44, 47 (D. Conn.), *aff'd*, 14 F.3d 591 (2d Cir. 1993) (requiring removing defendant to show a "reasonable possibility" that the amount in controversy exceeds the jurisdictional minimum).

29. *See, e.g.*, Pakledinaz v. Consolidated Rail Corp., 737 F. Supp. 47, 48 (E.D. Mich. 1990); *cf.* Foret v. Southern Farm Bureau Life Ins. Co., 918 F.2d 534, 537 (5th Cir. 1990) (holding it was not error for the district court to exercise jurisdiction over a case where "the plaintiffs could have recovered more than $50,000").

30. Saunders v. Rider, 805 F. Supp. 17, 18 (E.D. La. 1992) (emphasis added); *cf.* Navarro v. LTV Steel Co., 750 F. Supp. 928, 929 (N.D. Ill. 1990) ("Jurisdiction cannot be based on probabilities (even of the highest degree) or on surmise or guesswork" and, therefore, an action is not removable until it becomes "certain that more than [$75,000] is in controversy."); Navarro v. LTV Steel Co., 750 F. Supp. 930, 931 (N.D. Ill. 1990) ("It remains preferable to make removal depend upon certainty."); Stemmons v. Toyota Tsusho Am., Inc., 802 F. Supp. 195, 198 (N.D. Ill. 1992) (same) (citing *Navarro*, 750 F. Supp. at 931); Maki v. Keller Indus., Inc., 761 F. Supp. 66, 68 (N.D. Ill. 1991) ("Just as in *Navarro*, even a high degree of probability that Maki's claim may exceed the federal jurisdictional amount does not suffice for this Court's retention of jurisdiction at this point."). This formulation uses the legal certainty language and, therefore, appears to have its foundation in the *St. Paul Mercury* test. To the contrary, however, it appears to turn the test on its head, with the undesirable effect of placing the defendant "in the unenviable position of having to prove the plaintiff's case." Garza v. Bettcher Indus., Inc., 752 F. Supp. 753, 756 (E.D. Mich. 1990).

31. *See, e.g.*, Kennard v. Harris Corp., 728 F. Supp. 453, 454-55 (E.D. Mich. 1989); Corwin Jeep Sales & Serv. v. American Motors Sales Corp., 670 F. Supp. 591, 595 (M.D. Pa. 1986).

or "a *reasonable* probability" that the amount in controversy exceeds the jurisdictional threshold.[32]

The appellate courts, however, have rejected the legal certainty test and have looked instead to a preponderance of evidence test based upon *McNutt*.[33]

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32. *See, e.g.*, Mutual First, Inc., v. O'Charleys, Inc., 721 F. Supp. 281, 283 (S.D. Ala. 1989) (emphasis added). These variations on the legal certainty standard differ from court to court—and sometimes from opinion to opinion by the same court. For example, one district court observed that the Seventh Circuit has explained the standard in a variety of ways:

> In *Jeffries v. Silvercup Bakeries, Inc.*, 434 F.2d 310, 312 (7th Cir. 1970), the court described it as "a probability that the value of the matter in controversy exceeds the jurisdictional amount." In *Ross v. Inter-Ocean Ins. Co.*, 693 F.2d 659, 663 (7th Cir. 1982), the court stated that the jurisdictional amount was satisfied "[i]f there is a reasonable possibility that the plaintiff can recover more than $[5]0,000 on his claim." And in *Sharp Electric Corp. v. Copy Plus, Inc.*, 939 F.2d 513, 515 (7th Cir. 1991), the court reversed dismissal of the complaint on the grounds that "'a verdict, if rendered for [the amount necessary to exceed $50,000] would be excessive and set aside for that reason.'"

Engle Corp. v. American College of Legal Med., No. 91 C 6486, 1992 WL 177084, at *2 (N.D. Ill. July 17, 1992) (quoting Bell v. Preferred Life Societies, 320 U.S. 238, 243 (1943)).

33. Singer v. State Farm Mut. Auto. Ins. Co., 116 F.3d 373, 377 (9th Cir. 1997); Gilman v. BHC Securities, Inc., 104 F.3d 1418, 1421 (2d Cir. 1997); Sanchez v. Monumental Life Ins. Co., 102 F.3d 398, 404 (9th Cir. 1996); Tapscott v. MS Dealer Serv. Corp., 77 F.3d 1353, 1357 (11th Cir. 1996); Allen v. R&H Oil & Gas Co., 63 F.3d 1326, 1336 (5th Cir. 1995); Gafford v. General Elec. Co., 997 F.2d 150, 158 (6th Cir. 1993); Shaw v. Dow Brands, Inc., 994 F.2d 364, 366 n.2 (7th Cir. 1993). In adopting the preponderance test, the Seventh Circuit explained its reasoning as follows:

> *St. Paul* holds that when a plaintiff asserts federal jurisdiction, the defendant may challenge the amount in controversy, but the plaintiff's contentions will stand unless it appears to a legal certainty that the claim is actually worth less than the jurisdictional amount. . . . This standard should not be confused, however, with what a defendant must prove to invoke jurisdiction in a removal action . . . . We think the Supreme Court dictated the proper standard in *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 56 S. Ct. 780: "If his allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof. And where they are not so challenged, the court may still insist that the jurisdictional facts be established or the case be dismissed, and for that purpose, the court may demand that the party alleging jurisdiction justify his allegations by a preponderance of the evidence."

Shaw, 994 F.2d at 366 n.2. Based upon this broad language, it is unclear whether the court's analysis applies to all types of removal cases or whether it applies only to the hard cases presented by the indeterminate or lowball complaints. The facts of the case show

They, too, have varied in their descriptions of what the test requires. The Fifth, Sixth, Ninth, and Eleventh Circuits have construed the preponderance test as requiring a removing defendant to show that the plaintiff's total damages "more likely than not" exceed the jurisdictional amount.[34] The Second and Seventh Circuits, on the other hand, have explained the test as requiring proof "to a 'reasonable probability'" that the claim is in excess of the jurisdictional amount.[35]

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that the court was dealing with an indeterminate complaint. Therefore, although the opinion could be read to suggest that the *McNutt* standard applies in *any* removal action, it is possible that the court intended to adopt the *McNutt* test only with respect to cases involving indeterminate or lowball complaints.

34. *Sanchez*, 102 F.2d at 404 (stating that under preponderance burden, "the defendant must provide evidence establishing that it is 'more likely than not' that the amount in controversy exceeds" the jurisdictional minimum); *Tapscott*, 77 F.3d at 1357 ("[W]here a plaintiff has made an unspecified demand for damages in state court, a removing defendant must prove by a preponderance of the evidence that the amount in controversy more likely than not exceeds the [$75,000] jurisdictional requirement."); *Allen*, 63 F.3d at 1336 (using preponderance standard, the court considered whether it was "more likely than not" that plaintiff's damages exceed the jurisdictional amount); *Gafford*, 997 F.2d at 158 ("We conclude that the 'preponderance of the evidence' ('more likely than not') test is the best alternative.").

35. Chase v. Shop 'N Save Warehouse Foods, Inc., 110 F.3d 424, 427 (7th Cir. 1997); *Gilman*, 104 F.3d at 1421; *Shaw*, 994 F.2d at 366; *cf.* Gilmer v. Walt Disney Co., 915 F. Supp. 1001, 1007 (W.D. Ark. 1996) (adopting preponderance standard and stating that "[d]efendants may meet their burden 'by sufficient proof that a plaintiff's verdict *reasonably* may exceed [the jurisdictional] amount'") (emphasis added); Krider Pharmacy & Gifts, Inc., v. Medi-Care Data Sys., Inc., 791 F. Supp. 221, 225 (E.D. Wis. 1992) (finding that remand required because defendant "has failed to demonstrate upon this record the existence of a reasonable possibility that [the plaintiff] could recover cumulatively more than the $50,000 jurisdictional minimum on its claims").

Interestingly, although the *Gilman* decision suggested that its standard is based upon *McNutt*, earlier Second Circuit cases suggest that its "reasonable probability" inquiry evolved from the legal certainty test. The circuit's "reasonable probability" standard was first enunciated for removal cases in *United Food and Commercial Workers Union, Local 919 v. Centermark Properties Meriden Square, Inc.*, 30 F.3d 298, 304-05 (2d Cir. 1994). But the *UFCW* standard was adopted verbatim from *Tongkook America, Inc. v. Shipton Sportswear Co.*, 14 F.3d 781, 784 (2d Cir. 1994), which was a case involving an original jurisdiction scenario—*i.e.*, where the plaintiff has filed the complaint directly in federal court. *Tongkook*, in turn, cites to *Moore v. Betit*, 511 F.2d 1004, 1006 (2d Cir. 1975), which explained the "reasonable probability" standard as follows:

> Federal courts have consistently held that absolute certainty in valuation of the right involved is not required to meet the amount in controversy requirement but rather the requirement is that there be a reasonable probability of an amount in controversy exceeding [the] jurisdictional amount if an amount can be ascertained pursuant to some realistic formula. . . .

The difference between these formulations of the test may be purely semantic because a "probability," by definition, is "[a] condition or state created when there is more evidence in favor of the existence of a given proposition than there is against it."[36] Thus, a reasonable probability would appear to be the equivalent of a "more likely than not" test. Because the courts have employed differing terminology, however, it is unclear whether the standards are in fact the same or different.

2. Standards Applied to the Lowball Complaint

As suggested above,[37] there is some question as to whether cases involving a lowball complaint can be removed at all. Because the plaintiff has demanded a specific amount that falls below the federal jurisdictional minimum, such actions would appear to be nonremovable under the language in *St. Paul Mercury* suggesting that a plaintiff can avoid removal simply by suing for an amount less than the federal minimum.[38] But the two appellate courts that have addressed the issue have declined to interpret *St. Paul Mercury* that broadly,[39] holding instead that a case is removable so long as the defendant can establish that the amount in controversy in fact exceeds the federal jurisdictional threshold.[40] They disagree, however, on the appropriate test to be applied in such a case.

Conversely, courts should dismiss only when it is clear to a legal certainty that jurisdictional amounts cannot be met.

Id.

36. BLACK'S LAW DICTIONARY 1201 (6th ed. 1990).

37. *See supra* notes 19-24 and accompanying text.

38. St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 294 (1938).

39. Burns v. Windsor Ins. Co., 31 F.3d 1092, 1096 n.6 (11th Cir. 1994) (recognizing that a broad reading of *St. Paul Mercury* might suggest "that when plaintiff seeks less than the jurisdictional amount, the case cannot be removed as a matter of law—defendant gets no chance to prove jurisdiction"); *see also* De Aguilar v. Boeing Co., 47 F.3d 1404 (5th Cir. 1995).

The courts emphasized that a careful reading of *St. Paul Mercury* shows that the Court's decision "plainly was premised on the notion that the plaintiff would not be able to recover more in state court than what was alleged in the state court complaint." *De Aguilar*, 47 F.3d at 1410. *See also Burns*, 31 F.3d at 1096 n.6 which states that the court does not follow the seemingly absolute standard of *St. Paul Mercury* and *Iowa City Railway v. Bacon*, 236 U.S. 305 (1915), "because these cases were decided when different rules about pleading damages (in general, much more strict) and about jurisdiction were in effect. We think we are not bound by these old cases, although they are decisions of the Supreme Court."

40. *De Aguilar*, 47 F.3d at 1411; *Burns*, 31 F.3d at 1095-96.

Several early district court decisions applied a version of the legal certainty test, holding that removal was proper if there was "some possibility" that the plaintiff could recover in excess of the federal minimum.[41] But the Fifth Circuit and the Eleventh Circuit have rejected this standard as being too lenient.[42] The Eleventh Circuit has imposed a heavy burden upon the defendant, holding that a defendant may remove the case only upon proving that the plaintiff has either falsely or incompetently assessed the value of the case—*i.e.*, "defendant must prove to a legal certainty that plaintiff's claim must exceed [the jurisdictional amount]."[43] Although this application of the legal certainty standard is stringent, the court stressed that it "does not mean that a removing defendant can never prevail. A defendant could remain in federal court if he showed that, if the plaintiff prevails on liability, an award below the jurisdictional amount would be outside the range of permissible awards because the case is clearly worth more than [$75,000]."[44]

The Fifth Circuit, on the other hand, adopted a standard more favorable to defendants, holding that "the plaintiff's claim remains presumptively correct unless the defendant can show by a preponderance of the evidence that the amount in controversy is greater than the jurisdictional amount."[45] The court explained that "[t]he preponderance burden forces the defendant to do more than point to a state law that *might* allow the plaintiff to recover more than what is pled. The defendant must produce evidence that establishes that the actual

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41. In *De Aguilar*, for example, "the district court held that the removing defendant had to establish that there is 'some possibility' that the plaintiff could recover over $50,000." *De Aguillar*, 47 F.3d at 1411.

42. *Id.* at 1411 (stating that the "some possibility" standard applied by the district court was "too permissive"); *Burns*, 31 F.3d at 1096 (agreeing with the Fifth Circuit's prior decision in *Kliebert v. Upjohn Co.*, 915 F.2d 142, 147 (5th Cir. 1990), *vacated for reh'g en banc*, 923 F.2d 47 (5th Cir.), *appeal dismissed per stipulation of settlement*, 947 F.2d 736 (5th Cir. 1991), which held that "anything less than requiring defendant to prove that, should plaintiff prevail, she should be entitled to at least the jurisdictional amount was too permissive").

43. *Burns*, 31 F.3d at 1095.

44. *Id.* at 1096.

45. *De Aguilar*, 47 F.3d at 1412. In reaching this decision, the Fifth Circuit deviated from the position the court took five years earlier in *Kliebert v. Upjohn Co.*, 915 F.2d 142, 147 (5th Cir. 1990), *vacated for reh'g en banc*, 923 F.2d 47 (5th Cir.), *appeal dismissed per stipulation of settlement*, 947 F.2d 736 (5th Cir. 1991). *Kliebert*, like *Burns*, would have required the defendant to prove that it was "legally certain" that the plaintiffs would recover more than the jurisdictional amount. *Kliebert*, 915 F.2d at 146. The decision has no precedential value, however, because it was vacated for an en banc hearing that subsequently became unnecessary when the parties settled the case. The Fifth Circuit, therefore, was free to consider the issue as one of first impression when it decided *De Aguilar*.

amount in controversy exceeds [$75,000]."[46] Once the defendant meets this burden, "removal is proper, provided that the plaintiff has not shown that it is legally certain that his recovery will not exceed the amount stated in the state complaint."[47]

C. *Identifying the Proper Standard of Judicial Review*

The federal courts can resolve a great deal of the confusion surrounding removal cases simply by agreeing upon one standard to apply when conducting their jurisdictional inquiry into the amount in controversy. Analysis of the historical underpinnings of the *St. Paul Mercury* and *McNutt* cases shows that *St. Paul Mercury*'s legal certainty test is the most appropriate test to use.

1. Historical Origins of the Jurisdictional Standards

Diversity jurisdiction—and the corresponding right to remove a case from state court to federal court if the requirements for original diversity jurisdiction are satisfied—have coexisted under the federal Judiciary Act since its inception in 1789.[48] The precise rationale for extending this right to litigants is not entirely

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46. *De Aguilar*, 47 F.3d at 1412 (emphasis added).

47. Curiously, the court stated that this is "not a burden-shifting exercise." Rather, the court stated that:

> [O]nce the defendant has pointed to an adequate jurisdictional amount, the situation becomes analogous to the "typical" circumstances in which the *St. Paul Mercury* "legal certainty" test is applicable: The defendant has established, by a preponderance, that federal jurisdiction is warranted. At this point, "[i]t must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal."

Id.

48. Plaintiffs were granted diversity jurisdiction under section 11 of the First Judiciary Act, which provided, in pertinent part:

> That the circuit courts shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs or petitioners; or an alien is a party, or the suit is between a citizen of the State where the suit is brought, and a citizen of another State . . . .

Act of September 24, 1789, § 11, 1 Stat. 78-79.

Removals were governed by § 12, which provided:

> And be it further enacted, That if a suit be commenced in any state court against an alien, or by a citizen of the state in which the suit is brought against a citizen of another state, and the matter in dispute exceeds the aforesaid sum or value of five hundred dollars, exclusive of costs, to be made to appear to

clear, but the traditional explanation is that Congress feared that state courts would be prejudiced against litigants from other states.[49]

Whatever the motivating force behind the diversity and removal statutes, however, it would appear that the policy applies with equal force to both plaintiffs and defendants. Indeed, the legislation on its face gives plaintiffs and defendants equal access to a federal forum when all of the prerequisites for

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> the satisfaction of the court; and the defendant shall, at the time of entering his appearance in such state court, file a petition for the removal of the cause for trial into the next circuit court, to be held in the district where the suit is pending, . . . and offer good and sufficient surety for his entering in such court, on the first day of its session, copies of said process against him, and also for his there appearing and entering special bail in the cause, if special bail was originally requisite therein, it shall then be the duty of the state court to accept the surety, and proceed no further in the cause, and any bail that may have been originally taken shall be discharged, and the said copies being entered as aforesaid, in such court of the United States, the cause shall there proceed in the same manner as if it had been brought there by original process . . . .

Id. § 12.

49. *See* 13B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE 337-43, 355-63 (2d ed. 1984). As this treatise points out, "[n]either the debates of the Constitutional Convention nor the records of the First Congress shed any substantial light on why diversity jurisdiction was granted to the federal courts by the Constitution or why the First Congress exercised its option to vest that jurisdiction in the federal courts." 13B *id.* at 337. The "traditional, and most often cited, explanation" is "the fear that state courts would be prejudiced against out-of-state litigants." 13B *id.* at 338. Other historians have theorized that the real fear was of state legislatures rather than state courts—*i.e.*, the fear that state legislation would disallow judicially established claims or set aside jury verdicts. 13B *id.* at 339. These theories have been the subject of much debate, with one camp alleging there was no evidence of state prejudice in the period prior to the drafting of the Constitution and the other camp alleging "there were charges during the state constitutional conventions of reprisals by the judiciaries of one state against citizens of another." 13B *id.* at 340-41.

