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Comedy or Tragedy: The Tale of Diversity Jurisdiction Removal and the One-Year Bar

Michael W. Lewis

COMEDY OR TRAGEDY: THE TALE OF DIVERSITY JURISDICTION REMOVAL AND THE ONE-YEAR BAR

*Michael W. Lewis**

Thus at 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.[1]

THIS is not the only theatrical performance that has been driven by the one-year bar on diversity removal. Another darker and more cynical drama has also been playing to more intimate audiences. This from a performance in Virginia:

Opening scene: A scheduling conference in a civil matter between two lawyers with the state court judge's secretary. Calendars are compared, dates are proposed for a scheduling order, and the judge's secretary leaves the lawyers alone for a couple of minutes while cross-checking other docket entries and court calendars.

Defense attorney: "You've sued for $74,900 on a products liability theory. Let's ignore the potential Workers' Comp bar for now. Before we go too deep into discovery, any possibility of discussing settlement?"

Plaintiff's attorney: "No. This is a $3 million case. He's got over $300,000 in meds alone."

Defense attorney: "So why are you suing for $74,000? Sure it is under the jurisdictional amount for removal now, but you're obviously not going to stay there."

Plaintiff's attorney: "I only have to stay there for a year. I'll amend my *ad damnum* after one year has passed to our $3 million claim, and that way you can't remove us to federal court because of the one year bar. And you can't just confess judgment and tender the $74,900, because I

* Assistant Professor of Law at Ohio Northern University Pettit College of Law. This Article evolved from my experiences in practice. I would like to thank Professor John B. Oakley of the University of California-Davis School of Law, Professor Alexandra Lahav of the University of Connecticut School of Law and the participants in the Ohio Junior Legal Scholars Workshop for their review and comments on this Article. I would also like to thank my research assistant Nathan Hosek, for his substantial contributions to this work and our research librarian David Fetrow for his statistical support.

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

have allegations of punitive damages that would be deemed as admitted for any future claims involving the same product."

Defense attorney (to himself): "Can he do that?"[2]

The rather unsatisfactory answer to that question is "it depends." It depends upon which circuit you are in, and possibly which district within a circuit you are in, and the standards which that jurisdiction currently applies to determine whether a removal motion meets the burden of proof relative to the amount in controversy.

Both of these performances were created in reaction to the one-year bar on removal. This Article seeks to introduce this problem to a wider audience, discuss its many manifestations, review the existing solutions that have been proposed, and to add one of its own to the discussion. Both the American Law Institute ("ALI") and the Committee on Federal-State Jurisdiction of the Judicial Conference of the United States have advanced proposals for a legislative solution to the difficulties created by the one-year bar.[3] But the reality is that a legislative solution is unlikely.[4] Absent such action, this Article proposes a judicial solution that will yield a consistent answer to this question, while minimizing the incentives for gamesmanship such as that demonstrated above and upholding the legislative goal of restricting removals that underlies the one-year bar.

Part I of the Article will briefly describe federal diversity jurisdiction and the amount in controversy requirement. It will discuss the one-year bar on removal in diversity cases that Congress introduced in 1988, along with the purpose Congress attached to that change. It will also briefly examine the conventional belief, shared by both the plaintiffs' and the defense bar, that defendants fare better in federal court. Part II will discuss the various standards used by each circuit to determine whether the amount in controversy requirement for removing a diversity case has been met and how they have shifted over time. It will also describe the variety of state law pleading requirements that cut across circuit bounda-

2. Although perhaps not word-for-word accurate, this conversation took place in the judicial secretary's office in the Virginia Circuit Court, Norfolk Circuit, in 2005. For other possible examples of amount in controversy manipulation. *See, e.g.* Omi's Custard Co. v. Relish This, LLC, No. 04-CV-861-DRH, 2006 WL 2460573, at *1 (S.D. Ill. Aug. 24, 2006) (plaintiff secured remand on grounds that machine at issue only cost $39,800, then amended its complaint after the one year deadline to claim $300,000 in consequential damages); *see also* Wise v. Gallagher Bassett Servs., Inc., No. Civ. JFM-02-2323, 2002 WL 2001529, at *1 (D. Md. 2002) (plaintiff's initial complaint for $75,000 was amended fourteen months later to demand $750,000 without alleging any new facts to support the increase in damages); *see also* Smith v. Bally's Holiday, 843 F. Supp. 1451, 1453-55 (N.D. Ga. 1994) (oral communication from plaintiff's counsel indicating damages "in the six figure range" insufficient to support motion for removal).

3. *See* THE AMERICAN LAW INSTITUTE, FEDERAL JUDICIAL CODE REVISION PROJECT 2 (2004); Proposed Federal Courts Jurisdiction and Venue Clarification Act of 2008 (on file with the author).

4. Interview with John B. Oakley, Reporter for the ALI Federal Judicial Code Revision Project. The ALI proposal calls for the elimination of the one-year bar, and the draft legislative proposal from the Judicial Conference proposes the use of an equitable exception to the one-year bar to alleviate the problems discussed in this Article.

ries and illustrate how these state law variations potentially alter the application of the one-year bar from state to state. Part III will briefly discuss uniformity and the costs and benefits associated with attempting to maintain uniformity throughout the federal systems. It will also explain why, even if you accept the premise that uniformity is generally overvalued, the lack of uniformity in amount in controversy removal litigation is particularly damaging and must be remedied. Part IV will describe the legislative change proposed by the ALI in its 2004 Federal Code Revision Project and the proposal recently put forward by the Committee on Federal-State Jurisdiction of the Judicial Conference of the United States, and how each addresses the one-year bar. It will also consider proposals made by the courts for preventing amount in controversy manipulation, including the use of equitable exceptions to the one-year bar. Part V will outline my proposal for applying the one-year bar to amount in controversy issues in a manner that preserves the congressional intent to limit federal jurisdiction while preventing improper manipulation of that provision.

I. REMOVAL'S RULES AND PERCEPTIONS

A. Federal Diversity Jurisdiction

Federal diversity jurisdiction is specifically provided for by Article III, Section 2 of the Constitution which provides that "[t]he Judicial Power shall extend . . . to Controversies . . . between Citizens of different States."[5] James Madison explained to the Virginia ratifying convention that this measure was included in the Constitution because:

> It may happen that a strong prejudice may arise, in some states, against the citizens of others, who may have claims against them. We know what tardy, and even defective, administration of justice has happened in some states. A citizen of another state might not chance to get justice in a state court, and at all events he might think himself injured.[6]

Having been provided for in the Constitution, the boundaries of federal jurisdiction were first set by the Judiciary Act of 1789 and have been routinely altered by Congress ever since.[7] These boundaries have been adjusted through changes in the amount in controversy requirement and through the addition of other restrictions on the scope of federal jurisdiction.

Federal diversity jurisdiction requires not only complete diversity between plaintiff(s) and defendant(s) but also a showing that the "the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs."[8] Plaintiffs originally filing in federal court may meet

5. U.S. Const. art. III, § 2.

6. 3 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 533 (Jonathan Elliot ed. 2d ed. 1896).

7. Judiciary Act of 1789, § 11, 1 Stat. 73, 78 (1789).

8. 28 U.S.C. § 1332(a) (2000).

the amount in controversy requirement by making a good faith claim in excess of that amount.[9] The purpose of the amount in controversy requirement is the underlying belief that only cases of a certain magnitude merit federal court attention. It is generally accepted that the primary rationale for diversity jurisdiction was "to protect nonresidents from the local prejudices of state courts."[10] Where the cost of this disadvantage is minimal, the need for diversity jurisdiction is also minimal.

Increasing the amount in controversy has been a favorite congressional tool for restricting access to federal courts. The Judiciary Act of 1789 placed the amount in controversy requirement at $500.[11] This was increased to $2,000 in 1887[12] and to $3,000 in 1911.[13] A further increase to $10,000 occurred in 1958,[14] and as Congress added the one-year bar in 1988, it also raised the amount in controversy requirement to $50,000.[15] The final increase to $75,000 occurred in 1996.[16] These successive increases in the amount in controversy are mainly reflective of adjustments for inflation but also indicate a belief that the threshold magnitude for federal court cases has increased over the past fifty years.

The latest change in the amount in controversy requirement took place in 2005 with the passage of the Class Action Fairness Act (CAFA).[17] CAFA provided for the aggregation of class action claims to meet the amount in controversy requirement for diverse class actions. It also set the aggregated amount in controversy requirement at an aggregated value in excess of $5 million.[18] Although this aggregated value is much larger than the individual claim requirements of $75,000, by allowing aggregation of claims CAFA effectively expanded federal jurisdiction over diverse class actions.

B. Removal Rules and the One-Year Bar

In general civil defendants may remove a case from state court to federal court if the federal court would have had original jurisdiction.[19] One source of original federal jurisdiction are cases where complete diversity of citizenship exists and "the matter in controversy exceeds the sum or

9. St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 288-89 (1938).

10. 14B Charles Alan Wright et al., Federal Practice and Procedure § 3721 (3d ed. 1998).

11. The Judiciary Act of 1789, ch. 20, 1 Stat. 73, 78 (1789).

12. Act of Mar. 3, 1887, ch. 373, 24 Stat. 552, 552.

13. Act of Mar. 3, 1911, ch. 231, 36 Stat. 1087, 1091.

14. Act of Jul. 25, 1958, Pub. L. No. 85-554, § 1332, 72 Stat. 415, 415-16.

15. *See* The Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642, 4646 (1988).

16. Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, 110 Stat. 3847, 3850 (1996); 28 U.S.C. §1332(a) (2000).

17. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005).

18. 28 U.S.C. § 1332(d)(2) & (6) (Supp. V. 2005). Prior to CAFA the amount in controversy could not be aggregated to meet the $75,000 jurisdictional threshold for each individual claim.

19. 28 U.S.C. § 1441(a) (2000).

value of $75,000, exclusive of interest and costs."[20] The actual procedures for removal and the limitations thereon are governed by 28 U.S.C. § 1446.[21]

In 1988 Congress revised § 1446 and inserted a condition in the second paragraph of § 1446(b) "that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title [diversity jurisdiction] more than 1 year after commencement of the action."[22] The stated purpose of this additional restriction was to "reduc[e] the opportunity for removal after substantial progress has been made in state court."[23] As the House Report indicates, Congress intended this amendment as a "modest curtailment" of removals that otherwise might be allowed by changes in parties that occur shortly before trial.[24]

As written, this provision represents an absolute bar against any removal on diversity grounds after one year. The Commentary to § 1446 recognizes that this bar may invite plaintiffs to engage in "tactical chicanery" to avoid unwanted federal jurisdiction and addresses the most common manipulative method employed, the addition of diversity-destroying defendants.[25] While pointing out that the inclusion of clearly improper defendants may run afoul of the "fraudulent joinder" doctrine, the Commentary acknowledges that this doctrine is rarely effective for defendants.

Neither the House Report nor the Commentary discusses the possibility of manipulating the amount in controversy to avoid federal jurisdiction.[26] This is probably because that technique for forum manipulation was actually made possible by the creation of the one-year bar. Prior to the 1988 amendments, the only time restriction on the defendants right to removal was

> [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

20. 28 U.S.C. § 1332(a) (2000).
21. *See* 28 U.S.C. § 1446 (2000).
22. *Id.* § 1446(b).
23. H.R. Rep. No. 100-889 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5982, 6031-6034; *see also* 134 Cong. Rec. H10430-01 (1988). The congressional record amplified this reasoning by stating that Subsection (b)(2) amends 28 U.S.C. § 1446(b) to establish a one-year limit on removal based on diversity jurisdiction as a means of reducing the opportunity for removal after substantial progress has been made in state court. The result is a modest curtailment in access to diversity jurisdiction. The amendment addresses problems that arise from a change of parties as an action progresses toward trial in state court. The elimination of parties may create for the first time a party alignment that supports diversity jurisdiction. Under Section 1446(b), removal is possible whenever this event occurs, so long as the change of parties was voluntary as to the plaintiff. Settlement with a diversity-destroying defendant on the eve of trial, for example, may permit the remaining defendants to remove. Removal late in the proceedings may result in substantial delay and disruption. H.R. Rep. No. 100-889.
24. *Id.*
25. 28 U.S.C. § 1446 Commentary on 1988 Revision at 129 (Supp. 1990).
26. *See id.*

> ascertained that the case is one which is or has become removable. . . .[27]

Therefore any initial representation that the amount in controversy was below the jurisdictional minimum had no effect on the defendant's ultimate ability to remove. It was only the addition of the one-year bar that allowed a plaintiff's initial misrepresentation to ultimately affect federal jurisdiction.

Based on the House Report two things seem clear. First, Congress intended to modestly curtail the availability of removal in diversity cases even though such curtailment might be subject to abuse. Second, although Congress generally recognized that this amendment created a potential for abuse, it did not understand that the amendments were creating an additional method for such abuse, namely amount in controversy manipulation.

C. PERCEPTIONS OF REMOVAL'S IMPACT ON LITIGATION

One of the most hotly contested procedural issues in any litigation where federal jurisdiction may be found is whether the case will be tried in state or federal court. Empirical studies indicate that both the plaintiff and defense sides of the bar generally believe that defendants derive a significant advantage by removing a case to federal court.[28] Based on this belief, the plaintiffs' bar has produced numerous articles on the best ways to defeat federal jurisdiction.[29] Academic studies do seem to support this shared belief that defendants enjoy some advantage in federal court, although the magnitude of the advantage may not be as great as perceived.[30] In addition to these broad summaries indicating that defendants benefit from federal jurisdiction, there are also localized differences between state civil procedure and federal procedure that likely encourage removal.

One example of state/federal procedural differences can be found in Virginia, where state civil procedure does not allow for the use of deposi-

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27. 28 U.S.C. § 1446(b) (2000).

28. *See* Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581, 581 (1998); *see also* Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369, 417 (1992).

29. *See, e.g.*, Allyson Singer Breeden, *Federal Removal Jurisdiction and its Effect on Plaintiff Win-Rates*, 46 RES GESTAE 26, 30-31 (2002) (Although Breeden opens her article by citing raw win-rate data, thereby ignoring the caveats that Clermont and Eisenberg place on drawing conclusions from such data, the article is indicative of many discussions about the strategic value of state court versus federal jurisdiction.); Erik B. Walker, *Keep Your Case in State Court*, 40-SEP JTLATRIAL 22, 22-29 (2004).

30. *See* Clermont & Eisenberg, *supra* note 28, at 606-07 (affirming statistically that removing defendants have greater win-rates in federal court than those involved in cases originally filed by plaintiffs in federal court). *But see* Theodore Eisenberg, John Goerdt, Brian Ostrom and David Rothman, *Litigation Outcomes in State and Federal Courts: A Statistical Portrait*, 19 SEATTLE U. L. REV. 433, 433-34 (1996) (indicating that plaintiff win rates in state and federal court are relatively comparable).

tion testimony to support motions for summary judgment.[31] This makes that procedural device a rarity in state court. These restrictions on summary judgment evidence are not found in federal court, giving Virginia state court defendants an additional incentive to seek federal jurisdiction.

II. CURRENT PROCEDURAL RULES

A. AMOUNT IN CONTROVERSY STANDARDS

The one aspect of amount in controversy disputes that is well settled is the standard that is applied when defendants attempt to defeat federal jurisdiction over diversity cases originally filed in federal court. Defendants must show that it is "a legal certainty that the claim is really for less than the jurisdictional amount."[32] This "legal certainty" test established by the Supreme Court in *Red Cab* applies to diversity cases where the plaintiff is seeking a federal forum. But this is only one of at least four tests that are variously applied across the circuits when the amount in controversy is disputed in the removal context.

Because it is widely believed that defendants benefit from a federal forum, it is in the removal context that most disputes over the amount in controversy arise. In these cases defendants remove the case to federal court based, in part, on the claim that the case satisfies the amount in controversy requirement.[33] Plaintiffs respond by moving to remand the case to state court on the grounds that defendants have failed to establish that the amount in controversy requirement has been met.[34] Plaintiffs may avail themselves of a variety of methods to avoid providing the evidentiary support for this contention.[35]

Courts have adopted at least four different standards to analyze disputes over whether the amount in controversy requirement is satisfied in the removal context the "legal certainty" standard used by the *Red Cab* court was briefly described above.[36] The other standards commonly used are "preponderance of the evidence," "reasonable probability," and "inverted legal certainty," although each of these standards has also been referred to by a variety of other names. Some circuits apply more than one of these standards depending upon a variety of factors including the type of claim involved and the form of the pleadings. Even in circuits that recognize only one standard, a look at the district courts within the circuit often reveals that several different standards are actually applied.

Nominally the "preponderance of the evidence" standard requires that the removing party demonstrate that it is more likely than not that the amount in controversy requirement is satisfied. There are a whole host of

31. *See* Va. Code Ann. § 8.01-420 (2007).
32. St. Paul Mercury Indem. Co. v. Red Cab, 303 U.S. 283, 289 (1938).
33. Breeden, *supra* note 29, at 30.
34. *Id.*
35. *See, e.g., id.* at 30-31 (instructing plaintiff's attorneys on how to avoid federal jurisdiction); *see also* Walker, *supra* note 29, at 26.
36. *See* text accompanying note 32.

issues that this standard implicates. When should the amount in controversy be measured?[37] What qualifies as evidence of the amount in controversy?[38] What effect can a plaintiff's stipulations have upon the amount in controversy?[39] Are defendants allowed to conduct discovery on amount in controversy issues after filing a removal petition?[40] Courts are far from unified in their approach to answering many of these questions.

The same holds true for courts applying the "reasonable probability"[41] or "some possibility"[42] standards. The little used "some possibility" standard represents a more relaxed standard than the "preponderance of the evidence" standard while the much more frequently used "reasonable probability" standard is considered to be more demanding than the "preponderance of the evidence" standard.[43] For both standards the same issues regarding evidence, stipulations, and discovery discussed above are in play, and trial courts are required to provide a meaningful "reasonable probability" analysis explaining the decision to grant or deny the motion to remand.[44]

In many instances, after a removing defendant satisfies the local standard for meeting the amount in controversy requirement, courts then allow plaintiffs to overturn that determination if they can meet the "inverted legal certainty" standard. Under this test, the plaintiff (as the non-moving party) is required to meet the *Red Cab* standard; that it is a legal certainty that the amount in controversy will not be satisfied.[45]

37. There is a clear circuit split on this issue. The majority rule states that the amount in controversy must be determined at the time that suit is filed. Wolde-Meskel v. Vocational Instruction Project Community Servs., Inc., 166 F.3d 59, 63-64 (2d Cir. 1999). The minority rule followed by the Fourth Circuit and the D.C. Circuit allows for events occurring after the suit is filed, such as the dismissal of certain counts of the complaint that reduce its value below the jurisdictional minimum, to oust jurisdiction at the discretion of the court. Stevenson v. Severs, 158 F.3d 1332 (D.C. Cir. 1998). Still other courts have chosen to consider the time that the removal petition is filed as the point at which the amount in controversy must be considered; Shanaghan v. Cahill, 58 F.3d 106, 109 (4th Cir. 1995). *See, e.g.*, Leslie v. BancTec Serv. Corp., 928 F. Supp. 341, 349 (S.D.N.Y. 1996).

38. 28 U.S.C. § 1446(b) states that the basis for removal may be ascertained from "an amended pleading, motion, order or other paper" which has been taken by most courts to include demand letters, settlement offers and other correspondence. *See* Vermande v. Hyundai Motor Am., Inc., 352 F. Supp. 2d 195, 201 (D. Conn. 2004). *But see* King v. Wal-Mart Stores, Inc., 940 F. Supp. 213, 217 n.1 (S.D. Ind. 1996) (stating that Federal Rule of Evidence 408 prohibits the use of settlement discussions to prove the amount in controversy).

39. *See infra* Part II.H.

40. *See infra* Part II.M.

41. *See, e.g.*, Mehlenbacher v. Akzo Nobel Salt, Inc., 216 F.3d 291, 296 (2d Cir. 2000).

42. *See, e.g.*, Foret v. S. Farm Bureau Life Ins. Co., 918 F.2d 534, 537 (5th Cir. 1990).

43. *See, e.g.*, Gafford v. Gen. Elec. Co., 997 F.2d 150, 157 (6th Cir. 1993).

44. *See* Blockbuster, Inc. v. Galeno, 472 F.3d 53, 58-59 (2d Cir. 2006) (affirming the Second Circuit's reliance on the reasonable probability standard but remanding to the district court for an explanation of how the amount in controversy analysis was done).

45. *See, e.g.*, Frederico v. Home Depot, 507 F.3d 188, 196-97 (3d Cir. 2007).

B. First Circuit

While the First Circuit follows the *Red Cab* "legal certainty" standard in cases where the defendant is challenging federal jurisdiction on amount in controversy grounds,[46] it is an open question as to which standard its courts would apply in deciding an amount in controversy dispute in the removal context.[47] In the past six years both *Radlo v. Rhone-Poulenc* and *Satterfield v. F.W. Webb, Inc.*, from the district courts of Maine and Massachusetts respectively, indicated a willingness to utilize either a "preponderance of the evidence" standard or a "legal certainty" test. Neither court adopted a firm position on this open question because they found that, in both cases, the defendants had not even met the "preponderance of the evidence" standard, thereby allowing these courts to remand without deciding which standard should apply. In contrast, the District of New Hampshire definitively applied the "preponderance of the evidence" standard to removing defendants in amount in controversy disputes.[48]

Whether or not the districts within the First Circuit agree on whether "preponderance of the evidence" is the standard, the approach that they take when considering amount in controversy disputes where no specific amount has been pled is relatively uniform. The question appears to be "'whether to anyone familiar with the applicable law [the] claim could objectively have been viewed as worth' the jurisdictional minimum."[49] This "I know it when I see it" standard based upon a judicial analysis of the face of the complaint has lead to judgment calls that have granted motions to remand where pain and suffering was the principal source of damages as well as denying remand in similar circumstances.[50] This is not to say that these judgments were wrong, just that they provide sufficient uncertainty for both sides of the removal equation to nurture some hope that their preferred result will prevail. Defendants in questionable removal cases are encouraged by this standard's uncertainty to attempt removal while plaintiffs are given an incentive to be even less specific in their damages claims in order to support their motion for remand.

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46. *See* Stewart v. Tupperware Corp., 356 F.3d 335, 338 (1st Cir. 2004).

47. *See, e.g.*, Satterfield v. F.W. Webb, Inc., 334 F. Supp. 2d 1, 3 (D. Me. 2004); Radlo v. Rhone-Poulenc, S.A., 241 F. Supp. 2d 61, 63-64 (D. Mass. 2002). Both cases indicate that either the legal certainty standard or the preponderance of the evidence standard apply and both remand to state court without a decision because defendants could not even meet the preponderance of the evidence standard.

48. Evans v. Yum Brands, Inc., 326 F. Supp. 2d 214, 219-20 (D.N.H. 2004) (citing Tremblay v. Philip Morris, Inc., 231 F. Supp. 2d 411, 414 n.2 (D.N.H. 2002)).

49. *Id.* at 221 (quoting Jimenez Puig v. Avis Rent-A-Car Sys., 574 F.2d 37, 40 (1st Cir. 1978)).

50. *Compare Stewart*, 356 F.3d at 340 (holding that mental anguish and loss of consortium worth more than $75,000 jurisdictional minimum), *with* Ortega v. Star-Kist Foods, Inc., 370 F.3d 124, 129-31 (1st Cir. 2004), *rev'd on other grounds*, Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546 (2005) (finding that Ortega's emotional distress damages could not rise to the level of the jurisdictional minimum).