Other theories postulated for the creation of diversity jurisdiction include: (1) "that diversity jurisdiction is necessary in order to implement the constitutional guarantee that 'the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States;'" (2) "that the federal courts qualitatively are so superior to the state courts that it is desirable to channel as many cases as possible to the federal courts, or at least that out-of-state litigants who have no opportunity to work for the improvement of the state courts, should be spared exposure to them;" (3) "that the existence of concurrent state and federal jurisdiction creates a competition between the two that acts as a spur to higher standards of justice in each court system;" and (4) "the fear on the part of investors that local prejudice may exist." 13B *id.* at 358-63. Each of these theories has its own weaknesses, as described more fully in the treatise. 13B *id.*

diversity jurisdiction are present.[50] As one commentator observed, "Removal is simply a mode by which the right to resort under certain circumstances to the Federal courts rather than to the State courts is secured to the defendants as well as the plaintiffs, or, as has been said, an indirect mode of exercising original jurisdiction."[51]

These rights are not entirely equal, of course, because the removal statute provides that only *non-resident* defendants may remove a case to federal court on diversity grounds,[52] while the diversity statute currently makes the right available to all plaintiffs.[53] This limitation, however, merely restricts the number of defendants who may exercise removal rights; it does not alter the two basic prerequisites for jurisdiction: diversity of citizenship between the parties and an amount in dispute that exceeds the federal jurisdictional amount. Indeed, these two key elements have been required of both original jurisdiction diversity cases and diversity removal cases from the first Judiciary Act to the present.[54]

Removal actions also differ from original jurisdiction actions with respect to appellate review. When a district court dismisses a plaintiff's original jurisdiction diversity action, the dismissal is appealable as a final order of the

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50. Original jurisdiction cases fall under 28 U.S.C. § 1332(a), which provides that "district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, . . . and is between . . . citizens of different States." Removal cases fall under 28 U.S.C. § 1441(a), which provides that a defendant may remove "any civil action brought in a State court of which the district courts have original jurisdiction."

51. JAMES HAMILTON LEWIS, REMOVAL OF CAUSES 104 (1923).

52. 28 U.S.C. § 1441(b) (1994) (stating that removal of a case based upon federal question jurisdiction is removable without regard to the citizenship or residence of the parties but that "[a]ny 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").

53. There have been efforts to limit plaintiffs' access to diversity jurisdiction as well. *See* JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 38-42 (1990) (suggesting that Congress virtually eliminate diversity jurisdiction but suggesting, as a modest backup proposal, that Congress take certain steps to limit diversity jurisdiction such as prohibiting plaintiffs from invoking diversity jurisdiction in their home states).

54. The First Judiciary Act listed this requirement in section 11's grant of diversity jurisdiction and repeated it in the removal provisions in section 12. The current statute, on the other hand, expressly states the requirement only in 28 U.S.C. § 1332's provisions granting district courts original jurisdiction over diversity cases. The removal statute implicitly incorporates the identical requirement in 28 U.S.C. § 1441(a) by giving defendants the right to remove "any civil action brought in a State court of which the [federal] courts . . . have original jurisdiction . . . ."

district court pursuant to 28 U.S.C. § 1291.[55] Defendants initially had a reciprocal right to appeal in removal cases,[56] but Congress repealed the provision authorizing appellate review of remand orders in 1887[57] and, in its place, enacted a provision expressly prohibiting appellate review.[58] Because there is no legislative history to explain the amendments, it is not entirely clear why Congress eliminated the right to appeal a remand order. But none of the potential explanations[59] for the change suggests that Congress intended to

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55. Section 1291 provides that federal appellate courts "shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . , except where direct review may be had in the Supreme Court." 28 U.S.C. § 1291 (1994).

56. The First Judiciary Act of 1789 did not mention appellate review of remand orders but the courts assumed that defendants had such a right. This right was made explicit in 1875 with amendments to the Act which expressly provided that remand orders "*shall* be reviewable by the Supreme Court on writ of error or an appeal . . . ." Act of March 3, 1875, ch. 137, § 5, 18 Stat. 470, 472 (emphasis added).

57. Act of March 3, 1887, ch. 373, § 6, 24 Stat. 552, 555.

58. Section 2 of the Act stated:

> Whenever any cause shall be removed from any State court into any circuit court of the United States, and the circuit court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the circuit court so remanding shall be allowed.

Act of March 3, 1887, § 2, 24 Stat. 552, 553. *See* 28 U.S.C. § 1447(d) (1994).

59. By examining the historical circumstances of the era surrounding this amendment, one scholar has suggested several potential explanations for the change. Rhonda Wasserman, *Rethinking Review of Remands: Proposed Amendments to the Federal Removal Statute*, 43 EMORY L.J. 83, 101-02 (1994). One explanation is that Congress was concerned about a burgeoning docket before the Supreme Court and intended to alleviate the overload by foreclosing at least one type of appeal. *Id.* at 95-96, 101. A second is that Congress was outraged by corporate abuse of diversity and removal jurisdiction and wanted to curtail the strategic advantage that a corporation gained through its "ability . . . to exhaust a plaintiff's resources or stamina by appealing a remand order to the Supreme Court in distant Washington, D.C." *Id.* at 94-97, 101. This latter theory is in line with the Supreme Court's conclusion that Congress, in banning appeal of remand orders, "established the policy of not permitting interruption of the litigation of the merits of a removed cause by prolonged litigation of questions of jurisdiction of the district court to which the cause is removed." United States v. Rice, 327 U.S. 742, 751 (1946).

A third possibility was that Congress had intended to bar appellate review only in cases that were removed on grounds of local prejudice. Wasserman, *supra*, at 101-02. This theory is based upon the fact that the ban on appellate review was tacked onto a paragraph providing for remand of these types of cases. *Id.* at 101. "It may be that it was these remand orders—which, even if erroneous, would not have caused much harm—that Congress had in mind when it barred review of remand orders." *Id.* at 102. The Supreme

impose a more stringent removal standard on defendants. Indeed, the 1887 Act did not alter the amount in controversy or diversity requirement in any way. Rather, the Act merely provided that once the district court decided whether or not the defendant had met those requirements, that decision was not subject to appeal. In short, although the defendant's right to remove is not perfectly symmetrical with the plaintiff's right to file a diversity action in federal court, both parties are subject to the identical requirements for getting in the door of the federal courthouse in the first place.

Judicial scrutiny of these requirements has evolved over time. The courts initially took a hands-off approach. Thus, when a plaintiff filed a diversity case in federal court, the court did not inquire into the factual basis of the plaintiff's jurisdictional allegations on its own motion, but rather, responded only to jurisdictional challenges raised in a motion to dismiss or a plea of abatement.[60] As long as the complaint properly alleged that the parties were of diverse citizenship and the amount in controversy exceeded the federal minimum, the defendant was required to challenge the sufficiency of those facts through the appropriate motion; failure to do so would constitute a waiver of the issue if the defendant pled to the merits instead.[61]

When the defendant did properly raise a jurisdictional challenge, the courts generally looked to the plaintiff's demand to determine whether a sufficient amount was in controversy.[62] That demand was subject to scrutiny, however, to determine only whether the law permitted a recovery of that amount, as explained by Chief Justice Ellsworth in *Wilson v. Daniel*:

> It was not intended to say, that on every such question of jurisdiction, the demand of the Plaintiff is alone to be regarded; but that the value of the thing put in demand furnished the rule. Thus, in an action of debt on a bond for 100£, the principal and interest are put in demand, and the Plaintiff can

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Court rejected this explanation, however, stating that even though the prohibition on appeals was included in the same paragraph as the remand authorizations for local prejudice cases, the language of the prohibition unambiguously banned appeals in *any* cause removed from a state court. Morey v. Lockhart, 123 U.S. 56, 58 (1887).

60. St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 287 n.10 (1936).

61. McNutt v. General Motors Corp., 298 U.S. 178, 183 (1936) (citing D'Wolf v. Rabaud, 26 U.S. 476, 498 (1828)); *compare* Capron v. Van Noorden, 6 U.S. 126, 127 (1804) (where the complaint fails to plead the necessary jurisdictional allegations, the court lacks jurisdiction and the issue is not waived by the litigants' failure to raise the issue because it is "the duty of the Court to see that they had jurisdiction, for the consent of the parties could not give it").

62. Wilson v. Daniel, 3 U.S. 401, 405 (1798) (in rejecting the argument that the amount in controversy is to be determined by the amount of the jury verdict, the Court, per Chief Justice Ellsworth, stated that the matter in dispute is determined by "the thing demanded . . . and not the thing found").

> recover no more, though he may lay his damages at 10,000£. The form of the The nature of the case must certainly guide the judgment of the Court; and whenever the law makes a rule, that rule must be pursued. action, therefore, gives in that case the legal rule. But in an action of trespass, or assault and battery, where the law prescribes no limitation as to the amount to be recovered, and the Plaintiff has a right to estimate his damages at any sum, the damage stated in the declaration is the thing put in demand, and presents the only criterion, to which, from the nature of the action, we can resort in settling the question of jurisdiction.
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> The proposition then is simply this: Where the law gives no rule, the demand of the Plaintiff must furnish one; but where the law gives the rule, the legal cause of action, and not the Plaintiff's demand, must be regarded.[63]

In short, the federal courts evaluated the plaintiff's demand only to determine whether the plaintiff's particular legal theory or cause of action would permit a recovery in the amount of damages claimed in the complaint. In conducting this review, the courts distinguished between two types of cases: (1) those in which the recoverable damages were fixed, such as in an action arising out of a contract; and (2) suits for unascertained damages, such as in actions based on tort.[64] In the former case, the courts would review the allegations set forth in the body of the complaint—and not just the demand or prayer for relief—to determine whether the amount in controversy requirement was satisfied.[65] Thus, "[i]f the action were *ex contractu* on a money demand and for a fixed sum, and the principal, interest and damages together did not exceed $500, then it would not be removable, although the prayer for judgment might be for an amount greater than $500."[66]

In tort actions, however, the courts deferred to the plaintiff's demand as "presumptively the amount in dispute"[67] because "[i]n suits prosecuted to recover

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63. *Id.* at 407-08.

64. *See, e.g.*, Culver v. Crawford County, 6 F. Cas. 948, 949 (W.D. Ark. 1877); Louisville & Nashville R.R. v. Roehling, 11 Ill. App. 264, 266 (4th Dist. 1882).

65. Lee v. Watson, 68 U.S. 337, 339 (1863) ("In an action upon a money demand, where the general issue is pleaded, the matter in dispute is the debt claimed, and its amount, as stated in the body of the declaration, and not merely the damages alleged, or the prayer for judgment at its conclusion, must be considered in determining the question whether this court can take jurisdiction on a writ of error sued out by the plaintiff.").

66. *Louisville & Nashville R.R.*, 11 Ill. App. at 266; *see also Culver*, 6 F. Cas. at 949 ("In an action on a money demand, the matter in dispute is the debt claimed; and its amount as stated in the body of the complaint, and not merely the damages alleged in the prayer for judgment at its conclusion, must be considered in determining the question whether the court can take jurisdiction.").

67. People v. The Judges of the New York Common Pleas, 2 Denio 197, 198 (N.Y. Sup. Ct. 1846); *see also Culver*, 6 F. Cas. at 949 ("[I]n a suit for unascertained damages, the only test of the amount in dispute is found in the prayer for relief."); *Louisville &*

damages for a tort, there can be no rule to determine the amount in controversy, unless it be to take the sum claimed by the plaintiff as damages."[68] For example, as one court explained, even if the plaintiff's claim is for injury to property of a fixed and ascertained value, the plaintiff is not limited to such compensatory damages in a tort action; the plaintiff also may be entitled to recover punitive damages, which would not be fixed or ascertained.[69] The courts, therefore, relied exclusively upon the plaintiff's demand to determine the amount in controversy; there was no further scrutiny of the reasonableness of that demand.

The courts' level of inquiry was raised slightly, however, following amendments to the Judiciary Act in 1875.[70] The Act imposed a new affirmative duty upon the courts to police their own jurisdiction, requiring the circuit courts[71] to dismiss any case in which

> it shall appear to the satisfaction of the said circuit court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act . . . .[72]

The Supreme Court recognized, therefore, that under the 1875 Act, "the trial court is not bound by the pleadings of the parties, but may, of its own motion, if led to believe that its jurisdiction is not properly invoked, inquire into the facts as they really exist."[73]

The Court emphasized, however, that in making this inquiry, the trial court "exercises a legal and not a personal discretion . . . ."[74] The court stated that a judge could not dismiss a case merely because, during the trial or hearing of the action, the judge received "impressions amounting to a moral certainty that it does not really and substantially involve a dispute or controversy within the

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Nashville R.R., 11 Ill. App. at 266 ("[I]n an action sounding in tort, . . . the damages as laid by the plaintiff in his declaration, is the test of the value or amount of the matter in dispute.").

68. *Louisville & Nashville R.R.*, 11 Ill. App. at 266.

69. *Id.*

70. The Act of March 3, 1875, ch. 137, § 5, 18 Stat. 470, 472.

71. Under section 1 of the Act, the circuit courts had original jurisdiction, concurrent with state courts, over diversity cases. *Id.* § 1.

72. *Id.*

73. Wetmore v. Rymer, 169 U.S. 115, 120 (1898).

74. Barry v. Edmunds, 116 U.S. 550, 559 (1886).

jurisdiction of the court."[75] Such personal convictions, no matter how strongly felt, are insufficient for the court to dismiss the case; dismissal is warranted only when "the facts on which the persuasion is based, when made distinctly to appear on the record, create a legal certainty of the conclusion based on them."[76]

In so holding, the Court recognized a two-part review of the jurisdictional amount stated in the plaintiff's complaint. The first step is the inquiry recognized by the earlier Supreme Court decisions for cases in which the damages are fixed by the cause of action: "[I]n some cases it might appear as a matter of law, from the nature of the case stated in the pleadings, that there could not legally be a judgment recovered for the amount necessary to the jurisdiction, notwithstanding the damages were laid in the declaration at a larger sum."[77] Thus, "[w]here the law gives no rule, the demand of the plaintiff must furnish one; but where the law gives the rule, the legal cause of action, and not the plaintiff's demand, must be regarded."[78]

The second part of the test targets tort claims and other actions involving unliquidated damages, requiring the court to inquire into the factual basis for the plaintiff's damage request. This part of the test recognizes the plaintiff's demand is not conclusive as to the actual value of the matter in dispute. Rather, the court may dismiss the case if it finds, "as matter of fact, upon evidence legally sufficient, 'that the amount of damages stated in the declaration was colorable, and had been laid beyond the amount of a reasonable expectation of recovery, for the purpose of creating a case' within the jurisdiction of the court."[79]

Enactment of the 1875 amendments also prompted the Court to reconsider the issue of which party should bear the burden of proving jurisdiction. Although early Supreme Court decisions suggested that the party challenging

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75. *Id.*

76. *Id.*

77. *Id.* at 560.

78. *Id.* (quoting Wilson v. Daniel, 3 U.S. 401, 408 (1798)).

79. *Id.* at 561 (quoting *Wilson*, 3 U.S. at 408). The term "colorable" is defined as "that which is in appearance only, and not reality, what it purports to be, hence counterfeit, feigned, having the appearance of truth." BLACK'S LAW DICTIONARY 265 (6th ed. 1990).

jurisdiction had the burden of proving that jurisdiction did not exist,[80] the *McNutt* decision concluded otherwise.[81]

McNutt was a federal question case, but under the jurisdictional statute at that time, such suits could be brought in federal court only if the matter in controversy exceeded $3,000.[82] The jurisdictional amount came under scrutiny in *McNutt* when the defendant's answer denied the jurisdictional allegations set forth in the plaintiff's complaint.[83] In response to a request from the court, the plaintiff filed an additional brief on the jurisdictional question, but the brief did nothing more than point to the allegations of the complaint; no evidence was introduced to support the general allegation that the amount in controversy exceeded $3,000.[84] Due to the absence of such evidence, resolution of the jurisdictional issue depended upon which party had the burden of proof—more precisely, the burden of production[85]—in the case.[86]

The Court noted that the 1875 amendments to the Judiciary Act prescribed a uniform rule and, therefore, courts should adopt a consistent practice in dealing with jurisdictional questions. The Court concluded that the burden of establishing jurisdiction should be placed upon the party "who claims that the power of the court should be exerted in his behalf. As he is seeking relief

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80. *See, e.g.*, Sheppard v. Graves, 55 U.S. 505, 510 (1852) ("[A]lthough in the courts of the United States it is necessary to set forth the grounds of their cognizance as courts of limited jurisdiction, yet wherever jurisdiction shall be averred in the pleadings, in conformity with the laws creating those courts, it must be taken *prima facie* as existing, and that it is incumbent on him who would impeach that jurisdiction for causes *dehors* the pleadng, [sic] to allege and prove such causes; that the necessity for the allegation and the burden of sustaining it by proof, both rest upon the party taking the exception.").

81. McNutt v. General Motors Corp., 298 U.S. 178, 188-89 (1936).

82. 28 U.S.C. § 41(1) (1936) (current version at 28 U.S.C. § 1331 (1994)). The amount in controversy requirement was eliminated for federal question cases in 1980. Pub. L. No. 96-486 (1980).

83. *McNutt*, 298 U.S. at 179-80.

84. *Id.* at 180-81. The jurisdictional statute in effect at that time permitted diversity actions in which the amount in controversy exceeded the value of $3,000, exclusive of interest and costs. 28 U.S.C. § 41(1) (1936).

85. As the Supreme Court recently explained, the term "burden of proof" was used for many years to describe two distinct concepts: "Burden of proof was frequently used to refer to what we now call the burden of persuasion—the notion that if the evidence is evenly balanced, the party that bears the burden of persuasion must lose. But it was also used to refer to what we now call the burden of production—a party's obligation to come forward with evidence to support its claim." Director, Office of Workers' Compensation Programs v. Greenwich Collieries, 512 U.S. 267, 272 (1994) (citing JAMES BRADLEY THAYER, EVIDENCE AT THE COMMON LAW 355-84 (1898)).

86. *McNutt*, 298 U.S. at 181.

subject to this supervision, it follows that he must carry throughout the litigation the burden of showing that he is properly in court."[87] The opinion described this burden as follows:

> He must allege in his pleading the facts essential to show jurisdiction. If he fails to make the necessary allegations he has no standing. If he does make them, an inquiry into the existence of jurisdiction is obviously for the purpose of determining whether the facts support his allegations.... If his allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof. And where they are not so challenged the court may still insist that the jurisdictional facts be established or the case be dismissed, and for that purpose the court may demand that the party alleging jurisdiction justify his allegations by a preponderance of evidence.[88]

Unfortunately, the Court cited no authority for this preponderance of evidence requirement and gave no explanation why that standard would be appropriate for all jurisdictional inquiries. The Court revisited the jurisdictional issue, however, with a more detailed analysis two years later in the *St. Paul Mercury* decision.

The *St. Paul Mercury* case arose when the company filed an action in state court alleging that the St. Paul Mercury Indemnity Co. had breached a workers' compensation insurance contract.[89] The complaint demanded damages in the amount of $4,000, which was greater than the $3,000 then required for federal jurisdiction,[90] and the insurance company removed the action to federal court.[91] The case took a twist when the plaintiff subsequently amended the complaint, repeating the original demand for $4,000, but including an exhibit that itemized the various damages for a total of only $1,380.89.[92]

After the district court entered judgment for the plaintiff in the amount of $1,162.98, the court of appeals declined to review the decision on the merits, holding instead that the action should have been remanded to state court because the record showed that the plaintiff's claim did not exceed the federal jurisdictional minimum.[93] The Supreme Court granted certiorari and ultimately held that the case had been properly removed because *at the time of removal*, the

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87. *Id.* at 189.

88. *Id.*

89. St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 284-85 (1936).

90. *Id.* at 285-86 (citing Act of March 3, 1911, ch. 231, § 24, 36 Stat. 1091, *amended by* 28 U.S.C. § 41 (1936)).

91. *Id.*

92. *Id.*

93. *Id.*

lump sum damages demanded by the plaintiff were clearly in excess of the federal minimum and the defendant had no reason to believe that the claim was for less than that amount.[94]

In reaching its decision, the Court acknowledged that its earlier decision in *McNutt* placed the burden of establishing jurisdiction upon the party that invoked the court's authority.[95] Thus, in an original jurisdiction diversity case, "[i]t is plaintiff's burden both to allege with sufficient particularity the facts creating jurisdiction, in view of the nature of the right asserted, and, if appropriately challenged, or if inquiry be made by the court of its own motion, to support the allegation."[96] The Court made no mention, however, of the "preponderance of evidence" language in *McNutt,* but instead gave the following landmark explanation of the judicial inquiry to be conducted in original jurisdiction diversity cases:

> [T]he sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal. The inability of the plaintiff to recover an amount adequate to give the court jurisdiction does not show his bad faith or oust the jurisdiction. Nor does the fact that the complaint discloses the existence of a valid defense to the claim. But if, from the face of the pleadings, it is apparent, to a legal certainty that the plaintiff cannot recover the amount claimed or if, from the proofs, the court is satisfied to a like certainty that the plaintiff never was entitled to recover that amount, and that his claim was therefore colorable for the purpose of conferring jurisdiction, the suit will be dismissed.[97]

The Court's use of the term "legal certainty" was perhaps unfortunate because that terminology has created much of the confusion that exists today regarding the proper level of judicial inquiry. But a comparison of this passage from *St. Paul Mercury* against the Court's earlier descriptions of the judicial inquiry[98] demonstrates that the Court was not enunciating a new test in *St. Paul Mercury,* but merely was providing a shorthand description of the two-part test set forth in the earlier cases. In other words, the legal certainty test scrutinizes (1) whether it is *legally* impossible for the plaintiff to recover in excess of the jurisdictional amount because the cause of action limits recovery to a fixed amount; and (2) whether it is *factually* impossible for the plaintiff to recover

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94. *St. Paul Mercury*, 303 U.S. at 295-96.

95. *Id.* at 288 n.10.

96. *Id.*

97. *Id.* at 288-89 (footnotes omitted).

98. *See* Barry v. Edmunds, 116 U.S. 550, 559-61 (1886); *see supra* notes 74-79 and accompanying text.

such an amount—*i.e.*, whether plaintiff's demand is beyond a reasonable expectation of recovery in cases in which the amount of damages is not limited by the cause of action.[99]

After describing the judicial inquiry for original jurisdiction cases, the *St. Paul Mercury* decision discussed the applicability of that test to removal actions in which the plaintiff had pled a specific amount of damages exceeding the federal threshold. The Court suggested that the sum claimed by the plaintiff is entitled to even greater deference in that situation than when the plaintiff has filed the lawsuit directly in federal court.[100]

> In a cause instituted in the federal court the plaintiff chooses his forum. He knows or should know whether his claim is within the statutory requirement as to amount. His good faith in choosing the federal forum is open to challenge not only by resort to the face of his complaint, but by the facts disclosed at trial, and if from either source it is clear that his claim never could have amounted to the sum necessary to give jurisdiction there is no injustice in dismissing the suit. . . .
>
> A different situation is presented in the case of a suit instituted in a state court and thence removed. There is a strong presumption that the plaintiff has not claimed a large amount in order to confer jurisdiction on a federal court or that the parties have colluded to that end. . . . Of course, if, upon the face of the complaint, it is obvious that the suit cannot involve the necessary amount, removal will be futile and remand will follow. But the fact that it appears from the face of the complaint that the defendant has a valid defense, if asserted, to all or a portion of the claim, or the circumstance that the rulings of the district court after removal reduce the amount recoverable below the jurisdictional requirement, will not justify remand. And though, as here, the plaintiff after removal, by stipulation, by affidavit, or by amendment of his pleadings, reduces the claim below the requisite amount, this does not deprive the district court of jurisdiction.[101]

In short, the *St. Paul Mercury* decision made it clear that the legal certainty test applies with equal vigor to the "easy" removal case—*i.e.*, one in which the plaintiff has expressly demanded a specific sum that exceeds the federal minimum—as well as to the diversity case filed directly in federal court by a plaintiff exercising the court's original jurisdiction.[102] Left unanswered,

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99. This distinction has been completely overlooked by the majority of courts analyzing the legal certainty test. For one of the few cases in which a court has recognized the fine points of this analysis, *see* Essex Ins. Co. v. J&D Blackwell Enter., Inc., No. CIV. A. 92-3721, 1993 WL 204109, at *2-*4 (E.D. Pa. June 9, 1993), *aff'd*, 16 F.3d 403 (3d Cir. 1993).

100. St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 290-92 (1936).

101. *Id.* (footnotes omitted).

102. *See, e.g.*, Allen v. R & H Oil & Gas Co., 63 F.3d 1326, 1335 (5th Cir. 1995)

however, are the harder questions raised by removal of cases involving indeterminate or lowball complaints. To resolve these issues, one must first consider whether *St. Paul Mercury*'s legal certainty test can be reconciled with the preponderance requirement set forth in *McNutt*.

2. Reconciling the Conflict Between *St. Paul Mercury* and *McNutt*

The analysis in the preceding Section shows that the removal statute mirrors the jurisdictional requirements set forth in the diversity statute and attempts to ensure that a defendant's access to federal court is roughly equivalent to the plaintiff's right to the federal forum.[103] Simple logic, therefore, suggests that the same jurisdictional inquiry should be applied regardless of which party invokes the court's jurisdiction. The key questions are whether the parties are of diverse citizenship and whether the amount in dispute exceeds $75,000. For reasons explained more fully below, the *McNutt* standard is proper for reviewing the first of these two requirements, but *St. Paul Mercury's* legal certainty test is the more appropriate standard for cases in which the amount in controversy is at issue.

Although the broad language used in *McNutt* seems to suggest that the preponderance test applies to all jurisdictional inquiries, this broad pronouncement was purely dictum and was implicitly rejected by the *St. Paul Mercury* decision. The sole issue in *McNutt* concerned the burden of

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(stating that the removing party bears the burden of establishing the facts necessary to establish federal jurisdiction, but "[w]here the plaintiff has alleged a sum certain that exceeds the requisite amount in controversy, that amount controls if made in good faith . . ." and therefore, "[i]n order for a court to refuse jurisdiction 'it [must] appear to a legal certainty that the claim is really for less than the jurisdictional amount'"); Gafford v. General Elec. Co., 997 F.2d 150, 157 (6th Cir. 1993) (based upon the discussion in *St. Paul Mercury* regarding removal cases the *Gafford* court stated, "it is equally evident that the 'legal certainty' standard should apply to cases removed to federal court from state court where the plaintiff's prayer for damages in the state suit exceeds the federal amount-in-controversy requirement"); Albright v. R. J. Reynolds Tobacco Co., 531 F.2d 132, 135-37 (3d Cir.), *cert. denied*, 426 U.S. 907 (1976) (citing *St. Paul Mercury* to justify a more lenient standard when the defendant removes a case from state court based upon the plaintiff's request for damages as compared with the level of scrutiny required when the plaintiff invokes the court's jurisdiction by filing the suit directly in federal court); Garza v. Bettcher Indus., Inc., 752 F. Supp. 753, 756 (E.D. Mich. 1990) ("[W]here the state court complaint itself states damages in an amount sufficient to obtain federal diversity of citizenship jurisdiction, by way of removal, and the defendant does in fact remove the case to federal court, it would make very good sense to require proof to a legal certainty that the plaintiff cannot recover damages equal to or greater than the jurisdictional amount.").

103. *See supra* notes 48-59 and accompanying text.

production—*i.e.*, *which party* had the burden of introducing evidence to go forward with the jurisdictional inquiry.[104] The Court's enunciation of the preponderance test unnecessarily went one step further, addressing the ultimate burden of persuasion—*i.e.*, the *quantity of evidence* required for a court to rule in that party's favor when both sides have submitted contradicting evidence on the question.[105]

None of the prior Supreme Court cases discussed in *McNutt* addressed the burden of persuasion. Instead, the cases focused on other procedural questions such as: the type of pleading that must be filed to raise the jurisdictional issue;[106] whether trial courts had the authority to resolve jurisdictional disputes without the intervention of the jury;[107] and, if the question is decided by the court rather than a jury, whether the decision was reviewable on appeal.[108] In *Wetmore v. Rymer,* for example, the Court noted that the 1875 Act did not "prescribe any particular mode in which the question of the jurisdiction is to be brought to the attention of the court, nor how such question, when raised, shall be determined."[109] The Court recognized that the inquiry "would usually depend upon matters of fact," and, therefore, raised questions as to whether the inquiry should be conducted by the court or the jury.[110] The Court noted that "the court might doubtless order the issue to be tried by the jury[,]" but it also acknowledged that "the questions might arise in such a shape that the court might consider and determine them without the intervention of a jury. And it would appear to have been the intention of [C]ongress to leave the mode of raising and trying such issues to the discretion of the trial judge."[111]

Allowing the court to conduct the jurisdictional inquiry makes sense because it addresses two major concerns: (1) that the federal courts should not adjudicate a case absent a sufficient showing that jurisdiction exists; and (2) that the threshold determination of jurisdiction should be made as quickly as possible to avoid delays in the litigation or the unnecessary expense of preparing the case in federal court only to have it remanded to state court after the parties are well

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104. *See supra* note 85.

105. *See supra* note 85.

106. Anderson v. Watts, 138 U.S. 694, 698 (1891) ("Under the act of March 3, 1875, . . . the objection to the jurisdiction upon a denial of the averment of citizenship is not confined to a plea in abatement or a demurrer, but may be taken in the answer, and the time at which it may be raised is not restricted.").

107. Gilbert v. David, 235 U.S. 561, 568 (1915); Wetmore v. Rymer, 169 U.S. 115, 120-21 (1898).

108. North Pac. S.S. Co. v. Soley, 257 U.S. 216, 221 (1921); *Wetmore*, 169 U.S. at 121-22.

109. *Wetmore*, 169 U.S. at 120.

110. *Id.*

111. *Id.*

into the litigation.[112] But in crafting a jurisdictional test, the courts must be cognizant of a third major concern—that the jurisdictional inquiry should not encroach upon the jury's province as arbiter of the merits of the case.

This latter issue does not arise in all jurisdictional disputes. Some of the cases discussed in *McNutt*, for example, dealt with factual disputes regarding the citizenship of the parties.[113] Resolution of the citizenship question has no bearing on the merits of the case, but instead addresses an issue that relates solely to jurisdiction. The court, therefore, can exercise its authority to resolve the jurisdictional issue without usurping the jury's authority to resolve the ultimate issues in the case. In these cases, it would seem logical for the court to apply a preponderance standard to resolve the factual dispute.

A different case arises, however, when the jurisdictional facts are intertwined with the merits of the action, as is the case with disputes concerning the amount in controversy. The Supreme Court specifically addressed this problem in its early decisions discussing the 1875 amendments to the Judiciary Act.[114] Recognizing that "it is the peculiar function of the jury" to determine the amount of damages in a case,[115] the Court emphasized that judicial inquiry should be limited in nature so that courts, acting under the guise of determining jurisdiction, do not deprive the parties of their right to a jury trial.[116] Thus, in *Smithers v. Smith,* the Court stated that judges are forbidden to "interpose and try a sufficient part of the controversy between the parties to satisfy [themselves] that the plaintiff ought to recover less than the jurisdictional amount, and to conclude, therefore, that the real controversy between the parties is concerning a subject of less than the jurisdictional value . . . ."[117]

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112. 14A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE (2d ed. 1985); *see also* Pratt Cent. Park Ltd. Partnership v. Dames & Moore, Inc., 60 F.3d 350, 351-52 (7th Cir. 1995).

113. Gilbert v. David, 235 U.S. 561 (1915); Anderson v. Watts, 138 U.S. 694 (1891).

114. Smithers v. Smith, 204 U.S. 632, 645 (1907); Barry v. Edmunds, 116 U.S. 550, 565 (1886).

115. *Barry*, 116 U.S. at 565.

116. *Smithers*, 204 U.S. at 645 ("For it must not be forgotten that where, in good faith, one has brought into court a cause of action which, as stated by him, is clearly within its jurisdiction, he has the right to try its merits in the manner provided by the Constitution and law, and cannot be compelled to submit to a trial of another kind.").

117. *Id.* at 644. The *Barry* Court similarly observed:

> For nothing is better settled than that, in cases such as the present, and other actions for torts where no precise rule of law fixes the recoverable damages, it is the peculiar function of the jury to determine the amount by their verdict. In *Whipple v. Cumberland Manuf'g Co.*, 2 Story, 661, 670, Mr. Justice STORY well expressed the rule on this subject that a verdict will not be set aside in a case of tort for excessive damages 'unless the court can clearly see

That is exactly what would happen if a court were to resolve disputes concerning the amount in controversy by using a preponderance of evidence standard; the court would be substituting its judgment for that of the jury on a question that goes to the merits of the case as well as to the court's jurisdiction. The legal certainty test, on the other hand, allows the court to determine its jurisdiction at the outset of the litigation without encroaching upon the jury's province as arbiter of damages. It does so, as the author of one treatise observes, by adopting a relatively low burden of proof which "recognizes that the question of whether the jurisdictional amount is satisfied is separate from a decision on the merits of the case."[118]

> No one will know with certainty how much money the case involves until it is decided on the merits. But the court's jurisdiction cannot be held in limbo until that point; the jurisdictional question normally will be a threshold matter. Moreover, equating the jurisdictional question with the merits would mean that a judgment for the defendant (or a judgment for less than the jurisdictional amount for plaintiff) would require a dismissal for lack of jurisdiction, rather than a judgment on the merits. Thus, while a federal court has the duty to assess subject matter jurisdiction throughout the litigation, the legal certainty test recognizes that the amount in controversy issue cannot be tied ultimately to the merits.
>
> Thus, so long as a plaintiff satisfies the legal certainty test, jurisdiction attaches.[119]

> that the jury have committed some very gross and palpable error, or have acted under some improper bias, influence or prejudice, or have totally mistaken the rules of law by which the damages are to be regulated,'—that is, 'unless the verdict is so excessive or outrageous,' with reference to all the circumstances of the case, 'as to demonstrate that the jury have acted against the rules of law, or have suffered their passions, their prejudices, or their perverse disregard of justice to mislead them.' In no case is it permissible for the court to substitute itself for the jury, and compel a compliance on the part of the latter with its own view of the facts in evidence, as the standard and measure of that justice, which the jury itself is the appointed constitutional tribunal to award.

Barry, 116 U.S. at 565.

118. 1 WILLIAM A. MOORE ET AL., MOORE'S FEDERAL PRACTICE, ¶ 0.92[1] (2d ed. 1994).

119. 1 *id.* The Supreme Court addressed a similar issue in the context of a federal question case, *Bell v. Hood*, 327 U.S. 678 (1946), decided ten years after *McNutt*. At issue in *Bell* was whether the plaintiff's complaint stated a claim for a violation of Fourth and Fifteenth Amendment rights. The defendants argued that there was no federal cause of action and, therefore, the case should be dismissed for lack of subject matter jurisdiction. The Supreme Court disagreed, stating:

Jurisdiction . . . is not defeated . . . by the possibility that the averments might

The Supreme Court, in fact, applied the legal certainty test in *Wetmore*, where the lower court had dismissed the case for failing to satisfy the amount in controversy requirement. After stating that the courts have discretion to determine such issues without the intervention of the jury, the Supreme Court considered whether the lower court had met the standard enunciated in *Barry v. Edmunds*[120] "that a suit cannot be properly dismissed by a circuit court as not substantially involving a controversy within its jurisdiction, unless the facts, when made to appear on the record, create a legal certainty of that conclusion . . . ."[121]

> fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and . . . must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations of the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction. . . .

Id. at 682-83.

The Court recognized, however, that such cases could be dismissed on jurisdictional grounds if the plaintiff's federal claim "appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous." *Id.* at 683.

See also Grubart v. Great Lakes Dredge & Dock Co., 115 S. Ct. 1043, 1050 (1995) (stating that jurisdictional facts need not be determined with finality at the jurisdictional stage; rather, "[n]ormal practice permits a party to establish jurisdiction at the outset of the case by means of a nonfrivolous assertion of jurisdictional elements . . . and any litigation of a contested subject matter jurisidictional fact issue occurs in a comparatively summary procedure before a judge alone (as distinct from litigation of the same fact issue as an element of the cause of action, if the claim survives the jurisdictional objection)") (citations omitted). Not surprisingly, this standard parallels part of the legal certainty test enunciated in *St. Paul Mercury*. *See supra* text accompanying note 97.

120. *See supra* notes 74-79 and accompanying text.

121. Wetmore v. Rymer, 169 U.S. 115, 128 (1898). In fact, *Wetmore* quotes *Barry*'s entire explanation of what the standard requires:

> In making [an order dismissing a case for failure to satisfy the jurisdictional amount], the circuit court exercises a legal, and not a personal, discretion, which must be exerted in view of the facts sufficiently proven, and controlled by fixed rules of law. It might happen that the judge, on the trial or hearing of the cause, would receive impressions amounting to a moral certainty that it does not really and substantially involve a dispute or controversy within the jurisdiction of the court. But upon such a personal conviction, however strong, he would not be at liberty to act, unless the facts on which the persuasion is based, when made distinctly to appear on the record, create a

McNutt failed to acknowledge this point, however, when it made the blanket statement that jurisdictional fact disputes were to be resolved by a preponderance standard.[122] Unfortunately, many federal courts have embraced *McNutt's* preponderance test without analyzing its legal foundations. As the preceding analysis suggests, the preponderance test might be appropriate when the disputed facts relate solely to jurisdiction—such as questions concerning the diversity of citizenship of the parties. When the jurisdictional facts are intertwined with the merits of the case, however, the Supreme Court's decisions in *Barry, Wetmore,* and *St. Paul Mercury* indicate that the legal certainty test should be used.

Knowing the purpose behind the legal certainty test also helps resolve a second question concerning the jurisdictional inquiry. As explained above, the test requires a two-part review: (1) whether it is *legally* impossible for the plaintiff to recover in excess of the jurisdictional amount because the cause of action limits recovery to a fixed amount; and (2) whether it is *factually* impossible for the plaintiff to recover such an amount—*i.e.*, whether the amount is beyond a reasonable expectation of recovery in cases where the amount of damages is not limited by the cause of action. But how does a court determine what constitutes a "reasonable expectation"? The answer can be found in court rulings on post-trial motions for a new trial.