C. SECOND CIRCUIT

It is unclear which standard the Second Circuit utilizes when determining whether removing defendants have satisfied the amount in controversy requirement. The "preponderance of the evidence" standard and the "reasonable probability" standard are most commonly cited, although at least one court has utilized the more relaxed "reasonable possibility" test.[51] While the "reasonable probability" standard is cited frequently and courts often render their decisions with reference to this standard,[52] language conflating "reasonable probability" with "preponderance of the evidence" occurs frequently in both district and circuit courts.[53] This conflation of standards might explain why as recently as 2003 one court concluded that "[t]he standard governing a removing defendant's burden where the plaintiff challenges the jurisdictional amount appears to be open in this circuit."[54]

In cases where no amount of damages have been pled, the Second Circuit relies on either the "value of the object that is the subject matter of the action"[55] or the "plaintiff's viewpoint test"[56] to determine the amount in controversy. Like the conflation of the "preponderance of the evidence" and "reasonable probability" standards, the practical difference between these tests for determining the amount in controversy has not been readily articulated.

Regardless of which terms the courts use to describe the standard of proof required, or to determine the amount in controversy, the practical reality is that the defendant must provide "competent proof" to justify its allegations that the amount in controversy has been met. In addition to any amount demanded on the face of the complaint, this proof may include demand letters,[57] deposition testimony,[58] or affidavits describing the compliance costs associated with injunctive relief.[59] The amount of

51. Ball v. Hershey Foods Corp., 842 F. Supp. 44, 47 (D. Conn. 1993).

52. *See* Mehlenbacher v. Akzo Nobel Salt, Inc., 216 F.3d 291, 296 (2d Cir. 2000); Pollock v. Trustmark Ins. Co., 367 F. Supp. 2d 293, 296 (E.D.N.Y. 2005); Freeman v. Great Lakes Energy Partners, L.L.C., 144 F. Supp. 2d 201, 214 (W.D.N.Y. 2001).

53. *See* United Food and Commercial Workers Union, Local 919, AFL-CIO v. Centermark Props. Meriden Square, Inc., 30 F.3d 298, 305 (2d Cir. 1994) (After stating that the "reasonable probability" standard applies, the court goes on to state that "the party asserting jurisdiction must support those facts with 'competent proof' and 'justify [its] allegations by a preponderance of evidence.'"); Ins. Co. of the State of Pa. v. Waterfield, 371 F. Supp. 2d 146, 148-49 (D. Conn. 2005) (citing both the "reasonable probability" and "preponderance of the evidence" standards); Royal Ins. Co. v. Jones, 76 F. Supp. 2d 202, 204 (D. Conn. 1999).

54. CHEUNG V. UNION CENT. LIFE INS. CO., 269 F. Supp. 2d 321, 323 (S.D.N.Y. 2003) (employing the preponderance of the evidence standard and denying the motion to remand).

55. *Id.* (quoting 14B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS § 3708 (3d ed. 1998)).

56. Kheel v. Port of N.Y. Auth., 457 F.2d 46, 49 (2d Cir. 1972); Leslie v. BancTec Serv. Corp., 928 F. Supp. 341, 348 (S.D.N.Y. 1996).

57. *Royal Ins. Co.*, 76 F. Supp. 2d at 204.

58. Ball v. Hershey Foods Corp., 842 F. Supp. 44, 47 (D. Conn. 1993).

59. *See, e.g., United Food and Commercial Workers Union*, 30 F.3d at 305-06.

statutorily available attorneys' fees may be considered if they are sufficiently likely to be awarded and are sufficiently definite.[60] Likewise, courts may also consider the possible award of punitive damages if "permitted under the controlling law."[61]

Much like the First Circuit, the end result of these vague and ill-defined standards is a great deal of uncertainty about whether a removal petition is likely to meet the amount in controversy standard. What is clear is that a plaintiff's best opportunity to avoid removal is to plead a specific amount below the amount in controversy. Although courts have recognized that the subsequent ability to amend means that this "does not reliably limit the extent of the defendant's exposure," the plaintiff's demand is presumed to be made in good faith.[62] It is equally clear that this uncertainty gives defendants an incentive to attempt removal of most cases where complete diversity exists. Regardless of the factual amount in controversy, there is some chance that a combination of inflated plaintiffs' demands, exaggerated deposition testimony, and potential attorneys' fees or punitive damages awards may result in the defendant securing its preferred jurisdiction while delaying the proceedings in the process.

D. Third Circuit

The Third Circuit has displayed a keen awareness of the inconsistencies plaguing amount in controversy disputes, but only time will tell whether its recently adopted solution will provide the clarity needed to move litigants toward desirable behavior.

In 2000, the Eastern District of Pennsylvania opined that "[c]ourts in the Third Circuit are unencumbered by consistency in their characterization of defendant[s'] burden of proving the amount in controversy on a motion to remand."[63] The court went on to cite cases utilizing three different standards: "legal certainty," "preponderance of the evidence," and "reasonable probability," to determine the defendant's burden in amount in controversy litigation.[64] In the same year, a District of New Jersey opinion completed a very thorough analysis of the problem which recognized both the external circuit split and the Third Circuit's own internal disagreement on how amount in controversy issues should be handled.[65] The court concluded that the "preponderance of the evidence" standard was appropriate.[66] The internal disagreement was recognized again in 2003 when the District of New Jersey again opted for the "preponderance of the evidence" standard.[67]

60. *See* Freeman v. Great Lakes Energy Partners, L.L.C., 144 F. Supp. 2d 201, 208-09 (W.D.N.Y. 2001).
61. A.F.A. Tours, Inc. v. Whitchurch, 937 F.2d 82, 87 (2d Cir. 1991).
62. Cheung v. Union Cent. Life Ins. Co., 269 F. Supp. 2d 321, 323-25 (S.D.N.Y. 2003).
63. Irving v. Allstate Indem. Co., 97 F. Supp. 2d 653, 654 (E.D. Pa. 2000).
64. *Id.*
65. Penn v. Wal-Mart Stores, Inc., 116 F. Supp. 2d 557, 562 (D.N.J. 2000).
66. *Id.*
67. Buchanan v. Lott, 255 F. Supp. 2d 326, 331 (D.N.J. 2003).

The Third Circuit attempted to clarify the issue in 2004 in *Samuel-Bassett v. KIA Motors of America, Inc.* by creating a two-tiered test that examined factual disputes with the "preponderance of the evidence" standard while adopting the *Red Cab* "legal certainty" standard once factual disputes were settled.[68] In adopting the "legal certainty" standard, however, the *Samuel-Bassett* court failed to address the different procedural posture that existed in *Red Cab*. In *Red Cab*, the defendant was challenging the plaintiff's assertion that the amount in controversy was met, but in *Samuel-Bassett* the roles were reversed.[69] The *Samuel-Bassett* court held that while this could lead to the parties taking strange positions, the defendant must prove to a legal certainty that the amount in controversy exceeded $75,000.[70]

The district courts did not embrace this standard. Highlighting the difference in procedural posture between *Red Cab* and *Samuel-Bassett*, the Eastern District of Pennsylvania held that defendants were not, in fact, required to prove the jurisdictional amount to a legal certainty but instead read *Samuel-Bassett* to require an "inverted legal certainty" test in which the plaintiffs had to show with legal certainty that they could not recover more than $75,000.[71]

It is unlikely that the Third Circuit had intended this inversion of the legal certainty standard in all situations, and it has since tried to clarify its position with a pair of cases that dealt with two different removal situations. In *Morgan v. Gay*,[72] the court addressed a situation in which the plaintiff affirmatively claimed damages less than the jurisdictional minimum, while in *Frederico v. Home Depot*[73] the court considered cases in which no specific damages claims were made. In *Morgan* the court held that the "legal certainty" standard applied, and the case was remanded because the defendant could not meet that burden.[74] While the court recognized that plaintiffs are the master of their own claims and have the right to limit their recoveries to avoid federal jurisdiction, it also noted that state law pleading rules (see further discussion *infra*) essentially neutralize any binding effect that a specific demand for damages might have.[75] The court suggested that recoveries in excess of the specific demand might be subject to judicial estoppel, although questions of whether this solution would be effectively utilized are far from resolved.[76]

In *Frederico*, where the plaintiff did not affirmatively limit her damages to less than the jurisdictional minimum, the Third Circuit interpreted *Samuel-Bassett* in much the same way as the Eastern District of Penn-

68. Samuel-Bassett v. KIA Motors Am., Inc., 357 F.3d 392, 398 (3d Cir. 2004).
69. *See id.* at 395, 397.
70. *Id.* at 398.
71. *See* Valley v. State Farm Fire and Cas. Co., 504 F. Supp. 2d 1, 3-5 (E.D. Pa. 2006).
72. *See* Morgan v. Gay, 471 F.3d 469, 469-71 (3rd Cir. 2006).
73. Frederico v. Home Depot, 507 F.3d 188, 196 (3d Cir. 2007).
74. *Morgan*, 471 F.3d at 474.
75. *Id.* at 476.
76. *Id.* at 477 & n.9.

sylvania and affirmed the "inverted legal certainty" standard.[77] Because the court's review of the pleadings did not show to a legal certainty that the plaintiff could not recover the jurisdictional amount, the motion for remand was denied.[78]

Morgan and *Frederico* establish the two standards that govern the Third Circuit in amount in controversy disputes. But *Frederico* is also important for what it indicates about the behavior of the parties. The plaintiff reacted to the uncertainty surrounding amount in controversy issues by behaving exactly as expected, by acting vaguely and withholding information concerning the value of her claim. As the court noted, "Frederico's response to the Court's query regarding jurisdiction supplies us with no useful information with which to calculate the amount in controversy. She is playing her cards close to the vest: Her answer neither agrees with the facts alleged in the removal notice nor contests them."[79] Likewise, in the face of such uncertainty defendants were encouraged to remove, and the establishment of the "inverted legal certainty" standard will certainly increase defendants' motivation to remove any cases falling into this category.

The twin standards established by *Morgan* and *Frederico* have created a situation in which removal is practically impossible if the plaintiff specifies that her damages are below the jurisdictional minimum and where removal is virtually certain to succeed if the plaintiff has not made a specific damages pleading. This will either result in an increase in the number of cases where lower damages are specifically pled or in the continued increase in the number of removals. If the former occurs, the question of whether judicial estoppel will effectively prevent awards in excess of the specific amount demanded will be severely tested.

E. Fourth Circuit

Although there are numerous cases involving amount in controversy disputes in its district courts, the Fourth Circuit has so far declined to adopt a particular standard defining the defendant's burden in these matters.[80] At the district court level some districts have achieved a consensus on the standard that will be applied within that district, but others have avoided squarely addressing the question.

Among those that have settled on a standard are the District of Maryland, the Middle District of North Carolina and the Southern District of West Virginia. The District of Maryland follows a two-tiered approach in which the "legal certainty" standard is applied where plaintiffs have specifically pled damages below the jurisdictional minimum and the "pre-

77. *See Frederico*, 507 F.3d at 197.
78. *Id.* at 199.
79. *Id.* at 198.
80. *See, e.g.*, Rota v. Consolidation Coal Co., 175 F.3d 1016 (4th Cir. 1999) (declining to adopt a standard); Gallagher v. Fed. Signal Corp., 524 F. Supp. 2d 724, 726 n.2 (D. Md. 2007) (stating that the Fourth Circuit has not articulated the standard to be applied).

ponderance of the evidence" standard is used when no specific damage amount has been claimed.[81] The reasoning behind these decisions is that the plaintiff's choice of forum is to be respected.[82] When the plaintiff has made her choice clear by pleading a specific amount, the burden on the defendant to challenge the choice should be higher.[83] The Middle District of North Carolina employs the "preponderance of the evidence" standard in all matters, regardless of whether the plaintiff has specifically claimed damages less than the jurisdictional amount.[84]

The Southern District of West Virginia also eventually arrived at the "preponderance of the evidence" standard, but only after a much longer period of uncertainty. In a pair of cases from 1994, the court described the "legal certainty" standard only to then discuss the defendant's burden with regard to "reasonable certainty."[85] After applying the courts' "common sense" to the allegations they found that a "realistic assessment of the record" established the jurisdictional amount.[86] This approach was very different from other "legal certainty" analyses which called into question the actual standard adopted by the court. Not only was it unclear whether these cases actually followed the "legal certainty" standard that they adopted, but it also became unclear whether the Southern District had actually adopted a specific standard at all. In *Sayre v. Potts*, the court complained that "[i]n the Southern District of West Virginia, a difference of opinion exists among the various judges over the appropriate standard in such cases" stating that "legal certainty," "preponderance of the evidence," and "reverse legal certainty" had all appeared in opinions within the past five years.[87] In its dismay about the state of the law within the district, the *Sayre* court overlooked an opinion which followed yet another standard, the "clear and convincing" standard utilized in *Watterson v. GMRI, Inc.*[88] Since *Sayre*, in which the court followed the "preponderance of the evidence" standard,[89] the Southern District of West Virginia appears to have settled on the "preponderance of the evidence" standard.[90]

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81. *See, e.g.*, *Gallagher*, 524 F. Supp. 2d at 726-27; Delph v. Allstate Home Mortg., Inc., 478 F. Supp. 2d 852, 854 (D. Md. 2007); Momin v. Maggiemoo's Int'l, L.L.C., 205 F. Supp. 2d 506, 509-10 (D. Md. 2002).