One of the most frequently cited grounds for seeking a new trial—or a remittitur—is that the jury's verdict was legally excessive. In that situation, much like the jurisdictional inquiry into the amount in controversy, the court must be careful not to substitute its judgment for that of the jury regarding the proper amount of damages. It logically follows that the courts should employ the same standard for the jurisdictional inquiry as it uses for a post-trial motion—*i.e.*, the court should determine whether a jury could reasonably enter a verdict in excess of the federal minimum based upon the facts alleged in the complaint or, conversely, whether such an award would be set aside as excessive.[123]

An example of the appropriate inquiry can be found in *Herbert v. Rainey,*[124] where the plaintiff brought an action alleging that the smoke, flames, gases, and

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legal certainty of the conclusion based on them.

Id. at 122.

122. McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 189 (1936).

123. Under the Supreme Court's recent decision in *Gasperini v. Center for Humanities, Inc.*, 116 S. Ct. 2211 (1996), the federal courts should consult state law for a more precise test of what constitutes an excessive verdict. In *Gasperini*, a sharply divided Court concluded that a New York rule concerning the reasonableness of jury verdicts was substantive in nature. Thus, under the doctrine of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), federal courts sitting in diversity cases must apply the state rule of law rather than the federal standard. *Id.* at 2219-21.

124. 54 F. 248 (W.D. Pa. 1892).

heat from a neighboring landowner's coke ovens rendered the plaintiff's land valueless.[125] In determining whether the value of the land exceeded the federal jurisdictional amount, the court noted that estimates given by the defendant's witnesses differed greatly from those given by the plaintiff's witnesses. But the court noted that such differences are not uncommon when the value of real estate is involved. The court ultimately held that the jurisdictional prerequisite had been satisfied because "upon the whole evidence a jury or a master might well find the plaintiff's property to be worth over $2,000. We are then of the opinion that this suit does 'really and substantially involve a dispute or controversy properly within the jurisdiction' of the court . . . ."[126]

3. Flaws in the Arguments Rejecting the Legal Certainty Test

A number of courts have rejected the use of the legal certainty test for removal cases involving indeterminate or lowball complaints because, in their view, *St. Paul Mercury* suggests that the test is applicable only when the plaintiff has pleaded against his or her chosen forum—*i.e.*, when the complaint contains an unequivocal demand or prayer for relief in an amount that exceeds the federal jurisdictional minimum. The Sixth Circuit explains its reasoning as follows:

> The "legal certainty" test in removal cases arose in a context where the plaintiff's prayer for damages in state court exceeded the federal amount-in-controversy requirement. In such a case as that, it is proper to presume that the plaintiff's prayer is an appropriate presentation of potential damages because the damages sought are against the plaintiff's interests. There can be no such presumption where there is no specific prayer for damages. Thus, the "legal certainty" test should not be applied to situations . . . where damages are unspecified.[127]

Under this theory, jurisdiction would exist only in the two easy cases that were addressed in *St. Paul Mercury*—original jurisdiction diversity cases and the few removal cases where the state court complaint expressly demands a sum

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125. *Id.* at 249-50.

126. *Id.* at 252.

127. Gafford v. General Elec. Co., 997 F.2d 150, 160 (6th Cir. 1993); *see also* Singer v. State Farm Mut. Auto. Ins. Co., 116 F.3d 373, 376 (9th Cir. 1997); Garza v. Bettcher Indus., Inc., 752 F. Supp. 753, 755-56 (E.D. Mich. 1990).

certain that exceeds the federal minimum.[128] This viewpoint, however, misinterprets the *St. Paul Mercury* analysis.

As described above,[129] the *St. Paul Mercury* decision begins with the basic premise that the legal certainty test applies in original jurisdiction cases—cases in which the plaintiffs have filed their actions directly in federal court and, therefore, demanded damages in amounts in excess of the federal jurisdictional minimum. The opinion suggests that the plaintiff's demand is entitled to even greater deference in a removal case when the state court complaint includes a request for relief that brings the action within the federal court's jurisdiction.[130] Thus, the Court recognized a strong presumption that the plaintiff's damage estimate was made in good faith because it is contrary to the plaintiff's interest in remaining in state court.[131]

Obviously this presumption does not apply when the plaintiff has not included a specific request for damages in the state-filed complaint or has requested damages that fall below the federal minimum. The absence of this presumption, however, does not totally preclude the application of the legal certainty test. To the contrary, it simply puts the defendant in precisely the same position as a plaintiff who filed the action directly in federal court in the first place. In both cases, the party seeking federal jurisdiction supplies an estimate of the amount in controversy. Accordingly, the same judicial inquiry standard should be used to determine whether the jurisdictional prerequisite has been met.

This makes sense when one considers that the amount in controversy is a two-sided coin. It reflects not only the amount of damages that the plaintiff expects to receive in the case, but also the extent of the defendant's exposure—the financial detriment that the defendant is likely to incur if the plaintiff wins. In the easy cases discussed in *St. Paul Mercury,* the plaintiff estimated that the recoverable damages were greater than the federal threshold. But in removal cases involving an indeterminate complaint, the defendant alleges that his exposure in the case is likely to exceed the federal threshold if the plaintiff succeeds on the merits. Similarly, in removal cases involving lowball

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128. *See* Sanchez v. Monumental Life Ins. Co., 102 F.3d 398, 402 (9th Cir. 1996) ("[T]he *St. Paul Mercury* legal certainty test is applicable in two types of cases: (1) those brought in the federal court in which the plaintiff has filed a good faith complaint alleging damages in excess of the required jurisdictional minimum and (2) those brought in the state court in which the plaintiff has filed any complaint alleging damages in excess of the required federal jurisdictional minimum.").

129. *See supra* notes 89-97 and accompanying text.

130. *See supra* text accompanying notes 100-01.

131. *See supra* text accompanying note 100; *see also Gafford*, 997 F.2d at 160 ("[I]t is proper to presume that the plaintiff's prayer is an appropriate presentation of potential damages because the damages sought are against the plaintiff's forum-selection interests.").

complaints, the defendant alleges that the plaintiff's demand does not fairly reflect the defendant's real exposure in the case because state pleading rules do not bind the plaintiff to the amount of that demand.

The legal certainty test provides the proper inquiry regardless of which party asserts that the jurisdictional amount is satisfied. The test is not intended to "give the benefit of the doubt" to one particular party's demand for damages, as some courts have suggested,[132] but instead requires the court to conduct an independent inquiry as to how much money is ultimately at stake in the matter. In making this determination, the court's review focuses on the nature of the plaintiff's cause of action and the nature of the damages that are alleged; if there is a "reasonable expectation" that the plaintiff will recover in excess of $75,000 if the claim succeeds, the jurisdictional inquiry is satisfied. Thus, it makes no difference whether it is the plaintiff or the defendant who has alleged that the amount in controversy exceeds $75,000.

In cases involving lowball complaints, however, some courts insist that great deference is owed to the plaintiff's damage request because the plaintiff is the master of the complaint and, therefore, should be entitled to have the case heard in the forum of his or her choice. But this viewpoint is contrary to the mandate of the removal statute, which gives non-resident defendants the right to have the action heard in federal court so long as the requirements for diversity jurisdiction are present. Thus, if the defendant can prove that his or her exposure in the case exceeds the federal minimum, the removal statute on its face defers to the *defendant's* choice of forum notwithstanding the plaintiff's desire to remain in state court.

Nevertheless, several courts have suggested that the plaintiff's status as master of the complaint means that the courts should give controlling weight to the plaintiff's estimate of damages.[133] In support of these views, the courts rely upon language from *St. Paul Mercury* which suggests that federal courts must defer to the amount claimed by the plaintiff as being the value of the matter in dispute because the plaintiff has the right to avoid removal by "suing for less than the jurisdictional amount . . . ."[134] Similarly, the Supreme Court stated in

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132. *See* Pratt Cent. Park Ltd. Partnership v. Dames & Moore, Inc., 60 F.3d 350, 350 (7th Cir. 1995) (suggesting that the legal certainty test was intended to allow courts to make the jurisdictional inquiry "expeditiously and cheaply" by simplifying the inquiry and giving "the plaintiff the benefit of the doubt").

133. This argument, of course, applies only to cases in which the complaint includes a demand for a specific sum that falls below the federal minimum; it is irrelevant to the situation where the plaintiff has failed to provide an estimate of the damages in the complaint. "Where a plaintiff has made an unspecified demand for damages, . . . there is simply no estimate of damages to which a court may defer." Tapscott v. MS Dealer Serv. Corp., 77 F.3d 1353 (11th Cir. 1996).

134. St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 294 (1938).

Lee v. Watson[135] that in determining the amount in controversy, "[t]he damages or prayer for judgment must be regarded, inasmuch as the plaintiff may seek a recovery for less than the sum to which he appears entitled by the allegations in the body of the declaration."

What these Supreme Court decisions are referring to, however, is the "general rule that plaintiff may in his prayer waive a part of the recovery to which, according to the averments of the complaint, he is entitled, and thus avoid removal."[136] In other words, "the injured party may, if he sees fit, waive his right to recover full damages, and in that case the litigation involves only the amount which he seeks to recover."[137] This waiver rule, however, must be read in the context of the pleading rules that existed at that time. Under the common law, a plaintiff "could not recover anything other than the relief specifically requested in the ad damnum clause of his complaint."[138] Thus, under those circumstances, the plaintiff's demand did in fact represent the true amount in controversy because the plaintiff was bound by the amount demanded in the prayer for relief.[139]

That is no longer the case following the enactment of Rule 54(c) of the Federal Rules of Civil Procedure in 1937 and the state pleading rules patterned after that rule. As pointed out above,[140] Rule 54(c) provides that "every final judgment shall grant the relief to which the party in whose favor it is rendered

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135. 68 U.S. 337, 339-40 (1863).

136. Collins v. Twin Falls North Side Land & Water Co., 204 F. 134, 135 (D. Idaho 1913).

137. Smith v. Northern Pac. R.R. Co., 53 N.W. 173, 173 (N.D. 1892).

138. 10 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE 134 (2d ed. 1983); *see also* Singer v. State Farm Mut. Auto. Ins. Co., 116 F.3d 373, 375 (9th Cir. 1997) (citing Benjamin J. Shipman, COMMON LAW PLEADING 223 487-89 (3d ed. 1923) for the position that "[a]t common law, a statement of the amount claimed was required [in the plaintiff's complaint], and was an upper limit on recovery"); Starke v. Hoerning, 206 F. 1006, 1007 (E.D. Mich. 1913) (stating that "no larger sum can be recovered in a suit than the amount claimed in the writ").

139. That was precisely the case in *Iowa Central Railway Co. v. Bacon*, 236 U.S. 305 (1915). The body of the plaintiff's complaint for wrongful death alleged that the decedent's estate had been damaged in the sum of $10,000 but the prayer for relief asked only for the sum of $1,990. The defendant attempted to remove to federal court, arguing that the amount in controversy exceeded the federal jurisdictional threshold of $2,000. However, the state court denied the application for removal, holding that the amount in controversy was less than $2,000. The Supreme Court upheld the decision, noting that "[t]he state court had authority to determine the effect of the prayer to the petition, and it decided that, under the petition, no more than the amount prayed for could be recovered in the action, notwithstanding the statement that the estate had suffered damage in the sum $10,000." *Id.* at 309.

140. *See supra* note 23 and accompanying text.

is entitled, even if the party has not demanded such relief in the party's pleadings." Thus, a plaintiff is no longer bound by the amount demanded in the prayer for relief and the defendant's actual exposure in the case could be much higher. Accordingly, the plaintiff's demand is not dispositive of the amount in controversy.

The two federal circuit courts that have addressed this issue have recognized that the plaintiff's demand is not the conclusive measure of the value of the case. Thus, they have held that a defendant may be entitled to remove a case to federal court notwithstanding the plaintiff's demand for a specific sum that is below the federal minimum. For purposes of determining the amount in controversy in this situation, however, the courts ultimately concluded that the legal certainty test is too lenient and, instead, have imposed upon the defendant a much higher burden of establishing jurisdiction.[141] In essence, although these courts have refused to recognize the plaintiff's demand as the conclusive measure of damages, they are still willing to give the demand a considerable degree of deference.

The key difference between the Fifth Circuit and Eleventh Circuit standards is in the degree of deference they would recognize. As set forth above, the Eleventh Circuit's standard places a heavy burden on the defendant to prove that jurisdiction exists despite plaintiff's specific request for an amount below the jurisdictional threshold.[142] Among its reasons for adopting a higher standard was its view that

> [e]very lawyer is an officer of the court. And, in addition to his duty of diligently researching his client's case, he always has a duty of candor to the tribunal. So, plaintiff's claim, when it is specific and in a pleading signed by a lawyer, deserves deference and a presumption of truth. We will not assume—unless given reason to do so—that plaintiff's counsel has falsely represented, or simply does not appreciate, the value of his client's case. Instead, we will assume that plaintiff's counsel best knows the value of his client's case and that counsel is engaging in no deception. We will further presume that plaintiff's counsel understands that, because federal removal jurisdiction is in part determined by the amount of damages a plaintiff seeks, the counsel's choices and representations about damages have important legal consequences and, therefore, raise significant ethical implications for a court officer.[143]

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141. De Aguilar v. Boeing Co., 47 F.3d 1404 (5th Cir. 1995); Burns v. Windsor Ins. Co., 31 F.3d 1092 (11th Cir. 1994); *see supra* notes 42-47 and accompanying text.

142. *See supra* notes 43-44 and accompanying text.

143. *Burns*, 31 F.3d at 1095. The court noted that:

> The duty of candor goes beyond the moral duty imposed on counsel by ethical codes or good conscience. Under Alabama Rule of Civil Procedure 11, counsel must sign each pleading, motion or other document he submits to

The Fifth Circuit's preponderance standard, on the other hand, is less deferential to the plaintiff. In rejecting the strict standard adopted by the Eleventh Circuit, the Fifth Circuit stated that such a test "seems to conflict with our past decisions that have stated that the standard for determining jurisdictional amount should favor 'those parties seeking to invoke the jurisdiction of a federal district court.'"[144] In addition, the strict standard

> fails adequately to protect defendants from plaintiffs who seek to manipulate their state pleadings to avoid federal court while retaining the possibility of recovering greater damages in state court following remand. This court has spoken adamantly of "preventing the plaintiff from being able to destroy the jurisdictional choice that Congress intended to afford a defendant in the removal statute."[145]

The Eleventh Circuit also acknowledged that a plaintiff strategically could avoid federal jurisdiction by initially requesting a specific sum in damages less than the federal jurisdictional amount, but later amending the claim to seek in excess of that amount after the one-year time limitation in section 1446(b). The court declined to place much emphasis on this potential for abuse, however, stating that "such a result (if it is not good policy) should be remedied by congressional and not judicial action . . . ."[146] Moreover, the court stated that

> we are not convinced that [C]ongress would find the result [the defendant] fears (that is, an amendment for greater damages after the one year deadline for removal) to be bad. The Commentary to the 1988 Revisions of 28 U.S.C. § 1446(b) shows that [C]ongress knew when it passed the one year bar on removal that some plaintiffs would attempt to defeat diversity by fraudulently (and temporarily) joining a non-diverse party. In that case, as long as there is some possibility that a non-diverse joined party could be liable in the action, there is no federal jurisdiction. But, under section 1446(b), if, after one year, the plaintiff dismisses the non-diverse defendant, the [remaining] defendant cannot remove. So, a plaintiff could defeat jurisdiction by joining a non-diverse party and dismissing him after the deadline. Congress has

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> the court. His signature is a "certificate by him that he has read the [submission]; [and] that to the best of his knowledge, information and belief, there is good ground to support it . . . ." The rule also states that "[f]or a willful violation of this rule an attorney may be subjected to appropriate disciplinary action."

Id. n.5.

144. *De Aguilar*, 47 F.3d at 1411 (quoting dissenting opinion in Kliebert v. Upjohn Co., 915 F.2d 142, 149 (5th Cir. 1990) (Jolly, J., dissenting), *vacated for rehearing en banc*, 923 F.2d 47 (5th Cir.), *appeal dismissed*, 947 F.2d 736 (5th Cir. 1991)).

145. *Id.* (citations omitted).

146. *Burns*, 31 F.3d at 1095 n.4.

recognized and accepted that, in some circumstances, plaintiff can and will intentionally avoid federal jurisdiction.[147]

The Eleventh Circuit stated that a lesser standard, such as the legal certainty test, would unacceptably broaden federal jurisdiction because it would allow removal "anytime a plaintiff sued for less than the jurisdictional amount but there remained even a possibility that she would amend her claim or be awarded more than she pleaded . . . ."[148] The mere fact that the plaintiff "could" recover more, given the power of the court to award more than what was requested in the complaint, "is not enough to prove jurisdiction in the face of plaintiff's specific pleading."[149]

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147. *Id.* at 1097 n.12. This statement requires some clarification. In explaining the new one-year limit on removing diversity actions, the House Report acknowledged that the change would result in "a modest curtailment in access to diversity jurisdiction." H.R. REP. NO. 889, 100th Congress, 2d Sess., at 72 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5982, 6032-33. The report suggested that the change was necessary, however, because the current system allowed removal whenever non-diverse parties were eliminated in the state proceeding—notwithstanding the fact that substantial progress had been made in the state court and that a removal late in the game would result in considerable delay and disruption. To illustrate the problem, the report stated that "[s]ettlement with a diversity-destroying defendant on the eve of trial, for example, may permit the remaining defendants to remove."

The Commentary cited by *Burns* discussed a very different scenario—one in which a plaintiff, as a matter of strategy, joins a nondiverse defendant "whom the plaintiff does not really intend to sue but who is arguably liable on the claim and hence properly joined under state law. The plaintiff can then just wait a year and drop that party, polishing the action to just the point desired and at the same time dissolving the threat of federal jurisdiction." David D. Siegel, *Commentary on 1988 Revision of Section 1446*, 28 U.S.C.A. § 1446, at 316-17 (1994). The Commentary then concluded: "The one-year cutoff therefore has an anti-diversity ring to it. Congress acknowledged this, but called it a 'modest curtailment.'" *Id.* at 317.

In short, it was the Commentary—and not necessarily Congress—that acknowledged the potential for "tactical chicanery" under the new one-year cutoff. The House report merely acknowledged the fact that the new one-year limit would modestly curtail access to diversity jurisdiction. Thus, the Eleventh Circuit goes too far in suggesting that Congress "knew when it passed the one year ban on removal that some plaintiffs would attempt to defeat diversity by fraudulently . . . joining a non-diverse party."