82. *Momin*, 205 F. Supp. 2d at 509.

83. *Id.*

84. *See, e.g.*, Dash v. FirstPlus Home Loan Owner Trust 1996-2, 248 F. Supp. 2d 489, 498 (M.D.N.C. 2003); Bartnikowski v. NVR, Inc., No. 1:07CV00768, 2008 WL 2512839, at *2 (M.D.N.C. June 19, 2008) (applying the preponderance of the evidence standard to a CAFA case).

85. White v. J.C. Penney Life Ins. Co., 861 F. Supp. 25, 27 (S.D.W. Va. 1994); Mullins v. Harry's Mobile Homes, 861 F. Supp. 22, 24-25 (S.D. W. Va. 1994).

86. *White*, 861 F. Supp. at 24-25, 27-28.

87. Sayre v. Potts, 32 F. Supp. 2d 881, 884 (S.D.W. Va. 1999).

88. *See* Watterson v. GMRI, Inc., 14 F. Supp. 2d 844, 849-50 (S.D.W. Va. 1997) (arriving at the "clear and convincing" standard after rejecting the "legal certainty," "preponderance of the evidence," and "reasonable probability" standards).

89. *Sayre*, 32 F. Supp. 2d at 885.

90. *See, e.g.*, Smith v. Booth, No. 2:07-cv-00553, 2007 WL 2963776, at *2 (S.D.W. Va. Oct. 9, 2007) (following the preponderance of the evidence standard); McCoy v. Erie Ins.

Unlike the districts listed above, the District of South Carolina has avoided squarely addressing the question of which burden removing defendants should be required to meet. While an examination of the cases demonstrates a two-tiered approach somewhat similar to that of the District of Maryland, the courts in this district have not articulated the standard as clearly. For cases in which the plaintiff's claim is lower than the jurisdictional minimum, the courts have clearly rejected the "inverse legal certainty" standard because it improperly shifts the burden of proving federal jurisdiction onto the plaintiff, but they have not formally adopted any of the other standards.[91] This failure to formally adopt a test is somewhat misleading however, because in practice the courts have refused to look beyond a plaintiff's assertion that the amount in controversy is below the jurisdictional minimum, thus creating a *de facto* legal certainty test (or arguably an even stronger deference to the plaintiff's choice of forum).[92] Meanwhile, in cases where no specific amount has been claimed the "inverse legal certainty test" has been employed.[93]

The Fourth Circuit is a microcosm of the rest of the nation with regard to the amount in controversy problem. The various districts of the Fourth Circuit have experimented with numerous different standards; there is some cross-district discussion on how best to handle this issue, but ultimately each district has taken its own approach. Some have arrived at a settled standard while others still remain divided on how this issue is best decided.

F. Fifth Circuit

Since the 1988 amendment that created the one-year bar, the Fifth Circuit has consistently handled more diversity removal cases than any other circuit.[94] Not surprisingly, it produced one of the earliest comprehensive

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Co., 147 F. Supp. 2d 481, 486-89 (S.D.W. Va. 2001) (analyzing the various standards and following the *Sayre* court's selection of the preponderance of the evidence); Green v. Metal Sales Mfg. Corp., 394 F. Supp. 2d 864, 866-67 (S.D. W. Va. 2005) (following the preponderance of the evidence standard).

91. *See, e.g.*, Spann v. Style Crest Prods., Inc., 171 F. Supp. 2d 605, 607-08 (D.S.C. 2001).

92. *See, e.g.*, Brooks v. GAF Materials Corp., 532 F. Supp. 2d 779, 781-82 (D.S.C. 2008) (following the reasoning of *Phillips*); Cook v. Medtronic Sofamor Danek, USA, Inc., No. 9:06-cv-01995-RBH, 2006 WL 2171130, at *3 (D.S.C. Jul 31, 2006) (finding remand proper where complaint specifically "limits recoverable damages to below the jurisdictional minimum"); Phillips v. Whirlpool Corp., 351 F. Supp. 2d 458, 461-62 (D.S.C. 2005) (noting that courts "lean toward" requiring legal certainty or reasonable probability, but that analysis is unnecessary because plaintiff's claim for less than the jurisdictional amount will not be second guessed by the court).

93. *See, e.g.*, Chavis v. Fidelity Warranty Servs., Inc., 415 F. Supp. 2d 620, 627 (D.S.C. 2006); Woodward v. Newcourt Commercial Fin. Corp., 60 F. Supp. 2d 530, 531 & n.2 (D.S.C. 1999).

94. *See* Federal Court Cases: Integrated Data Base, 1970–2000, ICPSR Study No. 8429 (Inter-University Consortium for Political and Social Research 2005); Federal Court Cases: Integrated Data Base, 2007, ICPSR Study No. 22300 (Inter-University Consortium for Political & Social Research 2008) (noting that the annual average number of diversity removal cases terminated in the Fifth Circuit from 1990-2007 was 3,895 while the next highest average, the Ninth Circuit, for the same period was 2,338).

analyses of the amount in controversy problem in *De Aguilar v. Boeing*,[95] as well as a detailed and innovative proposal for dealing with forum manipulation in the removal context.[96]

The *De Aguilar* case, which involved lawsuits against an aircraft manufacturer arising from an air crash in Mexico, came before the Fifth Circuit twice: in 1993 and again in 1995.[97] A central issue in both cases was whether the jurisdictional minimum for federal diversity jurisdiction had been met. In the 1993 case the plaintiffs had not pled a specific amount of damages, and the court held that in those circumstances, the defendants had to show by a "preponderance of the evidence" that the jurisdictional minimum was met.[98] In 1995 the case returned. This time the plaintiffs' had specifically stated that their damages did not exceed the jurisdictional amount.[99] After considering both the "legal certainty" standard and the much more relaxed "some possibility" standard applied by the district court, the Fifth Circuit concluded that the "preponderance of the evidence" standard was appropriate for this situation as well.[100] The opinion also stated that, once defendants met their burden, plaintiffs could still secure a remand by meeting the *Red Cab* "legal certainty" standard (see descriptions *supra* of the "inverted legal certainty" standard).[101]

Thus, the *De Aguilar* court employed the same standard for cases in which damages are unspecified and cases in which the plaintiff has affirmatively claimed less than the jurisdictional minimum. It justified this outcome by noting that state court pleading rules seldom bind plaintiffs to their initial *ad damnum* amounts, and Texas prohibits specific damages claims altogether.[102] It therefore declined to place a higher burden on defendants based on such non-binding state court pleadings, because to do so would invite manipulation.[103] This is particularly true when the complaint makes it "facially apparent" that the amount in controversy requirement has been met.[104]

This standard has remained largely unchanged at both the circuit and district court level.[105] The most common dispute that continues to arise is

95. De Aguilar v. Boeing Co., 11 F.3d 55, 57-58 (5th Cir. 1993) [hereinafter De Aguilar I]; De Aguilar v. Boeing, 47 F.3d 1404, 1409-13 (5th Cir. 1995) [hereinafter De Aguilar II].

96. *See generally* Tedford v. Warner-Lambert Co., 327 F.3d 423 (5th Cir. 2003) (applying an "equitable exception in the form of estoppel").

97. *De Aguilar I*, 11 F.3d at 55; *De Aguilar II*, 47 F.3d at 1404.

98. *De Aguilar I*, 11 F.3d at 58.

99. *De Aguilar II*, 47 F.3d at 1409-10.

100. *Id.* at 1411-12.

101. *Id.* at 1412.

102. *Id.* at 1410-11.

103. *Id.*

104. *Id.* at 1413.

105. *See, e.g.*, Myers v. Gregory, No. 07-2213, 2008 WL 239570, at *2 (W.D. La. Jan. 29, 2008); Felton v. Greyhound Lines, Inc., 324 F.3d 771, 773 (5th Cir. 2003); Gebbia v. Wal-Mart Stores, Inc., 233 F.3d 880, 882-83 (5th Cir. 2000); Simon v. Wal-Mart Stores, Inc., 193 F.3d 848, 850-51 (5th Cir. 1999); Luckett v. Delta Airlines, Inc., 171 F.3d 295, 298 (5th Cir. 1999); City of Sachse v. Kansas City S., 564 F. Supp. 2d 649, 657 (E.D. Tex. 2008); Garcia v.

whether it is "facially apparent" that the complaint seeks more than the jurisdictional amount. This determination is legally significant because plaintiff's post-removal stipulations may not prevent removal if the court determines that it was "facially apparent" from the complaint that the amount in controversy was met.[106] Predictably, the line defining "facially apparent" is not an easy one to draw.[107] As a result, in spite of the clarity and consistency within the Fifth Circuit on the standard to be applied, the ultimate question of whether a given case exceeds the jurisdictional minimum remains a difficult one to answer.

The Fifth Circuit has also attempted to fashion a judicial solution to the forum manipulation problem. In 2003, it became the first circuit to hold that the one-year bar of § 1446(b) could be subject to equitable exceptions.[108] In *Tedford*, the Fifth Circuit held that "[w]here a plaintiff has attempted to manipulate the statutory rules for determining federal removal jurisdiction, thereby preventing the defendant from exercising its rights, equity may require that the one-year limit in § 1446(b) be extended."[109] Although the plaintiff's manipulation in *Tedford* involved the repeated joinder of non-diverse defendants that the plaintiff had no intention of pursuing rather than amount in controversy manipulation,[110] the holding left open its application to amount in controversy disputes. While this standard has met with limited acceptance by district courts both within the Fifth Circuit and beyond, no other circuit court has embraced its use.[111]

G. Sixth Circuit

The Sixth Circuit is in general agreement on the standards applied to amount in controversy disputes. The clearest cases are those in which the complaint demands more than the jurisdictional minimum. To oppose removal in these cases, the plaintiff must show to a "legal certainty" that the amount in controversy does not, in fact, exceed that minimum.[112] Much more commonly encountered are cases where the amount of damages are unspecified. This is due, in part, to state law pleading rules in states such as Kentucky which prohibit including specific damage

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Koch Oil Co. of Texas, 351 F.3d 636, 638-39 (5th Cir. 2003); Owens v. David, 2007 WL 3243850, at *2-3 (S.D. Miss. Oct. 31, 2007).

106. *See Gebbia*, 233 F.3d at 883.

107. *Compare Simon*, 193 F.3d at 850-51 (shoulder injury, abrasions and bruises plus loss of consortium insufficient to meet "facially apparent" requirement), *with Luckett*, 171 F.3d at 298 (loss of luggage containing plaintiff's heart medication resulting in six-day hospitalization sufficient to meet "facially apparent" standard), *and Gebbia*, 233 F.3d at 883 (injuries to wrist, knee, patella, and back sufficient to meet "facially apparent" standard).

108. Tedford v. Warner-Lambert Co., 327 F.3d 423, 426-27 (5th Cir. 2003).

109. *Id.* at 428-29.