148. Burns v. Windsor Ins. Co., 31 F.3d at 1092, 1096-97 (11th Cir. 1994).

149. *Id.* at 1097. A federal district court recently expounded on this argument, observing that when a plaintiff expressly seeks damages that are less than the federal minimum, the defendant cannot force the plaintiff to take more. *In re* Amino Acid Lysine Antitrust Litig., 918 F. Supp. 1181, 1185-86 (N.D. Ill. 1996). Thus, if the plaintiff's complaint states that "neither plaintiff nor any other member of the class seeks damages exceeding [$50,000]," that provision must be read "as unequivocally committing [the plaintiff] and each other class member to the collection of no more than

This argument, which was echoed by the Fifth Circuit,[150] misconstrues the inquiry required under the legal certainty test as requiring only a "possibility" that the plaintiff will recover in excess of the federal minimum. To the contrary, as discussed above, the legal certainty test requires the party invoking the court's jurisdiction to demonstrate a reasonable expectation that the plaintiff can recover in excess of the federal jurisdictional minimum. The federal court does not defer to the party's allegation of the amount in controversy but, instead, considers whether a reasonable jury could enter a judgment on the plaintiff's claim in an amount exceeding the federal minimum—or, conversely, whether a judgment in that amount would be set aside as being excessive.[151]

As explained above, this standard reflects the special circumstance presented by cases in which the precise measure of damages is not fixed by law but instead left to the discretion of the fact finder. Thus, when the plaintiff alleged that his or her damages exceeded the federal minimum, the courts deferred to that amount unless it was clear that the estimate was beyond a reasonable expectation. This same policy should apply to a defendant's allegation that the amount in controversy exceeds the federal threshold. If the jury could legally return a verdict in excess of the federal minimum, then the defendant has met his or her burden of demonstrating that the amount in controversy is sufficient to trigger the federal court's jurisdiction.

Obviously a plaintiff should be able to remain in state court if the plaintiff is willing to forego recovery in excess of $75,000 through a binding stipulation or other procedural mechanism.[152] In that case, the amount in controversy clearly is less than the federal minimum. But if the plaintiff merely pleads a specific amount that falls below the federal minimum and is not legally limited to that amount, the defendant should be allowed to establish that his ultimate

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$50,000. *Burns* . . . teaches that the possibility of a plaintiff's change of heart in the future does not affect today's duty to remand." *Id.* at 1186. In short, in this court's view, the propriety of removal depends upon what the plaintiff has specifically requested—and not whether the plaintiff has the ability to amend the complaint at a later date to request a greater sum or whether a court could award more than the plaintiff requested.

150. *See supra* note 42 and accompanying text.

151. This standard cuts both ways. As the Seventh Circuit recently observed when reviewing a plaintiff's demand in a diversity action: "It does not follow that the court must accept the plaintiff's perspective and proceed to adjudicate on the merits every case in which the lawyers can keep straight faces when making their presentations." Anthony v. Security Pac. Fin. Serv., Inc., 75 F.3d 311, 318 (7th Cir. 1996). Thus, regardless of whether the plaintiff or defendant has brought the case to federal court, the court has the duty to inquire into the reasonableness of the party's claim that the amount in controversy exceeds the federal minimum.

152. *See infra* notes 200-16 and accompanying text.

exposure in the case—and, hence, the amount in controversy—is greater than the federal minimum.

Various other arguments have been offered as to why the defendant should be held to a higher standard in removal cases involving indeterminate or lowball complaints, but none is persuasive. The Eleventh Circuit, for example, contends that the defendant's right to remove is not on equal footing with plaintiff's right to choose his forum.[153] "[U]nlike the rules applied when plaintiff has filed suit in federal court with a claim that, on its face, satisfies the jurisdictional amount, removal statutes are construed narrowly; where plaintiff and defendant clash about jurisdiction, uncertainties are resolved in favor of remand."[154] This statement, however, is based on a misconception about the level of review required of diversity cases.

Certainly, removal statutes are to be construed narrowly.[155] At the heart of this rule is a sound respect for the principles of federalism—*i.e.*, a "[c]oncern about encroaching on a state court's right to decide cases properly before it . . . ."[156] Thus, where there is any doubt as to federal jurisdiction, the courts have held that such doubt should be construed in favor of remanding the case to the state court.[157]

What the Eleventh Circuit overlooks is the fact that the statute providing for original jurisdiction in diversity cases is subject to strict construction for the same reasons.[158] As the Supreme Court explained in an original jurisdiction

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153. *Burns*, 31 F.3d at 1095.

154. *Id.*

155. *See, e.g.*, Leffall v. Dallas Indep. Sch. Dist., 28 F.3d 521, 524 (5th Cir. 1994).

156. Cole v. Great Atl. & Pac. Tea Co., 728 F. Supp. 1305, 1307 (E.D. Ky. 1990).

> It must always be borne in mind that a federal court is a court of limited jurisdiction and can only entertain those actions which fall squarely within its jurisdiction as that jurisdiction is stated by the act or acts of Congress in conformity to the Judiciary Articles of the Constitution. This court has a responsibility to accept jurisdiction in all proper cases. It has a greater obligation to protect the jurisdiction of the State court, both by reason of comity to that court and fairness to litigants who have chosen it as a forum.

Id. (quoting Walsh v. American Airlines, Inc., 264 F. Supp. 514, 515 (E.D. Ky. 1967)).

157. *Id.*; Doe v. Allied-Signal, Inc. 985 F.2d 908, 911 (7th Cir. 1993) ("Courts should interpret the removal statute narrowly and presume that the plaintiff may choose his or her forum. Any doubt regarding jurisdiction should be resolved in favor of the states . . . ."); Abels v. State Farm Fire & Cas. Co., 770 F.2d 26, 29 (3d Cir. 1985) ("Because lack of jurisdiction would make any decree in the case void and the continuation of the litigation in federal court futile, the removal statute should be strictly construed and all doubts should be resolved in favor of remand.").

158. *See* Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 108 (1941) ("[T]he policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation."); Indianapolis v. Chase Nat'l

diversity case: "The policy of the statute conferring diversity jurisdiction upon the district courts calls for its strict construction.... Accordingly, if a plaintiff's allegations of jurisdictional facts are challenged by the defendant, the plaintiff bears the burden of supporting the allegations by competent proof."[159]

Moreover, although removal statutes are subject to narrow construction, several courts have noted that "there is a countervailing concern that dictates that a federal court 'be cautious about remand, lest it erroneously deprive defendant of the right to a federal forum.'"[160] Thus, if the defendant can sufficiently

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Bank, 314 U.S. 63, 76 (1941) (strict construction required because "[t]he dominant note in the successive enactments of Congress relating to diversity jurisdiction is one of jealous restriction, of avoiding offense to state sensitiveness, and of relieving the federal courts of the overwhelming burden of 'business that intrinsically belongs to the state courts' in order to keep them free for their distinctive federal business"); Healy v. Ratta, 292 U.S. 263, 270 (1934) ("policy of the statute calls for its strict construction"); Packard v. Provident Nat'l Bank, 994 F.2d 1039, 1044-45 (3d Cir. 1993) (diversity statute "must be narrowly construed so as not to frustrate the congressional purpose behind it: to keep the diversity caseload of the federal courts under some modicum of control"); Crowley v. Glaze, 710 F.2d 676, 678 (10th Cir.1983) ("Statutes conferring diversity jurisdiction are to be strictly construed."); Kantor v. Wellesley Galleries, Ltd., 704 F.2d 1088, 1092 (9th Cir. 1983) (congressional grant of diversity jurisdiction is to be strictly construed).

The Supreme Court's explanation of this policy demonstrates that it applies equally to diversity cases and removal cases:

> From the beginning suits between citizens of different states, or involving federal questions, could neither be brought in the federal courts nor removed to them, unless the value of the matter in controversy was more than a specified amount. Cases involving lesser amounts have been left to be dealt with exclusively by state courts, except that judgment of the highest court of a state adjudicating a federal right may be reviewed by this court. Pursuant to this policy the jurisdiction of federal courts of first instance has been narrowed by successive acts of Congress, which have progressively increased the jurisdictional amount. The policy of the statute calls for its strict construction. The power reserved to the states, under the Constitution (Amendment 10), to provide for the determination of controversies in their courts, may be restricted only by the action of Congress in conformity to the judiciary sections of the Constitution (article 3).... Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.

Healy, 292 U.S. at 269-70 (citations and footnote omitted).

159. Thomson v. Gaskill, 315 U.S. 442, 446 (1942).

160. Bolling v. Union Nat'l Life Ins. Co., 900 F. Supp. 400, 405 (M.D. Ala. 1995) (quoting 14A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE 218-19 (2d ed. 1985)). Indeed, district courts should exercise even greater care in ruling on a motion to remand a removal case because such rulings are not subject to federal appellate review. *See supra* notes 55-58 and accompanying text; 28 U.S.C. § 1447(d)

demonstrate that the amount in controversy exceeds the federal minimum, the case should remain in federal court notwithstanding the plaintiff's express claim for a smaller sum. "There is no reason to value the plaintiff's right to select a state court forum as a more worthy consideration than the nonresident defendant's statutory right to seek an impartial tribunal."[161] Indeed, that would be contrary to the very purpose of the removal statute.

Other courts have suggested that a different standard should be applied in a removal case because of concerns about expanding federal diversity jurisdiction. The Sixth Circuit, for example, acknowledged that defendants have a statutorily created right to remove an action to federal court to avoid the local prejudices of state courts.[162] At the same time, however, the court noted that Congress has indicated a desire to limit access to federal courts in diversity cases by imposing, and periodically increasing, the amount in controversy requirement.[163] "Thus, by statute, Congress has offered defendants a relatively neutral forum and has policed the diversity jurisdiction of the federal court system, balancing the interests at play in the legislation it passes."[164] The court ultimately concluded that the preponderance of evidence test best accommodated those two interests.

(1994).

161. Kliebert v. Upjohn Co., 915 F.2d 142, 148-49 (5th Cir. 1990) (Jolly, J. dissenting); *see also* DeAguilar v. Boeing Co., 47 F.3d 1404, 1411 (5th Cir. 1995) ("This court has spoken adamantly of 'preventing the plaintiff from being able to destroy the jurisdictional choice that Congress intended to afford a defendant in the removal statute.'").

162. Gafford v. General Elec. Co., 997 F.2d 150, 158-59 (6th Cir. 1993).

163. *Id.*

164. *Id.*

What this argument overlooks is the applicability of the amount in controversy requirement to *all* types of diversity cases, not just those removed from state court. It affects plaintiffs who file their actions directly in federal court as well as defendants who seek to remove a state-filed complaint.[165] The Sixth Circuit gave no reason why the desire to restrict diversity cases would require a different standard for defendants than that applied to plaintiffs. Rather, the court's decision seems to rest solely upon the argument that the legal certainty test is appropriate only when the plaintiff has given a specific damage figure in the complaint, thus triggering the presumption that the plaintiff's estimate is correct. This rationale should be rejected for the reasons stated above.[166]

In sum, there is no persuasive reason why the courts should apply a stricter standard to the defendant's estimate of damages in a removal case than the court would apply to the plaintiff's estimate of damages in a complaint filed directly in federal court. To the contrary, the language of the diversity and removal statutes puts defendants and plaintiffs on equal footing with respect to the right to be heard in federal court. Thus, in any type of diversity case or removal case based upon diversity, the courts should require the same standard for establishing jurisdiction: the party invoking the court's jurisdiction should bear the burden of establishing (1) that it is not *legally* impossible for the plaintiff to recover in excess of the jurisdictional amount—*i.e.*, that the plaintiff's cause of action does not limit recovery to a fixed amount below the federal minimum; and (2) that in cases where the amount of damages is not limited by the cause of action, it is not *factually* impossible for the plaintiff to recover such an amount—*i.e.*, that the amount is not beyond a reasonable expectation of recovery. To make this "reasonable expectation" determination, the court must consider whether a jury could reasonably enter a verdict in excess of the federal minimum based upon the facts alleged in the complaint or, conversely, whether such an award would be set aside as excessive under the applicable state standard.

III. PROCEDURAL ISSUES UNDER THE CURRENT STATUTORY SCHEME

Aside from the confusion surrounding the proper standard to be applied in the jurisdictional inquiry, the mismatch between state pleading rules and federal jurisdictional requirements also presents awkward procedural problems. One of the first issues that a defendant may encounter relates to the proper timing of the notice of removal. Once that hurdle is cleared, the court must decide what procedural mechanisms it will employ to determine whether the defendant has

165. *See supra* notes 48-59 and accompanying text.

166. *See supra* notes 127-31 and accompanying text.

established the requisite amount in controversy. These procedural issues and the varying judicial responses to them are described below, with a proposed statutory remedy suggested in Part IV.

A. Timing of the Notice of Removal

Section 1446(b) of the removal statute provides that the notice of removal generally must be filed within thirty days after the defendant receives the complaint or summons in the state court action.[167] However, the statute also provides that

> [i]f the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of [diversity] jurisdiction . . . more than 1 year after commencement of the action.[168]

These provisions present a procedural quandary for defendants served with indeterminate and lowball complaints. If the plaintiff has failed to allege a specific amount of damages in the complaint (or has alleged damages that are less than $75,000 but the defendant believes the amount is greater than that sum), the defendant must decide whether to immediately file a notice of removal based upon the defendant's own assessment that the amount in controversy exceeds the federal jurisdictional requirement or whether it would be preferable to wait until a later pleading or document establishes the amount in controversy.

Each course of action poses significant risks—a "Hobson's choice," as one court described it.[169] If the defense attorney waits until the amount in controversy can be verified, there is a risk that plaintiff's counsel may claim defendant's noncompliance with the thirty-day timetable prescribed for removal by section 1446(b).[170] On the other hand, filing a prompt notice of removal

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167. 28 U.S.C. § 1446(b) (1994) ("The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.").

168. *Id.*

169. Foster v. Mutual Fire, Marine & Inland Ins. Co., 986 F.2d 48, 53 (3d Cir. 1993).

170. *Id.* at 52-53 ("On the one hand, if defendants wait until the receipt of a

creates a risk that a court will find the removal premature because federal jurisdiction has not yet been established.[171]

Some courts have relied upon the second part of section 1446(b) to hold that when the plaintiff's prayer for relief is ambiguous, the defendant is not required to file a notice of removal immediately but, instead, may try to clarify the plaintiff's demand through interrogatories or receiving some other "paper" indicating the amount in controversy.[172] In rejecting the plaintiff's argument that the thirty-day removal period was triggered by the filing of the complaint itself, the Fifth Circuit stated that the removal clock begins to run "from the defendant's receipt of the initial pleading only when that pleading affirmatively reveals on its face that the plaintiff is seeking damages in excess of the minimum jurisdictional amount of the federal court."[173]

Not all courts agree, however. Some have held that the thirty-day clock begins to run from receipt of the initial pleading if it is fairly apparent from the complaint itself—or could be determined with due diligence—that the amount in controversy exceeds the federal jurisdictional minimum.[174] "Because state courts

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complaint, they risk a federal court finding they had actual knowledge of removability or diversity prior to receiving the complaint, thus rendering their notice time barred.").

171. *Id.* at 53 ("On the other hand, if defendants rely on what they actually know and remove prior to receiving a complaint or other formal court document, they risk plaintiffs' filing a motion to quash removal as premature. Thus, defendants have at best a Hobson's choice.").

172. Chapman v. Powermatic, Inc., 969 F.2d 160, 161 (5th Cir. 1992), *cert. denied*, 507 U.S. 967 (1993); *see also* Rowe v. Marder, 750 F. Supp. 718, 721 (W.D. Pa. 1990) (holding that initial pleading did not begin thirty-day removal period because it did not allege a specific amount of damages—even though the defendant probably knew that the damages would exceed the federal minimum), *aff'd*, 935 F.2d 1282 (3d Cir. 1991); Rollwitz v. Burlington N. R.R., 507 F. Supp. 582, 586 (D. Mont. 1981) (collecting cases in which courts have "found that the running of the time period for seeking removal began only when it could be ascertained from 'other papers' that the requisite amount was in controversy").

173. *Chapman*, 969 F.2d at 163.

174. McCraw v. Lyons, 863 F. Supp. 430, 433-34 (W.D. Ky. 1994) (holding that plaintiff's request for damages for personal injury, medical expenses, mental suffering, emotional distress and punitive damages and costs "should have alerted Defendant that Plaintiff was seeking an amount in excess of the $50,000 required to attain federal court jurisdiction"); Marler v. Amoco Oil Co., 793 F. Supp. 656, 659 (E.D.N.C. 1992) (finding that complaint, as well as plaintiffs' pre-litigation demand letters describing their damages in detail, "provided defendant the necessary information with which to research and ascertain that more than $50,000 was in controversy"); Knudsen v. Samuels, 715 F. Supp. 1505, 1507 (D. Kan. 1989) (holding that removal time period was triggered by complaint, which clearly stated that the dispute involved a contract for the purchase of items valued at $124,000); Turner v. Wilson Foods Corp., 711 F. Supp. 624, 626 (N.D. Ga. 1989) (holding that even though initial pleading did not specify the amount of

are well-equipped to handle diversity cases, there is no reason to allow a defendant additional time [to file the removal notice] if the presence of grounds for removal is unambiguous given the defendant's knowledge and the claims made in the initial complaint."[175] In other words, these courts take the position that the plaintiff's answers to interrogatories would not be a "paper from which it may *first* be ascertained" that the case is removable because the complaint itself provides such information.

Based upon this logic, some courts have held that the defendant has a duty "to assess and ascertain the amount in controversy within the 30-day time limit for removal."[176] That deadline may be impossible to meet, however, under the discovery rules of many states. Even if a defendant immediately were to serve interrogatories or requests to admit upon the plaintiff, many states give the opposing party thirty days or more in which to answer interrogatories.[177] The defendant, therefore, either must hope that the plaintiff will respond well before the ordinary deadline or, in the alternative, must seek a court order to shorten the time period.

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damages, it put defendant on notice of an amount exceeding the federal jurisdiction requisite because it alleged severe burns, permanent scarring, pain and suffering, and lifelong medical expenses); Richman v. Zimmer, Inc., 644 F. Supp. 540, 542 (S.D. Fla. 1986) (holding that defendant should have known action was removable based upon initial complaint alleging serious personal injuries); Mielke v. Allstate Ins. Co., 472 F. Supp. 851, 853 (E.D. Mich. 1979) (holding that defendant insurance company should have known that initial complaint was removable because plaintiff had previously presented the insurance company with medical bills that totaled more than the $10,000 jurisdictional minimum).

175. *McCraw*, 863 F. Supp. at 434; *see also Mielke*, 472 F. Supp. at 853 ("When the defendant should clearly ascertain from the circumstances and the original complaint that the case is removable, the defendant must remove, if at all, within 30 days of receipt of that complaint."); *cf.* Sanborn Plastics Corp. v. St. Paul Fire & Marine Ins. Co., 753 F. Supp. 660, 663 (N.D. Ohio 1990) (adopting reasonably qualified attorney standard—*i.e.*, removal required within the initial thirty-day period if any reasonably qualified attorney would or should know from the pleadings that the potential amount exceeds $50,000).

176. *Marler*, 793 F. Supp. at 659.

177. Alabama's rule on interrogatories is illustrative of the majority of the states. It provides that "[t]he party upon whom the interrogatories have been served shall serve a copy of the answers, and the objections if any, within thirty (30) days after the service of the interrogatories, except that the defendant may serve answers or objections within forty-five (45) days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time." ALA. R. CIV. P. 33(a). A handful of states allow an even greater period of time. *See, e.g.*, ALASKA R. CIV. P. 33(a) (requiring answers to interrogatories to be served within 40 days); ARIZ. R. CIV. P. 33(a) (40 days); MASS. R. CIV. P. 33(a) (45 days); R.I. R. CIV. P. 33(a) (40 days).

Even if a court were to find that the case first becomes removable when the plaintiff's answers to pre-removal interrogatories specify a dollar figure in excess of $75,000, the defendant still must meet the one-year deadline in section 1446(b).[178] This requirement can put the defendant's right to remove at the mercy of a dilatory or unscrupulous plaintiff. In *Perhats Associates, Inc. v. Fasco Industries*,[179] for example, defendant's counsel had served a request for admissions on the plaintiffs "but each plaintiff responded . . . after the one-year bar date was already past—by hedging."[180] The defendant, therefore, lost the opportunity to remove even though the delay was caused by the plaintiffs.[181] A defendant would suffer the same fate if the plaintiff deliberately failed to respond to interrogatory requests until after the one-year period expired,[182] or if the plaintiff initially answered the interrogatory by indicating that the lawsuit sought an amount less than $75,000 but later amended or supplemented the answer after the one-year deadline to indicate a higher amount.

Because of these pitfalls in the removal process, one district court has suggested that a defendant exercise an abundance of caution by filing a prompt notice of removal upon receipt of an indeterminate complaint.[183] In the worst-

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178. *See supra* text accompanying note 168. Congress enacted the one-year limit on removal in 1988, at the same time that it increased the amount in controversy requirement from $10,000 to $50,000. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 1016(b) (2), 102 Stat. 4642, 4669 (1988). Congress acknowledged that the one-year limit was a "modest curtailment" in a defendant's removal rights, but concluded that the cut-off was necessary to "[reduce] the opportunity for removal after substantial progress has been made in state court." H.R. REP. NO. 889, 100th Cong., 2d Sess., at 72 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5982, 6032 (1988). More specifically, the House report suggests that the one-year limit was an attempt to address the problems that arise when a diversity-destroying defendant is dismissed late in the state court proceedings, thereby creating the opportunity for removal to federal court. The report stated that removal that late in the proceedings "may result in substantial delay and disruption." *Id.*

179. 843 F. Supp. 424, 427 (N.D. Ill. 1994).

180. *Id.* at 427 n.5

181. *Id.* at 427.

182. *See* Vail v. Orkin Exterminating Co., No. 91-C-3053, 1991 WL 134275, at *2 (N.D. Ill. July 12, 1991) (stating that the court "is troubled by the evasion exhibited by the plaintiff's attorney, who has repeatedly refused to estimate the damages his client has suffered and will suffer in the future").

183. McGraw v. Lyons, 863 F. Supp. 430, 433 n.8 (W.D. Ky 1994); *see also* Charles A. Carlson, *Removal to Federal Court on the Basis of Diversity Jurisdiction: The "Amount in Controversy" Controversy*, FLA. B.J., October 1995, at 77, 80 (encouraging defendants to "proceed under the safest course of action," which is to remove promptly "if the defendant in good faith believes that the complaint suggest that the amount in controversy exceeds [the federal minimum]").

case scenario, the action would be remanded but the defendant still would have a second window of opportunity to remove if the plaintiff later made the damages clear.[184] The court acknowledged that this strategy arguably might create a conflict with the defendant's responsibilities under Rule 11 of the Federal Rules of Civil Procedure, which prohibits attorneys from filing any pleadings or other documents without a good faith belief that they are warranted under the law and the facts of the case.[185] The court suggested, however, that defendants who harbor any doubts about whether they have the evidentiary support to establish jurisdiction upon removal can protect themselves either by (1) propounding interrogatories to the plaintiff at the same time that the petition for removal is filed, or (2) if a remand motion is filed, asking the federal court

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184. *McCraw*, 863 F. Supp. at 433 n.8. This second bite at the apple is still subject to § 1446(b)'s one-year limit on removals, however. In an analogous situation, the federal district court declined to speculate whether the defendant would be able to remove the case if, upon remand, the state court were to subsequently dismiss two nondiverse defendants whose presence in the suit deprived the federal court of jurisdiction. Beritiech v. Metropolitan Life Ins. Co., 881 F. Supp. 557, 562 (S.D. Ala. 1995).

> The court appreciates that some of the year which Metropolitan Life has to remove this action under 28 U.S.C. § 1446(b) has passed while this court ruled on the motions to remand, but that appears to be the risk defendants incur in removing diversity-based actions and then attempting in federal court to get rid of nondiverse defendants, rather than moving to dismiss such defendants in state court and removing the actions if the state court dismisses the nondiverse defendants.

Id. at 562 n.6.

185. Rule 11 provides that "[e]very pleading, written motion, and other paper shall be signed by at least one attorney of record . . . ." By presenting the document to the court:

> an attorney . . . is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,—
> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
> (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

FED. R. CIV. P. 11(b).

to delay its decision until limited discovery can be completed.[186] "Defense counsel who make a good-faith attempt to show that the plaintiff's claims meet the federal jurisdictional threshold will rarely subject themselves to sanctions."[187]

A number of defendants have opted for the early-removal approach, filing their notice of removal within thirty days after being served with the plaintiff's complaint and stating "a good faith belief" that the complaint seeks in excess of the federal minimum. The dilemma then shifts to the federal courts to reconcile the state-pleaded complaint with the federal jurisdictional requirements. Their response has been varied, as illustrated in the following Section.

B. Procedural Mechanisms for Reviewing the Amount in Controversy

Although a handful of early decisions suggested that the plaintiff's failure to specify damages in a state-pleaded complaint precludes the defendant from removing the case to federal court (or, at the very least, would suggest that removal is premature until the plaintiff has filed some other paper or pleading that reveals a sufficient amount in controversy),[188] the vast majority of courts

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186. *McCraw*, 863 F. Supp. at 435.

187. *Id.*

188. *See, e.g.*, Gaitor v. Peninsular & Occidental Steamship Co., 287 F.2d 252, 254-55 (5th Cir. 1961); Bonnell v. Seaboard Air Line R.R. Co., 202 F. Supp. 53, 54 (N.D. Fla. 1962); *cf.* Rollwitz v. Burlington N. R.R., 507 F. Supp. 582 (D. Mont. 1981). *But see* Robinson v. Quality Ins. Co., 633 F. Supp. 572, 575-76 (S.D. Ala. 1986) (criticizing the *Gaitor-Bonnell-Rollwitz* analysis). This view, which requires the court to summarily remand the action back to state court, stems primarily from *St. Paul Mercury*'s statement that "the sum claimed by the plaintiff controls if the claim is apparently made in good faith." St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. at 283, 288 (1938). Thus, as one court stated in dictum, "[t]he jurisdictional amount is that amount which is claimed by the plaintiff in his complaint and not that which is alleged in the defendant's petition for removal." *Bonnell*, 202 F. Supp. at 54 (citing *Gaitor*, 287 F.2d at 255).

> This is not to say that a defendant seeking to remove in a proper diversity case is to be denied access to federal court merely because the complaint against him is couched in nebulous mathematical phraseology, but, in such case, as here, the key to the door is an affirmative showing by he who seeks entry of all the requisite factors of diversity jurisdiction, including amount in controversy, at the time removal is attempted. The complaint, as here, may not be sufficient itself to make such showing, but removal may still be had "within twenty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper, from which it may first be ascertained that the case is one which is, or has become removable."

have extended the jurisdictional inquiry beyond the face of the plaintiff's complaint.[189] In justifying a broader scope of review, these courts have voiced a concern for fairness—*i.e.*, that limiting the jurisdictional review to the damages pled in the plaintiff's complaint "would permit a plaintiff to defeat the defendant's right to a federal forum simply by omitting a specific ad damnum . . . ."[190] Moreover, one court has suggested that federal courts "have not only the authority, but the duty to independently determine the propriety of jurisdiction."[191]

Several different procedural mechanisms have been used to review jurisdiction following removal of cases involving indeterminate or lowball complaints, with varying degrees of success. The following Subsections examine the four main viewpoints.

1. Taking Defendant's Jurisdictional Allegations at Face Value

When the amount in controversy is not expressly set forth in the plaintiff's state-pleaded complaint (or the complaint states an amount less than the federal jurisdictional threshold but the defendant believes that the plaintiff may be entitled to a greater sum), the defendant must fill in the gap by including such

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Gaitor, 287 F.2d at 255 (quoting 28 U.S.C. § 1446(b)).

189. *See, e.g.*, Chase v. Shop 'N Save Warehouse Foods, Inc., 110 F.3d 424, 427-28 (7th Cir. 1997) (where plaintiff's complaint states only that the amount in controversy is "in excess of $15,000," the district court "may look outside the pleadings to other evidence of jurisdictional amount in the record").

190. Bolling v. Union Nat'l Life Ins. Co., 900 F. Supp. 400, 405 (M.D. Ala. 1995); *see also* Steele v. Underwriters Adjusting Co., 649 F. Supp. 1414, 1416 (M.D. Ala. 1986) ("The Plaintiff should not be allowed to rob [the defendant] of its right to remove by demanding such damages as may be 'fairly ascertained by the jury'. Permitting such practice allows the Plaintiff to 'have his cake and eat it too' [because] the Plaintiff effectively prevents federal jurisdiction by failing to demand a specific monetary figure, while making it possible for the jury to return a verdict well in excess" of the federal jurisdictional amount.).

191. Robinson v. Quality Ins. Co., 633 F. Supp. 572, 575 (S.D. Ala. 1986); *cf.* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821) (federal courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not"); Quackenbush v. Allstate Ins. Co., 116 S. Ct. 1712, 1720-21 (1996) (noting that federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress but that the duty is not absolute; "federal courts may decline to exercise their jurisdiction, in otherwise 'exceptional circumstances,' where denying a federal forum would clearly serve an important countervailing interest, . . . for example where abstention is warranted by considerations of 'proper constitutional adjudication,' 'regard for federal-state relations,' or 'wise judicial administration'") (quoting Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976)).

allegations in the notice of removal.[192] The courts disagree, however, as to how detailed those allegations must be.[193]

In conducting a jurisdictional inquiry, some courts simply have taken the allegations in the defendant's notice of removal at face value.[194] This inquiry has been found inadequate, however, for several reasons. First, some opinions have suggested that courts cannot give great weight to the defendant's bald statement of the amount in controversy because many defendants are ill-situated to assess damages at the time the notice of removal is filed[195]—unless "crucial facts supporting jurisdiction are known to the defendant," such as in suits for injunctive or declaratory relief.[196]

Secondly, because the amount in controversy is a jurisdictional issue, it cannot be waived by the plaintiff but, rather, is subject to challenge at any point in the lawsuit (including an appeal).[197] Therefore, even if the plaintiff has not

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192. 28 U.S.C. § 1446(a) (1994) (requiring notice of removal to include a "short and plain statement of the grounds for removal"); *see* Laughlin v. Kmart Corp., 50 F.3d 871, 873 (10th Cir.), *cert. denied*, 116 S. Ct. 174 (1995) ("Both the requisite amount in controversy and the existence of diversity must be affirmatively established on the face of either the [complaint] or the removal notice.").

193. Prior to 1988, § 1446(a) had required the removal notice to include a "short and plain statement of the facts" upon which jurisdiction rested if those facts were not present in the pleadings. The 1988 amendments to the statute, however, changed the requirement to a "short and plain statement of the grounds for removal . . . ." Several courts have recognized, therefore, that the current version requires the equivalent of notice pleading—*i.e.*, that the defendant can simply provide a blanket allegation that more than $75,000 is in controversy. *See, e.g.*, Cole v. Great Atl. & Pac. Tea Co., 728 F. Supp. 1305, 1308 n.1 (E.D. Ky. 1990) ("By requiring a 'short and plain statement of the grounds for removal' rather than the 'facts' justifying removal, Congress sought to eliminate the possibility that 28 U.S.C. § 1446(a) might require fact pleading in petitions for removal."); *accord* Simpson v. Wal-Mart Stores, Inc., 889 F. Supp. 489, 491 (M.D. Ga. 1994).

Notwithstanding the 1988 amendment, however, several courts have held that the defendant must provide more than a conclusory allegation that the jurisdictional requirement has been met. Thus, they have required the notice of removal to affirmatively allege the underlying *facts* that support the jurisdictional claim. *See, e.g.*, *Laughlin*, 50 F.3d at 873 ("The burden is on the party requesting removal to set forth, in the notice of removal itself, the 'underlying facts supporting [the] assertion that the amount in controversy exceeds [$75,000].'"); Herber v. Wal-Mart Stores, 886 F. Supp. 19, 20 (D. Wyo. 1995) (remanding case because defendant's notice of removal failed to allege underlying facts to support jurisdiction).

194. *See, e.g.*, ANPAC v. Dow Quimica de Colombia, S.A., 988 F.2d 559, 565 n.8 (5th Cir. 1993), *cert. denied*, 510 U.S. 1041 (1994) (collecting cases).

195. Printworks, Inc. v. Dorn Co., 869 F. Supp. 436, 441 (E.D. La. 1994).

196. *ANPAC*, 988 F.2d at 566.

197. American Fire & Cas. Co. v. Finn, 341 U.S. 6, 16-18 (1951) (allowing

challenged the defendant's jurisdictional allegations in the notice of removal, a

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jurisdictional issue to be raised for the first time in appeal before the Supreme Court); *see also* 28 U.S.C. § 1447(c) (requiring a motion to remand to be filed within thirty days if the motion attacks a defect in the removal process, but providing for a remand at any time before final judgment is entered if it appears that the court lacks subject matter jurisdiction).

The Seventh Circuit's decision in *Shaw v. Dow Brands, Inc.*, 994 F.2d 364 (7th Cir. 1993), has been criticized as allowing a waiver in violation of this principle. In that case, the plaintiff's state-filed complaint did not specify damages other than to state that they were "in excess of $15,000." *Id.* at 366. The defendant's removal petition, however, stated a good faith belief that the amount in controversy exceeded $50,000. *Id.* The plaintiff did not object to this allegation either in the district court or in its initial pleadings on appeal; to the contrary, the jurisdictional statement in plaintiff's opening brief to the Seventh Circuit alleged that the amount in controversy exceeded $50,000. *Id.* It was only after the court itself began questioning the parties during oral argument that the plaintiff's counsel "took up the jurisdictional issue with a vengeance," claiming that his client's damages were less than $50,000. *Id.*

The court ultimately held that the jurisdictional amount was satisfied because the plaintiff "has already conceded that his claim is worth more than $50,000: by not contesting removal when the motion was originally made, and by jurisdictional statements to this Court in his first brief." *Id.* at 367-68. Although counsel subsequently argued that the claim was worth less than $50,000, that lawyer had "also signed the brief that assured us jurisdiction was intact; it is indeed a wonder that he shouldn't be subject to sanctions for swearing one thing in one brief and then swearing the opposite thing in a subsequent affidavit after it became clear that telling a new story might benefit his client." *Id.* at 368.

The Tenth Circuit criticized the *Shaw* decision, stating that "[w]e do not agree . . . that jurisdiction can be 'conceded.'" Laughlin v. Kmart Corp., 50 F.3d 871, 874 (10th Cir. 1995); *cf.* United Food & Commercial Workers Union, Local 919 v. Centermark Properties Meriden Square, Inc., 30 F.3d 298 (2d Cir. 1994) (distinguishing its case from *Shaw* on factual grounds and, therefore, declining to speculate whether it would follow *Shaw*'s "waiver approach"). However, the *Shaw* decision was not based upon a waiver of *jurisdiction*; rather, the Seventh Circuit concluded that plaintiff's counsel had conceded the existence of a particular fact that was a prerequisite to exercising jurisdiction.

As the Seventh Circuit explained, this is much like the plaintiff who alleges a specific sum in the complaint but attempts to amend the complaint after removal to seek a lower amount:

> If we were to permit Shaw to get away with this, we would be allowing him to manipulate defendants in the very manner that is prohibited by the rule in *St. Paul*: once removal is perfected, the plaintiff cannot suddenly decide that, after all, the amount in controversy is less than the jurisdictional amount so that the case must go shuttling back to state court.

Shaw, 994 F.2d at 368; *cf.* Prizevoits v. Indiana Bell Tel. Co., 76 F.3d 132, 134 (7th Cir. 1996) (citing *Shaw* for the proposition that "a party's change of mind about whether a prerequisite to jurisdiction is present is not conclusive").

court still may insist that the defendant justify those allegations.[198] Indeed, a number of courts now conduct routine jurisdictional checks on newly filed cases to ensure that any jurisdictional problems are addressed before considerable time and resources are invested in the cases.[199]

2. Stipulations Regarding the Amount in Controversy

Some courts tried to put the ball back in the plaintiff's court to defeat jurisdiction after removal. Thus, if the plaintiff filed a motion to remand alleging that the amount in controversy was less than the federal minimum, these courts would grant the motion only if the plaintiff filed a stipulation or affidavit to that effect.[200] The plaintiff then would be bound by the stipulation upon remand and precluded from recovering in excess of that amount in the subsequent state court proceedings.[201]

This procedure is appealing because it allows the plaintiff to be master of the complaint—*i.e.*, to exercise his or her right to avoid federal court by deliberately seeking an amount less than the federal jurisdictional minimum. It also makes sense to require the plaintiff, as the party seeking recovery, to reveal the extent of his or her damages. There is considerable controversy, however, as to whether this procedure is appropriate.

The Seventh Circuit has rejected the use of post-removal stipulations,[202] concluding that they are inconsistent with the holding of *St. Paul Mercury*.[203] As the court pointed out, *St. Paul Mercury* held that jurisdiction depends upon the situation at the time of removal.[204] Therefore, once a case is properly removed,

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198. Gaus v. Miles, Inc., 980 F.2d 564, 566-67 (9th Cir. 1992).

199. *See* Tongkook Am., Inc. v. Shipton Sportswear Co., 14 F.3d 781, 784 (2d Cir. 1994) ("[W]ith mounting federal case loads, . . . it has become doubly important that the district courts take measures to discover those suits which [do not belong in a federal court] and to dismiss them when the court is convinced to a legal certainty that the plaintiff cannot recover an amount in excess of [the minimum statutory jurisdictional amount].") (quoting Deutsch v. Hewes St. Realty Corp., 359 F.2d 96, 98 (2d Cir. 1966)); Maki v. Keller Indus., 761 F. Supp. 66, 67 n.1 (N.D. Ill. 1991) (citing *Wisconsin Knife Works v. National Metal Crafters*, 781 F.2d 1280, 1282 (7th Cir. 1986), for the proposition that "[t]he first thing a federal judge should do when a complaint is filed is check to see that federal jurisdiction is properly alleged").