110. *Id.* at 428.

111. *See, e.g.*, Foster v. Landon, No. Civ. A. 04-2645, 2004 WL 2496216, at *2 (E.D. La. Nov. 4, 2004) (acknowledging equitable exception but finding insufficient evidence of manipulation to apply it); Wise v. Gallagher Bassett Servs., Inc., No. Civ. JFM-02-2323, 2002 WL 2001529, at *1 (D. Md. Aug. 27, 2002) (denying remand on equitable grounds).

112. *See, e.g.*, Gafford v. Gen. Elec. Co., 997 F.2d 150, 157 (6th Cir. 1993).

amounts in the complaint.[113] In these cases, the Sixth Circuit generally imposes the "preponderance of the evidence" or "more likely than not" standard on the defendant.[114]

Where the complaint specifically demands less than the jurisdictional minimum, a somewhat heightened "substantial likelihood" or "reasonable probability" standard is employed.[115] The Sixth Circuit chose not to place the higher "legal certainty" burden on the defendant because it recognized that in most states within the circuit, the plaintiff's ultimate recovery is not limited by the initial complaint.[116] As a result, defendants are able to challenge plaintiffs' claims that the amount in controversy is below the jurisdictional minimum, and often succeed in removing such cases over plaintiffs' objections, even when the plaintiff has stipulated that the amount sought does not meet the jurisdictional minimum.[117] The Sixth Circuit displays some division on questions concerning stipulations and their effectiveness.

The *Rogers* court held that a plaintiff's post-removal stipulation that the amount in controversy would not exceed the jurisdictional minimum was not by itself sufficient to require remand.[118] This decision was based on the rule articulated in *Red Cab* that "[e]vents occurring subsequent to the institution of suit which reduce the amount recoverable below the statutory limit do not oust jurisdiction."[119] While noting that numerous district courts around the country had remanded in response to binding stipulations, the *Rogers* court found it immaterial that a stipulation was binding, and it refused to remand solely because such a stipulation had been made.[120] Since then other district courts in the circuit have been less categorical in their refusal to credit binding stipulations, characterizing these agreements as "clarifications" of the amount in controversy when the complaint demanded unspecified damages.[121]

While this disagreement is relatively minor compared to the divisions in many of the other circuits, the overall approach is one that still injects a good deal of uncertainty into the process. The fact that even cases where

113. Egan v. Premier Scales & Sys., 237 F. Supp. 2d 774, 777 (W.D. Ky. 2002). A more complete discussion of state law pleading requirements and their role in amount in controversy disputes can be found in the next Section.

114. *See, e.g.*, *Gafford*, 997 F.2d at 158; Rogers v. Wal-Mart Stores, Inc., 230 F.3d 868, 871 (6th Cir. 2000), *cert. denied*, 532 U.S. 953.

115. *See, e.g.*, Alinsub v. T-Mobile, 414 F. Supp. 2d 825, 828 (W.D. Tenn. 2006); *In re* Cardizem CD Antitrust Litig., 90 F. Supp. 2d 819, 823 (E.D. Mich. 1999); *Gafford*, 997 F.2d at 157-58.

116. *See, e.g.*, *Rogers*, 230 F.3d at 871; *Gafford*, 927 F.2d at 158.

117. *See, e.g.*, *Rogers*, 230 F.3d at 871; *Egan*, 237 F. Supp. 2d at 777-78.

118. *Rogers*, 230 F.3d at 872-73.

119. *Id.* (quoting St. Paul Mercury Indem. Co. v. Red Cab, 303 U.S. 283, 290 (1938)).

120. *Id.* at 872-73.

121. *See, e.g.*, Sparks v. Wal-Mart Stores, Inc., No. 1:06-CV-151-R, 2007 WL 101850, at *2 (W.D. Ky. Jan. 10, 2007) (granting remand based upon plaintiff's "clarification" of amount in controversy); *Egan*, 237 F. Supp. 2d at 778 (finding that lack of unequivocal stipulation limiting recovery prevented remand); Fenger v. Idexx Labs., Inc., 194 F. Supp. 2d 601, 604 (E.D. Ky. 2002) (giving weight to plaintiff's stipulation in granting motion to remand).

the plaintiff specifically demands less than the jurisdictional minimum may be removed, coupled with uncertainty about the effectiveness of plaintiff's stipulations concerning the amount in controversy, provides defendants with an incentive to remove any diverse case regardless of its size.

H. Seventh Circuit

Until recently the Seventh Circuit utilized a combination of the "reasonable probability" and "inverted legal certainty" standards.[122] Once defendants met their "reasonable probability" burden, plaintiffs could still avoid federal jurisdiction by showing that it was a legal certainty that the amount in controversy did not exceed the jurisdictional minimum. However, *Meridian Security Insurance Co. v. Sadowski*, decided by Judge Easterbrook in mid-2006, squarely addressed the problems associated with amount in controversy disputes and sharply criticized the vague, meandering, and inconsistent jurisprudence that resulted from the use of the "reasonable probability" standard.[123] He traced the origin of that standard to a restatement of the "preponderance of the evidence" norm and complained that since then "[t]he phrase has acquired a life of its own" to the detriment of legal clarity and consistency.[124] He concluded this criticism by establishing "preponderance of the evidence" as the standard in the Seventh Circuit while "banish[ing] from our lexicon" the phrase "[r]easonable probability that jurisdiction exists."[125] He also reaffirmed that plaintiffs might still win a motion to remand if they met the "inverted legal certainty" standard.[126]

Such clarity has proven helpful to district courts in the Seventh Circuit dealing with such issues (they have cited *Meridian's* discussion of amount in controversy issues over one hundred times in roughly two years)[127] and has helped to discourage the twin problems of forum manipulation by plaintiffs and removal of cases that fall below the jurisdictional minimum by defendants.

Two recent cases from the Southern District of Illinois are illustrative. The first, *Wienstroer v. Wal-Mart Stores, Inc.*, found that "the phrase 'in a sum in excess of FIFTY THOUSAND DOLLARS ($50,000) and under

122. *See, e.g.*, Rising-Moore v. Red Roof Inns, Inc., 435 F.3d 813, 815 (7th Cir. 2006); Smith v. Am. Gen. Life and Acc. Ins. Co., Inc., 337 F.3d 888, 892 (7th Cir. 2003); Chase v. Shop 'N Save Warehouse Foods, Inc., 110 F.3d 424, 427 (7th Cir. 1997); Shaw v. Dow Brands, Inc., 994 F.2d 364, 366 & n.2 (7th Cir. 1993) (interpreting *McNutt* to require a reasonable probability test).

123. *See* Meridian Sec. Ins. Co. v. Sadowski, 441 F.3d 536, 542-43 (7th Cir. 2006).

124. *Id.*

125. *Id.* at 543.

126. *Id.*

127. *See, e.g.*, Lawrence Crawford Ass'n for Exceptional Citizens, Inc. v. Conversource, Inc., No. 4:04-cv-4120-DGW, 2008 WL 2557461, at *2 (S.D. Ill. June 23, 2008); Reason v. Wal-Mart Stores, Inc., No. 07-3292, 2008 WL 410227, at *1 (C.D. Ill. Feb. 12, 2008); Epstein v. Target Corp., No. 06 C 7035, 2007 WL 551552, at *1 (N.D. Ill. Feb. 15, 2007); Shadday v. Rodriguez Mahuad, No. 4:06-CV-0088-JDT-WGH, 2006 WL 2228958, at *2 (S.D. Ind. Aug. 2, 2006).

SEVENTY FIVE THOUSAND DOLLARS ($75,000)' in the state court complaint [did] not preclude removal" where plaintiff's answers to interrogatories stated that she had over $104,000 in medical bills.[128] In the second case, *Lawrence Crawford Association for Exceptional Citizens, Inc. v. Centersource, Inc.*, the plaintiff's initial pleading exceeded $75,000, but an error in calculating damages made it clear that damages could not exceed $67,547.[129] The court appropriately found defendant's arguments that the plaintiff's complaint should control unavailing and remanded the case because it did not (and could not) meet the jurisdictional minimum.[130]

While the "preponderance of the evidence" standard itself is quite common, the Seventh Circuit's approach in *Meridian* has improved the clarity and uniformity with which amount in controversy disputes are handled. The detailed and focused discussion on the practical meaning of the term and the underlying policies that it was designed to promote has been generally well received and carefully followed by the district courts.

I. EIGHTH CIRCUIT

Like the Seventh Circuit, the Eighth Circuit also follows the "preponderance of the evidence" standard while allowing plaintiffs an opportunity to meet the "inverted legal certainty" standard once the defendant's burden has been met.[131] However, its gloss on "preponderance of the evidence" underscores Judge Easterbrook's concern that any legal phrase may take on "a life of its own" when additional words or phrases become attached to it.[132]

The 2005 *Kramper* opinion stated that a removing party must "show by a preponderance of the evidence the claims originally asserted by [plaintiff] could, that is might, legally satisfy the amount in controversy requirement."[133] This somewhat awkward (and potentially unfortunate) phraseology was used to emphasize the fact that the amount in controversy is not defined by the ultimate jury award, but rather what a rational jury could have awarded without being struck as legally excessive.[134] It is easy to imagine how a restatement of the standard, indicating that the defendant's burden can be met with a showing that a plaintiff's claim "could, that is might, legally satisfy" the jurisdictional minimum, could lead to confusion at the district court level. Fortunately, until now, there

128. Wienstroer v. Wal-Mart Stores, Inc., No. 08-CV-0457-MJR-DGW, 2008 WL 2782842, at *2 (S.D. Ill. July 15, 2008).

129. *See Lawrence Crawford*, 2008 WL 2557461, at *2-3 & n.1.

130. *See id.* at *5.

131. *See* James Neff Kramper Family Farm P'ship v. IBP, Inc., 393 F.3d 828, 831 (8th Cir. 2005); Kopp v. Kopp, 280 F.3d 883, 884-85 (8th Cir. 2002).

132. *James Neff Kramper Family Farm P'ship*, 393 F.3d at 835; *see also* Meridian Sec. Ins. Co. v. Sadowski, 441 F.3d 536, 542 (7th Cir. 2006).

133. *Kramper*, 393 F.3d at 831.

134. *Id.* at 833 (quoting *Kopp*, 280 F.3d at 885).

have been very few citations to this specific passage[135] and no indication that a "could, that is might" standard is being employed at the district court level.[136]

The district courts of the Eighth Circuit have also clarified two other areas of amount in controversy litigation. Without challenging the broad use of the "preponderance of the evidénce" standard, they have generally agreed that the "legal certainty" test applies where plaintiff's complaint specifically states an amount lower than the jurisdictional minimum.[137] Also, much like the district courts of the Sixth Circuit, several district courts have permitted plaintiff's post-petition stipulations limiting their damages as "clarifications" of the amount in controversy.[138]

J. Ninth Circuit

The Ninth Circuit has clearly established rules for how all types of amount in controversy disputes should be handled. There are three different standards that are used depending upon the amount claimed in the plaintiff's complaint. In cases where a specific amount of damages have not been pled, the "removing defendant must prove by a preponderance of the evidence that the amount in controversy requirement has been met."[139] Where the complaint alleges damages in excess of the jurisdictional minimum, the "inverted legal certainty" standard is applied, allowing the plaintiff to avoid federal jurisdiction if it can be shown to a legal certainty that the claim is actually for less than the jurisdictional minimum.[140] When the complaint specifies damages that are less than the jurisdictional amount then the defendant must satisfy the "legal certainty" standard in order to support removal.[141]

The first two standards are well established. The third, however, requiring the use of the "legal certainty" standard when plaintiff claims less than the jurisdictional amount, was only announced in 2007 by the *Lowdermilk* case and has since been questioned in a concurrence by Judge O'Scannlain.[142] Judge O'Scannlain favors the use of a uniform

135. *See generally* Westhoff v. Rebashares Dev. Co., No. 4:07CV86 HEA, 2007 WL 1395458, at *1 (E.D. Mo. May 9, 2007) (finding the amount in controversy of $34,087.31 clearly below the jurisdictional minimum); Questar Data Sys., Inc. v. Serv. Management Group, Inc., No. 06-0471, 2006 WL 1662961, at *1 (D. Minn. June 14, 2006).