200. *See, e.g.*, Dennler v. Shell Oil Co., No. 91-916-WLB (S.D. Ill. July 21, 1992), attached as appendix to *In re* Shell Oil Co., 970 F.2d 355, 356 (7th Cir. 1992).

201. *Id.*

202. Chase v. Shop 'N Save Warehouse Foods, Inc., 110 F.3d 424, 429 (7th Cir. 1997); *In re Shell Oil Co.*, 970 F.2d at 356.

203. 303 U.S. 283, 292 (1938).

204. *In re Shell Oil Co.*, 970 F.2d at 356.

the plaintiff cannot obtain a remand by amending the complaint, nor can the plaintiff accomplish the same result by filing a post-removal affidavit or stipulation indicating that the damages are less than the federal jurisdictional amount.[205] As the court explained in a later decision: "It seems unfair to defendants if a plaintiff can simply wait to see if her case is removed and then, once it is, have it sent back to state court by agreeing to a stipulation that the amount in controversy will not surpass [the federal minimum]."[206]

The Seventh Circuit recognized a potential problem for plaintiffs who wished to avoid federal court but were prohibited by the state's pleading rules from pleading a specific sum in damages in the complaint. Nevertheless, the court held that a post-removal affidavit or stipulation was not the proper way for the plaintiff to avoid removal. Instead, the court stated, "[l]itigants who want to prevent removal must file a binding stipulation or affidavit *with their complaints*; once a defendant has removed the case, *St. Paul Mercury* makes later filings irrelevant."[207]

The Fifth Circuit, on the other hand, has held that post-removal stipulations may be considered in some cases.[208] The court recognized that under *St. Paul*

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205. *Id.*

206. Shaw v. Dow Brands, Inc., 994 F.2d 364, 367 (7th Cir. 1993).

207. *Chase*, 110 F.3d at 430 (emphasis added); *In re Shell Oil Co.*, 970 F.2d at 356. The key requirement, however, is that the affidavit or stipulation must be binding. Otherwise, the plaintiff would be in the same position as a plaintiff who has pled a specific sum lower than $75,000 but, under state pleading rules, is not limited to the amount set forth in the pleadings. As discussed earlier, several courts have held that such a case may be subject to removal notwithstanding the plaintiff's demand. *See supra* text accompanying notes 39-40.

In *De Aguilar v. Boeing Co.*, 47 F.3d 1404, 1413 (5th Cir.), *cert. denied*, 116 S. Ct. 180 (1995), an attorney for the plaintiffs had attached to the complaint an affidavit that purported to limit the amount of damages the plaintiffs sought to recover. "The federal district court reasoned, however, that the plaintiffs [who were relatives of persons who had died in an airplane crash] could not effectively limit the amount of damages they could obtain unless they had the authority to bind the estates by limiting damages. In order to do so, they had to be the legal representatives or legal heirs of the estates." *Id.* The appellate court ultimately determined that the plaintiffs' attorney did not represent all of the heirs and, therefore, the affidavit was not binding. *Id.* at 1415. The court, therefore, held that the plaintiffs had failed to defeat removal jurisdiction. *Id.*

208. ANPAC v. Dow Quimica de Colombia, S.A., 988 F.2d 559, 565 n.8 (5th Cir. 1993), *cert. denied*, 510 U.S. 1041 (1994); *see also* Manuel v. Wal-Mart Stores Inc., 779 F. Supp. 56, 57-58 (W.D. La 1991) (accepting post-removal stipulation from plaintiff); Cole v. Great Atl. & Pac. Tea Co., 728 F. Supp. 1305, 1308-09 (E.D. Ky. 1990) (accepting a post-removal affidavit by plaintiff); Robinson v. Quality Ins. Co., 633 F. Supp. 572, 577 (S.D. Ala. 1986) (granting remand based on plaintiff's post-removal insertion of an *ad damnum* clause into a previously indeterminate complaint); *cf.* Printworks, Inc. v. Dorn Co., 869 F. Supp. 436, 439, 441 (E.D. La. 1994) (accepting

Mercury, a plaintiff may not defeat removal by changing a demand request after the notice of removal has been filed. The court held, however, that in cases where the state-filed complaint fails to identify the sum in controversy, the plaintiff's post-removal affidavit does not alter the amount of damages. Instead, it merely clarifies or identifies the amount for the first time.[209] "[T]he court is still examining the jurisdictional facts *as of the time* the case is removed, but the court is considering information submitted after removal" to make that determination.[210]

On a related issue, the Ninth Circuit held that a district court may accept a plaintiff's judicial admission that the amount in controversy exceeds the federal minimum.[211] In concluding that such an admission would not be the equivalent of waiving or stipulating to jurisdiction,[212] the court explained:

> Where the plaintiff filed the case in state court, and did not seek the federal forum, then the plaintiff's formal judicial admission that the amount in controversy exceeds [$75,000] has the effect of defeating the plaintiff's choice of forum. In this context, where state law prohibited the plaintiff from stating the amount in controversy in the complaint, the district judge has discretion

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attorney's statement as to pre-removal discussions that showed jurisdiction not present at time of removal); Oder v. Buckeye State Mut. Ins., 817 F. Supp. 1413, 1413-14 (S.D. Ind. 1992) (remanding case based upon "certification" in plaintiffs' motion opposing removal that plaintiffs do not seek recovery in excess of federal jurisdictional amount); Hall v. Travelers Ins. Co., 691 F. Supp. 1406, 1410 (N.D. Ga. 1988) (remand based upon post-removal affidavit in which plaintiff agreed to seek no more than a certain amount in attorney fees, thereby remaining below the federal jurisdictional threshold).

209. *ANPAC*, 988 F.2d at 565.

210. *Id.*; *see also* Reason v. General Motors Corp., 896 F. Supp. 829, 833 (S.D. Ind. 1995) (accepting plaintiffs' post-remand affidavit "as their first assertion of the amount in controversy"); *Cole*, 728 F. Supp. at 1309 (stating that plaintiff's post-removal stipulation "did not have the effect of changing the information on which [the defendant] relied [in removing the case], but instead providing the information for the first time"); *Oder*, 817 F. Supp. at 1414 ("[W]hen defendant sought removal [of plaintiff's indeterminate complaint], it was defendant's contention that the amount in controversy exceeded $50,000. Plaintiffs have, with their supplemental pleading, made their first assertions in this regard; they have not amended any prior contention.").

The Seventh Circuit acknowledged *ANPAC*'s exception but declined to apply it in *Chase*, noting that "the exception created in *ANPAC* was based on a record void of any assertion by plaintiff of the value of his claim." 110 F.3d at 429-30. The Seventh Circuit said there was no such void in *Chase* because the plaintiff had previously attempted to settle her case for an amount that exceeded the jurisdictional threshold. *Id.* at 430. The plaintiff also had refused the defendant's request to admit that the plaintiff would not seek more than $50,000 in damages. *Id.*

211. Singer v. State Farm Mut. Auto. Ins. Co., 116 F.3d 373, 376 (9th Cir. 1997).

212. *Id.*

> to accept the admission as establishing it. Otherwise we would be adopting the illogical position that a plaintiff can establish the amount in controversy by an ad damnum, but not by formal admission against the plaintiff's interest in choice of forum.[213]

In jurisdictions that allow post-removal stipulations or affidavits filed by the plaintiff, the document must be binding in nature.[214] If such documents "fall short of stipulating that the claimant will not seek more than the jurisdictional amount, jurisdiction must be assessed with reference to all the evidence."[215] One federal district court has cautioned plaintiffs that if they should "hereafter disregard their stipulation and seek damages over [$75,000.00]" in the state court proceedings, then "upon application to this court, sanctions will be swift in coming and painful upon arrival."[216]

3. Independent Appraisals by the Court

Another method of handling the jurisdictional inquiry is for the court to make its own independent evaluation of the amount in controversy. In doing so, the court first will consider whether it is "facially apparent" that the plaintiff's claim exceeds the federal jurisdictional threshold. The court will "look only at the face of the complaint and ask whether the amount in controversy was likely to exceed [$75,000]" because of the nature of the plaintiff's claim for damages.[217]

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213. *Id.*

214. *See* Printworks, Inc. v. Dorn Co., 869 F. Supp. 436, 440 (E.D. La. 1994).

215. *Id.*; *see also* Relf v. Wal-Mart Stores, Inc., No. 91-1514, 1992 WL 245629, at *4 (E.D. La. Sept. 15, 1992) (holding that despite plaintiff's claim that damages were less than $50,000, remand was not proper in light of plaintiff's settlement demands indicating a higher valuation of the case and plaintiff's failure to stipulate that he would limit his claim to an amount less than $50,000), *rev'd*, 49 F.3d 728 (5th Cir. 1995) (unpublished opinion); Hall v. Travelers Ins. Co., 691 F. Supp. 1406, 1410 (N.D. Ga. 1988) (indicating unwillingness to remand unless plaintiff filed a binding stipulation that he would seek only a certain amount in attorney fees, thereby remaining below the federal jurisdictional threshold).

216. Freeman v. Transouth Fin. Corp., Civ. A. No. 94-D-731-N, 1995 WL 376933, at *1 (M.D. Ala. Oct. 3, 1994); Teal v. Associates Fin. Life Ins. Co., Civ. A. No. 94-D-732-N, 1995 WL 376930, at *4 (M.D. Ala. Sept. 29, 1994).

217. Allen v. R&H Oil & Gas Co., 63 F.3d 1326, 1336 (5th Cir. 1995). In *De Aguilar v. Boeing Co.*, 11 F.3d 55, 57 (5th Cir. 1993), for example, the court found it "facially apparent" that the plaintiffs' claims—which included "wrongful death, terror in anticipation of death, loss of companionship, and funeral expenses" resulting from the deaths of plaintiffs' decedents in an airline crash—exceeded $50,000. However, in *ANPAC v. Dow Quimica de Colombia, S.A.*, 988 F.2d 559, 565 n.8 (5th Cir. 1993), *cert. denied*, 510 U.S. 1041 (1994), the court concluded that the injuries alleged by the

In cases where the "facially apparent" test is not met, the court will proceed to the second part of the inquiry, requiring the parties "to submit summary-judgment-type evidence, relevant to the amount in controversy at the time of removal."[218]

To make these determinations, several related issues must be addressed. First, the court must determine what types of damages the plaintiff may recover under the applicable state's laws.[219] For example, the court may need to decide whether the plaintiff is legally entitled to punitive damages and/or attorney fees

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plaintiff fishermen—skin rashes and the loss of fishing income attributed to a chemical spill—"are not ones that are facially likely to be over the jurisdictional amount."

218. *Allen*, 63 F.3d at 1336; *see also* Singer v. State Farm Mut. Auto. Ins. Co., 116 F.3d 373, 377 (9th Cir. 1997) (stating that if it is not facially apparent from the complaint that the jurisdictional amount is in controversy, "the court may consider facts in the removal petition, and may 'require the parties to submit summary-judgment-type evidence relevant to the amount in controversy at the time of removal'"); United Food & Commercial Workers Union, Local 919 v. Centermark Properties Meriden Square, Inc., 30 F.3d 298, 305 (2d Cir. 1994) ("Where the pleadings themselves are inconclusive as to the amount in controversy, . . . federal courts may look outside those pleadings to other evidence in the record.").

The "summary judgment-type evidence" that may be considered includes "interrogatories, requests for admissions, or other written documents the defendant may be able to establish the veracity of the material allegations in [the] petition for removal." Wright v. Continental Cas. Co., 456 F. Supp. 1075, 1078 (M.D. Fla. 1978); *see also* Larkin v. Brown, 41 F.3d 387, 389 (8th Cir. 1994) ("In determining the amount in controversy pursuant to a motion to dismiss, answers to interrogatories serve as the equivalent of affidavits to either support or defeat diversity jurisdiction.").

The key inquiry, of course, is to determine the amount in controversy at the time that the removal notice was filed. However, in making that inquiry, post-removal interrogatories and other forms of discovery may be used "if they are probative of the amount in controversy *at the time of removal.*" Harmon v. OKI Sys., 902 F. Supp. 176, 178 (S.D. Ind. 1995) (emphasis added) (concluding that plaintiff's answers to post-removal interrogatories were relevant because they showed that by the time of removal, the plaintiff had already incurred medical expenses in excess of $55,000 as well as lost wages in excess of $80,000), *aff'd*, 115 F.3d 477, 480 (7th Cir. 1997) ("The test should simply be whether the evidence sheds light on the situation which existed when the case was removed.").

219. *See* Horton v. Liberty Mut. Ins. Co., 367 U.S. 348, 352-53 (1961) ("[D]etermination of the value of the matter in controversy for purposes of federal jurisdiction is a federal question" but "federal courts must, of course, look to state law to determine the nature and extent of the right to be enforced in a diversity case."); Gilmer v. Walt Disney Co., 915 F. Supp. 1001, 1005 (W.D. Ark. 1996) ("In making the determination in a diversity case, the court looks to state law to determine the nature and extent of the right to be enforced as well as the state measure of damages and the availability of special and punitive damages.").

in addition to compensatory damages.[220] Secondly, once the applicable types of damages are identified, the court must attempt to assess the amount at stake in each category. Some sub-issues that arise in this inquiry include questions as to whether a plaintiff's multiple claims or the damages of multiple plaintiffs should be aggregated[221] and whether the amount in controversy should be measured from the plaintiff's perspective or the defendant's perspective.[222]

The court's independent appraisal of the amount in controversy is relatively straightforward in many cases, such as where the plaintiff earns more than $40,000 per year and alleges an injury that has resulted in more than two years of lost wages. Simple mathematics shows that the jurisdictional amount is satisfied in that case.

Other cases are more problematic, such as when a plaintiff has incurred medical bills of only $30,000, but is seeking additional damages for pain and suffering, an item of damages that is not readily quantifiable but, rather, left to the discretion of the fact finder.[223] Some courts have allowed defendants to establish the jurisdictional amount in these types of cases by citing jury verdicts in similar cases that exceeded the federal jurisdictional threshold.[224] Other courts have been reluctant to rely on such verdicts, however, particularly if the verdict

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220. *See, e.g.*, Melkus v. Allstate Ins. Co., 503 F. Supp. 842, 846 (E.D. Mich. 1980) (considering whether state law allows exemplary damages in a common law action for a commercial contract). Similarly, the amount in controversy may hinge upon whether the plaintiff can legally recover emotional distress damages in addition to pure economic relief.

221. *See, e.g.*, Tapscott v. MS Dealer Serv. Corp., 77 F.3d 1353, 1358 (11th Cir. 1996) (considering whether punitive damages may be aggregated in class action); Allen v. R&H Oil & Gas Co., 63 F.3d 1326, 1332-35 (5th Cir. 1995) (same); Reason v. General Motors Corp., 896 F. Supp. 829, 834 (S.D. Ind. 1995) (discussing general rules of aggregation and applying to a spouse's loss of consortium claim).

222. This issue frequently arises in suits for injunctive or declaratory relief. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 292 (2d ed. 1994) (discussing three lines of cases: (1) cases adopting the "plaintiff's viewpoint," which looks only to the value of the case from plaintiff's view and ignores the defendant; (2) cases adopting the viewpoint of the party seeking jurisdiction; and (3) cases adopting the "either viewpoint" rule in which the court looks to the cost or benefit of either party).

223. *See, e.g.*, Goldstein v. W.L. Gore & Assocs., 887 F. Supp. 168, 173 (N.D. Ill. 1995).

224. *See, e.g.*, Harding v. United States Figure Skating Ass'n, 851 F. Supp. 1476, 1481 (D. Or. 1994) (in finding that suit brought by skater Tonya Harding was for more than $50,000, court considered awards from other cases, including a jury verdict of $27 million in a dispute with another athlete who sued over his eligibility for the Olympic games); Kennard v. Harris Corp., 728 F. Supp. 453, 454 (E.D. Mich. 1989) (taking judicial notice of jury verdicts of more than $50,000 in nineteen other products liability suits within the same county).

was entered in another geographic area or if the injuries were not substantially similar to those in the case at bar.[225] As one court explained: "The verdicts from other cases provide no guidance without factual information that would permit a meaningful comparison."[226]

Equally problematic are the awkward roles in which the parties are cast when arguing the issue. As the Seventh Circuit observed in one such case, "[A]t oral argument we had the privilege of witnessing a comic scene: plaintiff's personal injury lawyer protests up and down that his client's injuries are as minor and insignificant as can be, while attorneys for the manufacturer paint a sob story about how plaintiff's life has been wrecked."[227]

4. Pre-removal Discovery and Settlement Offers

To avoid the problems inherent in a post-removal appraisal of the amount in controversy, several courts have suggested that the defendant should attempt to determine the exact amount of damages *before* attempting to remove the case to federal court.[228] These courts point out that while state pleading rules may prohibit the plaintiff from specifying damages in the complaint, those same rules often provide other avenues by which a defendant can determine the amount in controversy, such as serving interrogatories,[229] requests to admit,[230] or other

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225. *Goldstein*, 887 F. Supp. at 173 (rejecting evidence of verdicts in other cases where defendant made no effort to compare the injuries in those cases to the injuries suffered by the plaintiff); *see also* Kliebert v. Upjohn Co., 915 F.2d 142, 147 (5th Cir. 1990) (refusing to consider judgments in other cases alleging tooth discoloration caused by tetracycline; court observes a wide variation in damage awards in those cases and that defendant failed to provide evidence comparing the degree of discoloration that plaintiff experienced with that present in the prior cases); Coleman v. Southern Norfolk, 734 F. Supp. 719, 721 (E.D. La. 1990) ("Damage claims raised in other cases do not amount to the type of 'affirmative showing' of the Court's jurisdiction that is required of parties seeking removal.").

226. Reason v. General Motors Corp., 896 F. Supp. 829, 835 (S.D. Ind. 1995).

227. Shaw v. Dow Brands, Inc., 994 F.2d 364, 366 (7th Cir. 1993).

228. *Id.* at 367; *see also* ANPAC v. Dow Quimica de Colombia, S.A., 988 F.2d 559, 565 n.7 (5th Cir. 1993) ("If defendants wish to avoid the procedure of removing a case and then having it remanded after the plaintiff comes forward with an affidavit specifying his damages, there are other avenues available for clarifying an indeterminate complaint."), *cert. denied*, 510 U.S. 1041 (1994). However, while the Seventh Circuit has suggested that pre-removal discovery is "eminently sensible," the court stopped short of declaring that this is the *only* means by which a defendant can establish jurisdiction. *Shaw*, 994 F.2d at 367.