136. *Cf. Questar*, 2006 WL 1662961, at *3.

137. *See* Kaufman v. Costco Wholesale Corp., 571 F. Supp. 2d 1061, 1063 (D. Minn. 2008); Nagel v. Wal-Mart Stores, Inc., 319 F. Supp. 2d 981, 983 (D.N.D. 2004); Dyrda v. Wal-Mart Stores, Inc., 41 F. Supp. 2d 943, 946 (D. Minn. 1999).

138. *See, e.g.*, Yarovinski v. Heartland Exp. Inc. of Iowa, No. 4:OSCV1953 DDN, 2006 WL 146222, at *2-3 (E.D. Mo. Jan. 19, 2006); Agre v. Rain & Hail LLC, 196 F. Supp. 2d 905, 908 (D. Minn. 2002); *Dyrda*, 41 F. Supp. 2d at 949.

139. Abrego Abrego v. Dow Chem. Co., 443 F.3d 676, 683 (9th Cir. 2006); *see also* Lowdermilk v. U.S. Bank Nat'l Ass'n, 479 F.3d 994, 998 (9th Cir. 2007) (quoting *Abrego*, 443 F.3d at 683).

140. *Lowdermilk*, 479 F.3d at 998 (citing *Abrego*, 443 F.3d at 683 n.8).

141. *See id.* at 999.

142. Guglielmino v. McKee Foods Corp., 506 F.3d 696, 702 (9th Cir. 2007) (O'Scannlain, J., concurring).

"preponderance of the evidence" standard, citing the potential for plaintiffs to manipulate their pleadings to avoid federal jurisdiction and the inconsistencies caused by the vagaries of state law pleading requirements.[143] Although district courts in the Ninth Circuit have not commented on O'Scannlain's concurrence yet, other courts have noted it in their discussions of the benefits and detriments of the "legal certainty" standard.[144]

K. TENTH CIRCUIT

Tenth Circuit jurisprudence on amount in controversy issues can best be described as vague and hypertechnical. In *Laughlin v. Kmart Corp.*, the court required that the amount in controversy be "affirmatively established" on the face of the complaint or the removal petition and remanded when the defendant's removal notice failed to specifically allege that the amount in controversy requirement was satisfied.[145] It did so in spite of the fact that defendant's subsequent jurisdictional brief provided factual support for that contention.[146] The *Laughlin* court also failed to offer any guidance on the appropriate standard required to "affirmatively establish" that the amount in controversy requirement was met.[147]

Shortly after *Laughlin*, the Tenth Circuit quoted the *Red Cab* "legal certainty" standard but then employed it in the removal context, essentially inverting it, making it necessary for the plaintiff to show, or the court to find, to a legal certainty that the plaintiff could not recover the minimum amount.[148] Three years later it employed the "preponderance of the evidence" standard while in dicta implying a willingness to consider a more stringent test for defendants.[149] Yet after signaling this willingness to require more of defendants, the Tenth Circuit instead reaffirmed the "preponderance of the evidence" standard in *McPhail v. Deere & Co.* when it adopted Judge Easterbrook's *Meridian* framework (described *supra*).[150]

Meanwhile, district courts within the Tenth Circuit, seemingly anticipating the movement toward placing a higher burden on defendants, have already held that removing defendants must meet a higher burden, at least in cases where the plaintiff has expressly pled damages less than the

143. *Id.* at 703-04.

144. *See* Raspa v. Home Depot, 533 F. Supp. 2d 514, 518 (D.N.J. 2007); Faltaous v. Johnson and Johnson, No. 07-1572, 2007 WL 3256833, at *3 n.3 (D.N.J. Nov. 5, 2007).

145. Laughlin v. Kmart Corp., 50 F.3d 871, 873 (10th Cir. 1995).

146. *Id.*

147. *See id.*

148. *See* Miera v. Dairyland Ins. Co., 143 F.3d 1337, 1340 (10th Cir. 1998) (finding that treble damages plus reasonably available statutory attorneys' fees satisfied the jurisdictional minimum because there was no legal certainty that this amount could not be recovered).

149. *See* Martin v. Franklin Capital Corp., 251 F.3d 1284, 1290 (10th Cir. 2001) (requiring "at a minimum that the jurisdictional amount be shown by a preponderance of the evidence").

150. *See* McPhail v. Deere & Co., 529 F.3d 947, 953-57 (10th Cir. 2008). *See also supra* notes 108-11 and accompanying text.

jurisdictional amount.[151] The court in *Coca-Cola v. South Beach Beverage* adopted the Sixth Circuit's reasoning for utilizing a higher standard. Although it described the standard as "reasonable certainty," rather than the "reasonable probability" standard used by the Sixth Circuit, this has since been regarded as a distinction without a difference.[152] Subsequently the *Eatinger* court, in the same context, formally used the term "reasonable probability" in its opinion.[153] More significantly, neither court discussed the practical difference between "preponderance of the evidence" and "reasonable probability." As Judge Easterbrook indicated when banishing the "reasonable probability" standard from the Seventh Circuit, the distinction between these standards is difficult to articulate consistently and virtually impossible to measure.[154]

It remains to be seen whether the Tenth Circuit's newly found certainty on this issue as described in *McPhail* will influence the district courts. The lower courts, having anticipated the circuit's move towards a heightened standard for defendants, have now just received clear guidance in the other direction.

L. Eleventh Circuit

Like many other circuits, the Eleventh utilizes the "legal certainty" standard when plaintiff's claim is specifically below the jurisdictional minimum.[155] It also follows the "preponderance of the evidence" standard for cases in which the plaintiff's damages are unspecified,[156] although a recent opinion makes it clear that in practice, this standard probably understates the burden on removing defendants.[157]

Judge Tjoflat's long and thoughtful opinion in *Lowery v. Alabama Power Co.* examined the origin of the "preponderance of the evidence" standard and its efficacy in the "naked pleading" context.[158] In cases where there is no evidence concerning the amount in controversy beyond the bare pleadings, the court recognized that, from a practical standpoint, the standard actually approaches "legal certainty."[159] This is particularly true when the opinion's prohibition on post-removal discovery is consid-

151. *See* Coca-Cola Bottling of Emporia, Inc. v. S. Beach Beverage Co., 198 F. Supp. 2d 1280, 1285 (D. Kan. 2002) (remanding for failure to meet "reasonable certainty" standard); *see also* Eatinger v. BP Am. Prod. Co., 524 F. Supp. 2d 1342, 1346-47 (D. Kan. 2007) (denying remand because defendants met reasonable probability standard).

152. *Coco-Cola Bottling*, 198 F. Supp. 2d at 1285.

153. *Eatinger*, 524 F. Supp. 2d at 1347 n.1.

154. *See supra* Meridian Sec. Ins. Co. v. Sadowski, 441 F.3d 536, 542-43 (7th Cir. 2006).

155. *See* Burns v. Windsor Ins. Co., 31 F.3d 1092, 1095 (11th Cir. 1994).

156. Kirkland v. Midland Mortgage Co., 243 F.3d 1277, 1281 n.5 (11th Cir. 2001) (establishing preponderance of the evidence standard for defendant's burden when plaintiff has not pled a specific amount of damages); *see also* Lowery v. Ala. Power Co., 483 F.3d 1184, 1208 (11th Cir. 2007) (discussing the origins of the preponderance of the evidence standard and its drawbacks in cases with limited evidence).

157. *Lowery*, 483 F.3d at 1208-11.

158. *Id.* at 1209.

159. *Id.* at 1211.

ered.[160] By reaffirming the "preponderance of the evidence" standard and prohibiting any form of post-removal discovery on jurisdictional issues, even in the "naked pleading" context, *Lowery* effectively guaranteed the remand of diversity cases in which the plaintiff has not provided evidence supporting removal.[161] While voicing its dissatisfaction with the outcome, the court considered itself bound by precedent to "continue forcing this square peg into a round hole."[162]

It did not take long for the potential manipulation of this standard to manifest itself. In *Siniard v. Ford Motor Co.* the plaintiff filed a wrongful death claim in state court which Ford removed.[163] Because the complaint did not make any specific claim for damages but merely asked for compensatory and punitive damages resulting from a wrongful death, the plaintiff moved for remand on the grounds that Ford had not carried its burden with respect to the amount in controversy.[164] The court agreed.[165] "When a plaintiff seeks unliquidated damages and does not make a specific demand, therefore, the factual information establishing the jurisdictional amount must come from the plaintiff."[166] Therefore, if the plaintiff does not provide any information in her complaint, the defendant will be unable to remove, at least until discovery responses have been received.

This is particularly troubling for defendants in the Eleventh Circuit, because district courts have held that removal after thirty days may be untimely if the face of the complaint provides sufficient information for the defendant to ascertain that the amount in controversy exceeds the jurisdictional minimum.[167] In *Bartley v. Starwood Hotel & Resorts Worldwide, Inc.*, the court held that a complaint stating that the plaintiff sought over $15,000 for a spider bite that caused a fever, and resulted in surgery, was sufficient on its face to require the defendant to remove.[168] The *Siniard* court, on the other hand, held that a wrongful death claim, without supporting evidence on the amount in controversy, was insufficient on its face and had to be remanded.[169]

It is too soon to tell whether *Lowery* will result in an increasing number of pleadings being filed with unspecified damages claims in the Eleventh Circuit. As discussed below, the vagueness or specificity of plaintiff's pleadings are only partially a matter of tactical choice. Much of this

160. *Id.* at 1215-18.
161. *See id.*
162. *Id.* at 1211.
163. Siniard v. Ford Motor Co., 554 F. Supp. 2d 1276, 1277 (M.D. Ala. 2008).
164. *Id.* at 1278-79.
165. *Id.* at 1279.
166. *Id.* at 1278 (quoting *Lowery*, 483 F.3d at 1215).
167. Bartley v. Starwood Hotels & Resorts Worldwide, Inc., No. 07-80637-CIV, 2007 WL 2774250, at *1 (S.D. Fla. Sept. 24, 2007).
168. *Id.*
169. *Compare Siniard*, 544 F. Supp. 2d at 1277-78, *with* De Aguilar v. Boeing Co., 11 F.3d 55, 57-58 (5th Cir. 1993) (holding that it was "facially apparent" that a 1993 wrongful death claim satisfied the amount in controversy of $50,000).

vagueness and uncertainty is driven by state law pleading requirements. Whatever the cause of the lack of specificity in plaintiffs' pleadings, defendants in the Eleventh Circuit are currently in the unenviable position of having to guess at what may, or may not be, considered facially sufficient.

M. State Law Pleading Requirements

The inconsistencies caused by the varied application of the many standards described above, both across circuits and within them, are exacerbated by the differences that exist in state law pleading requirements. While historically many state law pleading requirements were aligned with the federal jurisdictional minimums, for a variety of reasons many of these requirements have not changed in concert with the federal statutes.[170] Currently in most states plaintiffs are not required to allege an amount in controversy that is relevant to federal removal jurisdiction. Over half of the states either allow or require that a plaintiff plead generally, without alleging a specific amount in controversy.[171] Most of the remaining states require that the pleadings set forth a threshold amount in controversy based on state jurisdictional requirements that are lower than $75,000.[172] In addition to these general pleading rules, many state legislatures have enacted statutes expressly forbidding *ad damnum* clauses in complaints arising from certain causes of action, including complaints alleging any type of malpractice,[173] medical malpractice specifi-

170. *See* Jack E. Karns, *Removal to Federal Court and the Jurisdictional Amount in Controversy Pursuant to State Statutory Limitations on Pleading Damage Claims*, 29 Creighton L. Rev. 1091, 1092-93 (1996).

171. Alabama, Alaska, Arizona, Colorado, Delaware, Hawai'i, Idaho, Indiana, Louisiana, Maine, Massachusetts, Mississippi, Missouri, Montana, Nebraska, New Jersey, New Mexico, New York, North Dakota, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, Vermont, Washington, West Virginia, and Wisconsin either require or allow general pleading. Ala. R. Civ. P. 8(a); Alaska R. Civ. P. 8(a); Ariz. R. Civ. P. 8(g); Del. Super. Ct. Civ. R. 9(g); Idaho R. Civ. P. 9(g); Ind. R. Trial P. 8(A)(2); Me. R. Civ. P. 8(a); Mass. Ann. Laws ch. 231, § 13B (LexisNexis 2008); Miss. R. Civ. P. 8(a)(2); Mo. Sup. Ct. R. 55.05; Mont. Code Ann. Ch. 20, 8(a) (2007); N.J. Ct. R. 4:5-2; N.M. Dist. Ct. R. Civ. P. 1-008; N.Y. C.P.L.R. 3017 (Consol. 2008); N.D. R. Civ. P. 8(a); Pa. R.C.P. 1021; S.C. R.C.P. 8(a); S.D. Codified Laws § 15-6-8(a) (2008); Tenn. R. Civ. P. 8:01; Vt. R.C.P. 8(a); Wash C.R. 8(a); Wis. Stat. § 802.02(1) (2007). In many of these states special damages must be pled with specificity. Ala. R. Civ. P. 9(g); Alaska R. Civ. P. 9(h); Ariz. R. Civ. P. 9(g); Del. Super. Ct. Civ. R. 9(g); Haw. R. Civ. P. 9(g); Idaho R.C.P. 9(g); Ind. R. Trial P. 9(g); La. Code Civ. Proc. Ann. Art. 861 (2008); Me. R. Civ. P. 9(g); Miss. R.C.P. 9(g); Neb. Ct. R. Pleading Civ. Actions 8(a); N.J. Ct. R. 4:5-8(f); N.D. R. Civ. P. 9(g); S.C. R.C.P. 9(g); S.D. Codified Laws § 15-6-9(g) (2008); Tenn. R. Civ. P. 9.07; Utah R.C.P. 9(g); Vt. R.C.P. 9(g); Wash. C.R. 9(g); W. Va. R.C.P. 9(g).

172. Connecticut, Florida, Iowa, Kentucky, Michigan, Minnesota, Nevada, New Hampshire, North Carolina, Ohio, Oklahoma, Rhode Island, Texas, and Wyoming only require that a complaint allege that the state court's jurisdictional minimums are satisfied. Conn. Gen. Stat. § 52-91 (2008); Fla. R. Civ. P. 1.110(b); Iowa R. Civ. P. 1.403(1); Ky. C.R. 8.01(2); Mich. C.R. 2.111(B)(2); Minn. R. Civ. P. 8.01; Nev. R.C.P. 8(a); N.H. Rev. Stat. Ann. § 508:4-c (LexisNexis 2008); N.C. Gen. Stat. § 1A-1, 8(a) (2008); Ohio Civ. R. 8(A); Okla. Stat. tit. 12, § 2008(A)(2) (2008); Tex. R. Civ. P. 47(b); Wyo. R. Civ. P. 8(a)(1).

173. Me. R. Civ. P. 8(a)(2); N.M. Stat. Ann. § 41-5-4 (2008).

cally;[174] personal injury;[175] and wrongful death.[176] As a result, very few plaintiffs nationwide are required to definitively address the federal amount in controversy requirements as part of their initial pleadings. Courts have commented on the difficulty this causes when attempting to assess the amount in controversy in removal disputes.[177]

Only a handful of states require plaintiffs to specifically allege an amount in controversy, and even some of these prohibit specific damages allegations for personal injury or wrongful death cases.[178] While requirements for specific allegations of the amount in controversy help draw clearer lines on the issue, these requirements are only effective in preventing manipulation if the *ad damnum* represents a cap on damages. If, as in many jurisdictions, plaintiffs are allowed to recover amounts in excess of the amount claimed, then these pleading requirements only give the illusion of certainty.

There are very few states that require specific *ad damnum* clauses and place caps on damages. Even among these, Virginia, Maryland and Oregon illustrate how these specific requirements still may fail to yield certainty about the true amount in controversy.[179] Oregon's "cap" allows for judgments in excess of the pleadings to be awarded subject to a notice and hearing requirement for defendants.[180] Maryland's "cap" allows the court to grant discretionary leave to amend the *ad damnum* clause after the jury has rendered its verdict.[181] Finally, as evidenced by the initial example at the opening of this Article from Virginia,[182] a policy allowing for liberal amendment of pleadings undermines state pleading rules that require specific *ad damnum* clauses, even with a cap.[183]

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174. *See, e.g.*, Alabama [ALA. CODE § 6-5-483 (LexisNexis 2008)], Alaska [ALASKA STAT. § 09.55.547 (2008)], Georgia [GA. CODE ANN. § 9-11-8(a)(2)(B) (2008)], Massachusetts [MASS. ANN. LAWS ch. 231, § 60C (LexisNexis 2008)], Utah [UTAH CODE ANN. § 78-B-3-409 (2008)].

175. *See* Illinois [735 ILL. COMP. STAT. ANN. 5/2-604 (LexisNexis 2008)], Washington [WASH. REV. CODE ANN. § 4.28.360 (LexisNexis 2008)].

176. California [CAL. CIV. PROC. CODE § 425.10(b)(2) (Deering 2008)], Hawai'i (HAW. REV. STAT. ANN. § 663-1.3 (LexisNexis 2008)), Indiana [IND. R. TRIAL P. 8(A)(2)], New York [N.Y. C.P.L.R. 3017(c) (Consol. 2008)], Rhode Island [R.I. GEN. LAWS §9-1-30(a) (2008)].

177. *See* Leslie v. BancTec Serv. Corp., 928 F. Supp. 341, 348 (S.D.N.Y. 1996).

178. California, Illinois, Maryland, Oregon and Virginia require that specific damage amounts be pled, although California and Illinois prohibit pleading specific amounts in personal injury cases. CAL. CIV. PROC. CODE § 425.10(a)(2) (Deering 2008); 735 ILL. COMP. STAT. ANN. 5/2-604 (LexisNexis (2008); MD. R. CIV. P. 2-305; OR. R. CIV. P. 18(B); VA. SUP. CT. R. 3:2(c)(ii). California also prohibits pleading specific dollar amounts in wrongful death cases.

179. VA. SUP. CT. R. 3, 3:2(c)(ii); MD. R. CIV. P. 2-305, as interpreted by *Hoang v. Hewitt Ave. Assocs.*, 936 A.2d 915, 930-31 (Md. Ct. spec. App. 2007); OR. R. CIV. P. 18(B) for specificity requirements. *See* VA. SUP. CT. R. 1:8; OR. R. CIV. P. 67(c) for "cap" rules.

180. *Id.*

181. MD. R. CIV. P. 2-341(b).

182. *Supra* note 1 and accompanying text.

183. VA. SUP. CT. R. 1:8 provides that "[l]eave to amend shall be liberally granted in furtherance of the ends of justice."

The two states whose pleading requirements effectively address amount in controversy manipulation are Arkansas and Kansas. Kansas requires that a plaintiff plead a specific amount for claims under $75,000, and that a plaintiff explicitly state that he is seeking more than $75,000 if that is the case.[184] Coupled with Kansas' cap and somewhat more meaningful review of amendments, the Kansas pleading rules appear to put a real check on amount in controversy manipulation.[185] Likewise, Arkansas has provisions limiting recovery for unliquidated damages to less than the amount required for federal diversity jurisdiction, unless the demand indicates that the claim exceeds that amount.[186] Provisions like these reduce the likelihood of amount in controversy manipulation, but they apply in less than five percent of the states and show no meaningful sign of expansion.

III. SHOULD WE CARE ABOUT AMOUNT IN CONTROVERSY MANIPULATION?

It is one thing to demonstrate that the rules governing removal are being manipulated and that this manipulation is producing inconsistent results across the circuits. It is quite another to assert that something needs to be done about it. What makes the manipulation of this rule different from the manipulation of any other procedural rule which occurs on a daily basis? After all, a significant part of being a good lawyer is knowing the procedural rules and using them to benefit your client. What values are threatened or undermined by the inconsistency that currently exists in this area of the law?

The reflexive answer to this question is that consistency or uniformity in and of itself is an important value that should be pursued. This perspective has a great deal of scholarly support in the context of uniformity in federal question cases, based on the desire for uniformity in federal substantive law across the circuits.[187] This goal of uniformity in federal law is also reflected in the U.S. Supreme Court's *certiorari* decisions which continue to place a high value on resolving circuit splits.[188]

However, critics of this view that uniformity is valuable for its own sake, would say that efforts made to ensure uniformity are not worth the costs imposed on the system. The Supreme Court's very limited docket space ought not be wasted on ensuring uniformity unless the lack thereof

184. *See* KAN. STAT. ANN. § 60-208(a)(2).

185. *See* KAN. STAT. ANN. § 60-215.

186. ARK. R. CIV. P. 8(a) (2008).

187. *See* Amanda Frost, *(Over)Valuing Uniformity*, 94 VA. L. REV. 1578. 1581 n.36 (2008) (listing numerous articles and court decisions citing the need for uniformity in federal law).

188. *See* Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403, 414; David R. Stras, *The Supreme Court's Gatekeepers: The Role of Law Clerks in the Certiorari Process*, 85 TEX. L. REV. 947, 981-82 (2007).

imposes obvious costs on the system.[189] Even when such obvious costs are imposed on the system, Amanda Frost argues that in many cases the legislative branch is primarily responsible for the ambiguities that result in circuit splits and in most cases the legislature is better equipped to deal with the problem.[190]

There are two factors that make this problem more deserving of judicial attention than most. First, there is the nature of the incentives created by the rules, and the predictable conduct of litigants in response to those incentives. Second, there is the fact that although the legislature is clearly better positioned to deal with this problem, it shows little inclination for doing so.

All rules are created to achieve a desired result. They do this by identifying the actors whose behavior can provide the desired result and offering them incentives to change their behavior accordingly. In the case of the one-year bar the stated goal was to "reduc[e] the opportunity for removal after substantial progress has been made in state court" and to avoid the "substantial delay and disruption" of proceedings caused by late removals.[191] While creating the one-year bar certainly will achieve this narrow goal by preventing the federal courts from entertaining late removal petitions, let us consider what this has done to the incentives for the parties involved.

Defendants now know that their only opportunity for attaining the federal jurisdiction they prefer will be to remove early in the case, even when the basis for that removal is highly questionable. As a result, defendants now have a strong incentive to immediately remove any case in which diversity may exist, regardless of the apparent amount in controversy. The vague and inconsistent standards applied in amount in controversy litigation serve only to increase defendants' incentives to seek federal jurisdiction, because there are very few bright line situations in which removal will clearly fail.

On the other hand, the one-year bar gives plaintiffs every incentive to make their damages pleas as vague as possible and to continue to be vague and non-specific in their early discovery responses regarding the quantum of damages. The same vague and inconsistent standards that drive defendants to remove questionable or unworthy cases also encourage plaintiffs to avoid sharing any specific information about their claims for the first year of litigation to preserve their choice of state court. These incentives, and the behavior they encourage, appear to have affected federal diversity removal rates.

While it will require a more detailed empirical study to measure how much of an effect the one-year bar has had on diversity removal rates,

189. *See* Frost, *supra* note 187, at 11 (noting that such costs might include great expense and inconvenience for multi-state actors, incompatible standards of conduct within jurisdictions, or conflicts that pose serious questions for the legitimacy of the system).

190. *Id.* at 27-28.