229. *Shaw*, 994 F.2d at 367, 374 (although Illinois prohibits plaintiffs from alleging specific damages in a personal injury action, the statute goes on to provide that "[n]othing in this Section shall be construed as prohibiting the defendant from requesting

similar requests upon the plaintiff.[231] A plaintiff's pre-removal settlement offer or monetary demand may provide the same information.[232]

One federal judge has suggested a bright-line rule that would prohibit a defendant from removing an indeterminate complaint from state court unless the defendant shows either (1) that the plaintiff has made a dollar demand in an amount that exceeds the federal jurisdictional minimum or (2) that the plaintiff's

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of the plaintiff by interrogatory the amount of damages which will be sought") (citing ILL. REV. STAT. ch. 110, ¶ 2-604, *recodified in* 1993 as 735 ILL. COMP. STAT. 5/2-604); *ANPAC*, 988 F.2d at 565 n.7 (noting that Texas law expressly provides that upon special exception by the defendant, the plaintiff may be required to amend his complaint to specify the maximum amount claimed) (citing TEX. R. CIV. P. 47); Coleman v. Southern Norfolk, 734 F. Supp. 719, 721 (E.D. La. 1990) (refusing to speculate as to amount in controversy when state procedural rules provided a mechanism for the defendant to ascertain the actual amount of damages prior to removal) (citing LA. CODE CIV. P. ANN. art. 893(A) (1) (West Supp. 1997), which provides: "By interrogatory, an opposing party may seek specification of the amount sought as damages, and the response may thereafter be supplemented as appropriate."); *see also* IOWA R. CIV. P. 69(a) (generally prohibiting a pleading from stating a specific amount of damages but providing that "[t]he specific amount and elements of monetary damages sought may be discovered by the use of interrogatories"); KY. R. CIV. P. 8.01(2) (generally prohibiting allegation of specific sum as alleged damages in an action for unliquidated damages but providing that "[w]hen a claim is made against a party for unliquidated damages, that party may obtain information as to the amount claimed by interrogatories; if this is done, the amount claimed shall not exceed the last amount stated in answer to interrogatories").

230. John B. White, Note, *Federal Removal—Jurisdictional Amount*, 15 U. MIAMI L. REV. 415, 418-19 (1961).

231. *See, e.g.*, N.Y. C.P.L.R. § 3017 (McKinney 1996) (generally prohibiting plaintiff from stating specific amount of damages in medical or dental malpractice suit or claim against a municipal corporation but providing that the defendant "may at any time request a supplemental demand setting forth the total damages to which the pleader deems himself entitled"); N.C. R. CIV. P. 8(a) (2) ("[A]t any time after service of the claim for relief, any party may request of the claimant a written statement of the monetary relief sought...."); OHIO R. CIV. P. 8(a) (2) ("At any time after the pleading is filed and served, any party from whom monetary recovery is sought may request in writing that the party seeking recovery provide the requesting party a written statement of the amount of recovery sought. Upon motion, the court shall require the party to respond to the request.").

232. *See, e.g.*, *Shaw*, 994 F.2d at 376 n.6 (Shadur, J., dissenting) (if plaintiff's demand "is for more than [$75,000] and defendant has no good faith basis for viewing the demand as wholly unrealistic, by definition the right to remove exists at the outset of the litigation"); *but see* Chase v. Shop 'N Save Warehouse Foods, Inc., 110 F.3d 424, 429 (7th Cir. 1997) (court declined to determine whether defendant's settlement offer is relevant to show that the amount in controversy was less than $75,000; the court states that even if the $4,400 offer were relevant, it did not reflect all of the damages that plaintiff was requesting in her lawsuit).

response to a pre-removal interrogatory demonstrates that the requisite amount is in controversy.[233] The Seventh Circuit, however, rejected such a rigid approach. Although the court suggested that the use of pre-removal discovery is "eminently sensible" when the plaintiff's complaint is ambiguous as to the amount in controversy, the court stopped short of declaring that such procedures provided the only way in which jurisdiction could be established.[234]

While pre-removal discovery is commendable in some cases, defendants face some potential timing problems. As pointed out above, if the defendant waits for answers to such interrogatories, the plaintiff could claim that the notice of removal was untimely because section 1446(b) generally requires the notice of removal to be filed within thirty days after service of the initial complaint and summons.[235] The defendant's counter argument, of course, is that removal of an indeterminate complaint would fall under the second part of section 1446(b), allowing removal within thirty days after the defendant receives an amended pleading or other document "from which it may first be ascertained that the case is one which is or has become removable . . . ." As discussed above, however, the courts are divided as to which section is controlling.[236]

The plaintiff's pre-removal settlement offer or demand has its own drawbacks as a means of establishing the amount in controversy. While some courts have suggested that such a demand provides good evidence of the value of the case,[237] other courts expressed reluctance to rely on such a demand absent some additional information to support a good faith basis for the amount.[238] As one court observed, "In our adversary system, federal jurisdiction should not turn on telephone 'puffing' from counsel for the plaintiff, who may want to increase his or her settlement potential or recovery, or counsel for defendant, who may be receptive to the puffing for purposes of removal."[239]

Similar problems exist when the pre-removal settlement offer comes from the defendant. In one case, for example, the plaintiff filed a motion to remand, arguing that the defendant had offered to settle the personal injury action for

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233. *Shaw*, 994 F.2d at 378 (Shadur, J., dissenting).

234. *Id.* at 367.

235. *See supra* notes 169-71 and accompanying text.

236. *See supra* notes 172-77 and accompanying text.

237. *See supra* note 232; Vail v. Orkin Exterminating Co., No. 91-C-3053, 1991 WL 134275, at *3 (N.D. Ill. July 12, 1991) (finding sufficient evidence of jurisdictional amount where affidavit indicated that plaintiff's counsel had stated that she was looking for "a lot more" than the $15,000 mentioned in the prayer for relief and that settlement discussions would be impossible unless a six-figure offer were made).

238. *See, e.g.*, Navarro v. Subaru of Am. Operations Corp., 802 F. Supp. 191, 194 (N.D. Ill. 1992).

239. *Id.*

$4,400.[240] The court rejected the argument, holding that even if the offer could be considered as evidence of the amount in controversy, the offer was for only the plaintiff's actual medical expenses.[241] Because the offer failed to account for other damages plaintiff was requesting in her lawsuit—such as pain and suffering, future medical treatment, and loss of past and future earnings—the court concluded that the offer "does not accurately represent the amount [the plaintiff] has put into controversy . . . ."[242]

In sum, there is great confusion as to how to resolve the difficult jurisdictional dilemmas presented by removal cases involving state-pleaded complaints that do not expressly demand a specific sum of damages exceeding the federal jurisdictional minimum. The courts have issued irreconcilable decisions on almost every aspect of the process, from the basic standard to determine whether the requisite amount in controversy exists, to the procedures to be followed in making that inquiry. Part IV of this Article offers several statutory proposals to bring coherence to this jurisdictional analysis.

IV. A STATUTORY REMEDY

By adopting the uniform standard of judicial review suggested in Part II(C), the Supreme Court can eliminate much of the confusion that exists among the lower federal courts over the appropriate jurisdictional review for removal cases. But the Court cannot take this action until it is presented with an appropriate case and, until the Court acts, it is likely that the lower courts will remain splintered in their approach to the issue. Moreover, adoption of a uniform standard does not address the procedural problems that were identified in Part III.[243] Congress, therefore, should consider statutory amendments to ensure that its equal-access removal policy will be more fully realized.

240. Chase v. Shop 'N Save Warehouse Foods, Inc., 110 F.3d 424, 428-29 (7th Cir. 1997).

241. *Id.* at 429.

242. *Id.*

243. *See supra* notes 167-242 and accompanying text.

This Part of the Article suggests a three-part approach: First, in the absence of a Supreme Court decision, Congress should adopt the uniform standard of jurisdictional review proposed in Part II(C). Second, Congress should clarify the deadline for filing the removal petition. Third, Congress should allow plaintiffs to obtain an automatic remand by filing a binding post-removal stipulation that the amount in controversy is less than the federal minimum.[244]

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244. Of course, another obvious way of resolving these jurisdictional dilemmas is to eliminate diversity jurisdiction altogether, as has been suggested from time to time. One of the most recent suggestions came from the Federal Courts Study Committee in 1990. JUDICIAL CONFERENCE OF THE UNITED STATES, *supra* note 53, at 38-42. The committee stopped short of recommending that diversity jurisdiction be abolished entirely; to the contrary, it recognized that there are some disputes that require a federal forum. *Id.* at 39-40. Accordingly, the committee recommended limiting diversity jurisdiction to a few select types of cases, such as complex multistate litigation, interpleader, and suits involving aliens. *Id.* at 38.

Congress so far has declined to take such drastic action, however. Rather than eliminating diversity jurisdiction entirely, it has chosen instead to restrict the number of diversity cases by increasing the amount in controversy requirement over the years.

> Legislative efforts to eliminate or reduce diversity jurisdiction in the Federal courts come to the fore at various intervals. The Judicial Conference of the United States has long supported total abolition of diversity jurisdiction, as well as measures short of total elimination, such as eliminating in-State plaintiff suits and raising the jurisdictional amount. It has always been a controversial endeavor. However, as inflation, the workload of the Federal courts, and the unwillingness of Congress to solve caseload problems by creating new judgeships coalesce pressures are created to review ways to reduce Federal jurisdiction. This often takes the form, as it did in 1958, of raising the jurisdictional amount in controversy. On the other hand, in the late 1970's through the leadership of Congressman Kastenmeier the House voted to eliminate diversity jurisdiction—an effort that failed to achieve meaningful diversity reform in conference by the closest of margins.

H.R. REP. NO. 889, 100th Cong., 2d Sess. 44-45 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5982, 6005. The issue resurfaced during 1988, with the Subcommittee on Courts, Civil Liberties, and the Administration of Justice voting to generally abolish diversity of citizenship. The House Judiciary Committee ultimately resolved the debate that year, however, by voting to increase the amount in controversy for diversity jurisdiction from $10,000 to $50,000). *Id.* at 45, *reprinted in* 1988 U.S.C.C.A.N. at 6005.

With the recent increase from $50,000 to $75,000, the amount in controversy has been raised six times since the original amount was set at $500 by the Judicial Act of 1789. Douglas D. McFarland, *The Unconstitutional Stub of Section 1441(C)*, 54 OHIO ST. L.J. 1059, 1059 n.1 (1993) (noting that the amount was increased in 1887 to $2000, in 1911 to $3000, in 1958 to $10,000, and in 1988 to $50,000). "Other times, Congress whittles an additional jurisdictional sliver from the diversity block. For example, since 1948 improper or collusive joinder to create diversity has been prohibited (28 U.S.C. § 1359 (1988)), since 1958 corporations have had dual citizenship (28 U.S.C. § 1332(c)

A. Adoption of a Uniform Standard of Judicial Review

Congress can adopt a uniform standard of jurisdictional review in diversity cases by amending Title 28, section 1332(c) to add the following italicized provisions:[245]

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(1) (1988)), and since 1988 the legal representative of the estate of a decedent has been deemed to be from the same state as the decedent (28 U.S.C. § 1332(c) (2) (1988))." *Id.*

245. 28 U.S.C. § 1332 currently provides, in its entirety:

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title—

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

28 U.S.C. § 1332 (Supp. 1997).

Paragraph (c) would have to be renumbered to allow the proposed revision to be displayed prominently as subsection (c) (1).

(c) For the purposes of this section and section 1441 of this title—

(1) *the party invoking the court's jurisdiction bears the burden of demonstrating that the matter in controversy exceeds the sum or value of $75,000. For cases in which the plaintiff's damages are fixed or readily ascertainable under the substantive law, the party invoking the court's jurisdiction must show that a recovery in excess of $75,000 would not be prohibited under such law. In cases where the amount of damages is left to the fact finder's discretion, the party must show that a recovery in excess of $75,000 would not be set aside as excessive under the applicable state's law for reviewing jury verdicts. The parties may support or oppose the establishment of this jurisdictional fact with sworn affidavits, depositions, answers to interrogatories and other competent evidence, including jury verdicts recovered on substantially similar claims.*[246]

This revision would codify the two-part jurisdictional test employed by the early Supreme Court decisions,[247] while clarifying what is required under the reasonable expectation standard. It assumes, of course, that Congress will agree that the reasonable expectation standard strikes the appropriate compromise between the litigants' statutory right to have a case heard in federal court and the congressional desire to limit diversity and removal jurisdiction to those cases in which the amount in controversy is substantial. The last sentence of the revision addresses the related procedural issue concerning the type of evidence that may be considered by the courts in determining whether the requisite amount in controversy exists.

B. Clarification of the Removal Deadline

To clarify the deadline for filing a removal notice, Congress should revise section 1446(b) as follows (the revised material has been italicized):

(b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

In a case removed on the basis of jurisdiction conferred by section 1332 of this title, the defendant must file a notice of removal within the thirty-day period set forth above if the plaintiff's initial pleading requests a specific amount of damages exceeding $75,000. If the pleading does not contain a

246. The paragraphs that are currently numbered (c) (1) and (c) (2) would have to be re-designated as (c) (2) and (c) (3), respectively.

247. *See supra* notes 70-79 and accompanying text.

specific request for relief or if it specifies an amount of $75,000 or less, the defendant may file a notice of removal within the thirty-day period based upon a good faith belief that the amount in controversy in fact exceeds $75,000.

If the case stated by the initial pleading is not removable *or if the removability of the case is uncertain because of an ambiguity in the amount in controversy*, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.[248]

This revision would resolve the "Hobson's choice" that defendants now face in trying to decide whether they should promptly file a notice of removal when presented with an indeterminate or lowball complaint or wait until they accumulate other evidence to demonstrate that the amount in controversy requirement is satisfied. The proposal would give the defendant the option of filing a notice of removal immediately upon receipt of the complaint if the defendant has a good faith belief that the amount in controversy exceeds $75,000 and can establish that fact after removal, or waiting until receipt of an amended pleading or other paper that clarifies the amount in controversy.

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248. Section 1446(b) currently provides:

(b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

28 U.S.C. § 1446(b) (1994).

C. Authorization of Post-removal Stipulations

The final proposed revision would modify the post-removal procedures in section 1447 to allow the plaintiff to clarify the amount in controversy after removal (again, the revised material has been italicized):

> (c) A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.
>
> *In a case removed on the basis of jurisdiction conferred by section 1332 of this title, a motion to remand shall be granted automatically if the plaintiff, within 30 days after the filing of the notice of removal, files a binding stipulation that the amount in controversy does not exceed $75,000. [The plaintiff may not rescind or modify this stipulation after remand except for good cause, which is to be determined by the district court from which the case was remanded. If the district court determines that the amount in controversy exceeds $75,000 after allowing such modification or rescission, the court may reinstate the federal proceedings at the defendant's request. Reinstatement under this section is not subject to section 1446(b)'s provisions prohibiting removal more than one year after commencement of the action.]*
>
> An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.[249]

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249. 28 U.S.C. § 1447 (Supp. 1996). In its entirety, this section currently provides:

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the removing party to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order

This amendment would statutorily overrule the judicial decisions holding that the plaintiff cannot avoid federal court by filing such a stipulation after the notice of removal has been filed. In doing so, it resolves the jurisdictional dilemma faced by a plaintiff who wants to avoid federal court by waiving any recovery in excess of $75,000 but is prohibited by state pleading rules from explicitly making this type of request in the complaint. At the same time, the statutory amendment allows the defendant to remain in federal court when there is a reasonable expectation that the defendant's exposure in the case exceeds the federal minimum. The proposed revision to section 1332(c) would make it clear, however, that the ultimate burden of proof remains on the defendant to show that this reasonable expectation exists.

Because this bright-line rule may pose a hardship upon plaintiffs who discover post-remand that their damages are greater than anticipated, Congress should consider including the bracketed material, which would allow a plaintiff to rescind the stipulation after remand, but only with the federal district court's approval and only upon a showing of good cause. If a plaintiff is authorized to rescind the stipulation, the federal court has the discretion to reinstate the federal proceedings notwithstanding the expiration of the one-year limit imposed by section 1447(b). In exercising this discretion, however, the federal court should weigh the equities of removal at that time, paying particular attention to how far the case has progressed in the state court.

By making these statutory changes, Congress can pull the curtain on many of the "comic scenes" that are being played out in some removal cases—when the plaintiff's attorney attempts to avoid federal jurisdiction by arguing that his client's injuries are insignificant while the defendant's attorney attempts to establish federal jurisdiction by arguing that the plaintiff's life has been devastated.[250] Presumably, most plaintiffs who desire to avoid federal court will do so by waiving the right to recover in excess of the federal minimum. That should reduce the controversy to a few cases in which the plaintiffs are unwilling to give up whatever chance they might have of recovering more than $75,000. In those cases, the courts simply must determine whether the plaintiff's chances reach the level of a "reasonable expectation."

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remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

(e) If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.

250. *See supra* text accompanying note 227.

V. CONCLUSION

Great confusion exists among the federal courts regarding the appropriate jurisdictional analysis to be used to determine the amount in controversy in cases removed from state court on the basis of diversity jurisdiction. Although the inquiry is straightforward in removal cases when the complaint requests a specific amount of damages that exceeds the federal amount in controversy requirement, complications arise when the complaint fails to request a specific sum or requests an amount that is less than the federal minimum. Under the current statutory framework, federal courts are sharply divided as to how to resolve the jurisdictional dilemmas presented by these latter removal cases.

The federal judiciary can begin to resolve much of this confusion by adopting a single, uniform standard for determining whether the amount in controversy requirement has been satisfied. For the reasons stated in Part II(C) of this Article, the "legal certainty test" enunciated by the Supreme Court in *St. Paul Mercury v. Red Cab Co.* should be applied to all removal cases as well as to original jurisdiction diversity cases. Under this inquiry, the party invoking the court's jurisdiction bears the burden of establishing that (1) it is not *legally* impossible for the plaintiff to recover in excess of the jurisdictional amount—*i.e.*, that the plaintiff's cause of action does not limit recovery to a fixed amount that is below the federal minimum; and (2) in cases where the amount of damages is not limited by the cause of action, that it is not *factually* impossible for the plaintiff to recover such an amount—*i.e.*, that there is a reasonable expectation that a jury would award damages in excess of the federal minimum.

While adoption of this uniform standard is a necessary first step, Congress should take additional steps to correct the procedural dilemmas that exist under the current statutory scheme. Part IV of this Article suggests that one way to correct many of these defects is to allow defendants to file a notice of removal based upon a good faith belief that the amount in controversy in fact exceeds $75,000. The plaintiff, on the other hand, can secure a prompt remand by filing a binding stipulation that the amount in controversy does not exceed the federal minimum—*i.e.*, that the plaintiff is willing to forego any recovery in excess of that amount. Otherwise, the defendant bears the burden of establishing the reasonable expectation that the amount in controversy exceeds $75,000.

Until Congress or the courts take action to remedy the defects in the removal process, plaintiffs and defendants should be equally wary of the unsettled status of the law. Accordingly, they would be well advised to thoroughly research the position taken by the applicable district court or court of appeals regarding the jurisdictional standard. Attorneys also should become familiar with those courts' interpretation of disputed procedural issues, such as when the notice of removal must be filed and what evidence may be considered in determining whether the jurisdictional amount has been satisfied.