191. H.R. Rep. No. 100-889, at 72 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5982, 6032.

there can be no question that diversity removal rates have gone up considerably since the creation of the one-year bar. From 1990 to 2007 the total number of civil cases terminated in those years increased 12% while the number of diversity cases remained almost the same.[192] During the same time period, removals on diversity grounds increased 56%.[193] Even when three-year averages are used these trends remain. The annual average number of civil cases terminated from 2005 to 2007 was 7.65% higher than the average from 1990 to 1992.[194] During that same time the average number of diversity cases terminated actually declined over 3%, but the average number of removed diversity cases increased 24.6%.[195]

It would seem that the one-year bar was a contributing factor in this increase. As the true meaning of the one-year bar was internalized by both the plaintiff and the defense bars, predictable results began to occur. When it became apparent that federal jurisdiction could be avoided through vagueness, the plaintiffs' bar repeatedly counseled its members on how to effectively withhold damages information until after the first year of litigation has passed.[196] Meanwhile the courts, armed largely with subjective standards for assessing vaguely pled amounts-in-controversy, inevitably produced opinions in which factually similar claims were found to fall on either side of the amount in controversy standard.[197] These decisions did nothing to dissuade defendants from removing even obviously non-meritorious cases on the gamblers' chance that an advantage could be gained from the present uncertainty.

While the judicial inefficiency and fundamental fairness concerns raised by these events might provide a reason for taking this uniformity problem more seriously than others, these are not the most pressing reasons for addressing this problem. Rather, it is the nature of removal/remand litigation, and the legitimacy concerns that go along with it, that is

192. *Compare* Federal Court Cases: Integrated Data Base, 1970–2000, ICPSR Study No. 8429 (Inter-University Consortium for Political & Social Research 2005), *available at* http://www.icpsr.umich.edu/cocoon/NACJD/STUDY/08429.xm., *with* Federal Court Cases: Integrated Data Base, 2007, ICPSR Study No. 22300 (Inter-University Consortium for Political & Social Research 2008), *available at* http://www.icpsr.umich.edu/cocoon/NACJD/STUDY/22330.xml. There were 213,922 civil cases terminated in the federal courts in 1990 compared with 239,678 terminated in 2007. Of these cases, 57,732 were diversity cases in 1990 while 57,758 were diversity cases in 2007 (an increase of 0.05%).

193. *Id.* There were 12,392 removed diversity cases that were terminated in 1990. That number increased to 19,384 in 2007.

194. *See supra* note 92 Federal Court Cases: Integrated Data Base, 2006, ICPSR Study No. 4685 (Inter-University Consortium for Political & Social Research 2007), *available at* http://www.icpsr.umich.edu/cocoon/NACJD/STUDY/04685.xml; Federal Court Cases: Integrated Data Base, 2005, ICPSR Study No. 4382 (Inter-University Consortium for Political & Social Research 2006), *available at* http://www.icpsr.umich.edu/cocoon/MACJD/STUDY/04382.xml. The average number of civil cases terminated from 1990-92 was 242,947. This increased by 7.65% to 261,541 for 2005-07.

195. *See supra* notes 192 and 194. The annual average number of civil diversity cases terminated from 1990-92 was 65,229 while that number decreased 3.17% to 63,161 for 2005-07. The annual average number of diversity removal cases terminated from 1990-92 was 15,265 while that number increased by 24.6% to 19,020 for 2005-07.

196. *See* Breeden and Walker, *supra* note 29.

197. *See supra* note 51.

the greatest cost imposed by the current system. A typical removal/remand dispute involving the amount in controversy turns the entire litigation on its head. The Seventh Circuit has described an oral argument involving one such motion for remand: "Thus at 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."[198] While this radical distortion of the parties' positions may provide comic relief for some judges, it also clearly illustrates why the current system is unacceptable. Both parties are driven to advocate positions that they do not actually believe and positions that they will promptly contradict the next time they appear in either state or federal court. While it may be difficult to quantify the detrimental effect that this has on the legitimacy of these proceedings, the fact that such distortions are routine illustrates the need for addressing this problem.

If the problem must be addressed, why must it be the judicial branch that addresses it? While there is no question that the most efficient solution for this problem lies in a legislative amendment to § 1446(b), there is every indication that Congress has no intention of satisfactorily addressing this problem any time soon.[199] Given the legislature's failure to act and the indication that the most likely action will leave the one-year bar in place, it falls to the judiciary to use the tools that it possesses to address such a threat to the legitimacy of the system.

IV. EXISTING PROPOSALS

A. THE ALI PROPOSAL

In the late 1990's the ALI undertook the Federal Judicial Code Revision Project (the "Project") that examined three discrete areas where it believed that statutes governing federal court civil litigation were not optimal.[200] One area that the Project addressed was removal. The Project recognized the complex and interwoven nature of removal statutes and sought mainly to clarify, rather than simplify, the rules that define the boundary between state and federal courts.[201] Its proposed changes to 28 U.S.C. §§ 1441-47 mainly focused on codifying well established features of decisional law and increasing the clarity of existing statutory provisions

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

199. Interview with John B. Oakley regarding the lack of a legislative reaction to the ALI's Federal Code Revision Project that has been completed for over four years. Recently the Committee on Federal-State Jurisdiction of the Judicial Conference of the United States has circulated its proposed amendment to § 1446(b), discussed in detail *infra*, that retains the one-year bar but with the allowance for equitable exceptions to it in cases of clear manipulation.

200. *See generally* AMERICAN LAW INSTITUTE, FEDERAL JUDICIAL CODE REVISION PROJECT (2004).

201. *See id.* at 325.

through extensive reordering and renumbering.[202]

The Project recognized that the one-year bar "invites contrivance to frustrate defendants' legitimate rights of removal" and described the one-year bar as "overbroad and easily abused."[203] To address these problems the Project proposed that the one-year bar be removed from § 1446(b) which governs removal and inserted new language into § 1447(b) which governs remand.[204] This new section would allow for discretionary remand to state court of diversity cases that were removed more than one year after the action commenced.[205] Such remand would only be ordered on a party's motion and not through *sua sponte* action of the court.[206]

While eliminating the one-year bar from § 1446(b) and adding a provision for discretionary equitable remand in § 1447(b) is an effective legislative solution to amount in controversy manipulation, this solution does not directly translate into decisional law. Because only legislative action can eliminate the one-year bar, any procedural solution must account for its continued existence which the ALI proposal, by its nature, does not do. What the ALI proposal does provide is an outline for a legislative solution that does not appear to be forthcoming.

B. The Judicial Conference Proposal

The Committee on Federal-State Jurisdiction of the Judicial Conference of the United States has proposed a bill entitled the "Federal Courts Jurisdiction and Venue Clarification Act of 2008" (the "proposed statute").[207] It proposes a variety of amendments to several sections of title 28 of the U.S. Code, including amendments to the removal procedures found in § 1446. The accompanying analysis discusses the major problems identified in this Article: the variety of standards that apply to amount in controversy litigation, the prevalence of unnecessary and disruptive removals, and the adoption of removal-defeating strategies by plaintiffs.[208] Its proposed solutions to these problems, while promising in some areas, are unlikely to fix the negative incentives for both parties that have produced the upside-down litigation posturing that is so damaging in this area.

Unlike the ALI proposal, the proposed statute leaves the one-year bar in place.[209] To address the problems identified in its accompanying analysis, the proposed statute takes several steps. It first eliminates the use of different standards across circuits by establishing the "preponderance of

202. *See id.* at 326-32.
203. *Id.* at 466.
204. *See id.* at 463-69.
205. *See id.*
206. *See id.* at 467.
207. Proposed Federal Courts Jurisdiction and Venue Clarification Act of 2008 (on file with the author).
208. Section-by-section analysis, Federal Courts Jurisdiction and Venue Clarification Act of 2008 (on file with author).
209. The second paragraph of the current § 1446(b) is left intact and renumbered in the proposal as § 1446(b)(3).

the evidence" standard as the uniform burden for defendants seeking removal.[210] This standard would apply in all cases, except where the initial pleading sought specific damages below the jurisdictional minimum and the state practice did not permit recovery of damages in excess of the amount claimed.[211] In these relatively rare circumstances, the amount sought in the pleading would be considered to be the amount in controversy, and the defendant would not be able to remove.[212]

The proposed statute limits disruptive removals by retaining both the one-year bar and the requirement that removals must occur within thirty days of service upon the defendant, if a case was removable when filed. It further restricts removal by limiting the ability to remove in close proximity to trial. Where a case was not removable when filed, if a defendant receives discovery responses or "other paper" indicating for the first time that a case is removable at trial or within thirty days of trial, a defendant may only remove if it can be shown that the "plaintiff deliberately failed to disclose the actual amount in controversy in order to prevent removal."[213]

The proposed statute also attempts to prevent plaintiffs' forum manipulation through the use of an equitable exception. In cases where a defendant does not receive the first indication that a case is removable until one year after the case is filed, the statute permits the court to grant the defendant an equitable exception to the one-year bar.[214] Such an exception would be allowed upon a showing "that the plaintiff deliberately failed to disclose the actual amount in controversy to prevent removal."[215]

While the proposed statute addresses many of the problems created by the one-year bar, it probably will not remedy the problems that we have seen displayed. Universally adopting the "preponderance of the evidence" standard will add uniformity to how these problems are approached by the courts, but as this Article has demonstrated, there remains a meaningful amount of uncertainty around how courts will interpret that standard. The "gamblers' chance" remains for removing defendants that prefer a federal forum, so it is unlikely that the proposed statute will reduce the number of speculative removals.

Likewise, the equitable exception offered to prevent plaintiffs' forum manipulation is unlikely to prove effective. If anything, it will encourage plaintiffs to "hide the ball" even more. Under the proposed statute plaintiffs are not even required to get to the one year mark to defeat removal, they can now also do so by just getting to within thirty days of trial. If plaintiffs can avoid sharing definitive information about the magnitude of their claim until either of these time restrictions have been met, they are

210. *See* proposed § 1446(4)(B).
211. *See* proposed § 1446(4)(A)(ii).
212. *See id.*
213. Proposed § 1446(b)(5)(A).
214. Proposed § 1446(b)(5)(B).
215. *Id.*

then only required to show that the failure to disclose was not "deliberate" or that it was not designed to "prevent removal." Except in particularly egregious cases, like the one described in the introduction, plaintiffs will argue that legitimate uncertainties about continuing treatment, permanency, emotional losses, or incidental or consequential damages, among other reasons, prevented them from truly knowing the value of their claim. Within the Fifth Circuit, which at least nominally recognizes equitable exceptions in this context, such behavior has already been exhibited.[216] In *Foster v. Landon*, the plaintiff explicitly claimed damages less than $75,000, but after the one year deadline had passed, sent a demand for more than $75,000 along with medical records demonstrating that the plaintiff had a herniated disc.[217] The court held that "though suspicious, the record in this case does not present the egregious, clear pattern of forum manipulation" necessary to warrant an equitable exception.[218]

Much like with defendants' removals described above, the proposed statute leaves plaintiffs with a "gamblers' chance," and given the height of the bar quite a good chance at that, to avoid federal jurisdiction. There is little reason to believe that they will not continue to avail themselves of that chance.

C. *Tedford v. Warner-Lambert* and Equitable Exceptions

As noted *supra*, the Fifth Circuit has pioneered the use of equitable exceptions to the one-year bar as a way to combat forum manipulation.[219] In *Tedford v. Warner Lambert Co.*, the Fifth Circuit referenced the ALI Federal Judicial Code Revision Project, the Project's proposed elimination of the one-year bar, and its creation of equitable remand provisions for later-removed cases in proposed § 1447(b).[220] *Tedford* appears to be an attempt at fashioning a temporary judicial fix for the manipulation problem while awaiting a more decisive and permanent legislative remedy. While arguably a laudable attempt at preventing plaintiffs from benefiting from clear forum manipulation, the *Tedford* approach suffers from the fact that the plain language of § 1446(b) does not allow for equitable exceptions and the legislative history does not contemplate their creation.[221] As a result it has not been adopted by any other circuit courts and has been used sparingly at the district court level.

While *Tedford's* concept of an equitable exception to § 1446(b) may carry some potential for remedying amount in controversy manipulation, even when it functions at its best it still fails to address major problems

216. *See* Foster v. Landon, No. Civ.A. 04-2645, 2004 WL 2496216, at *2 (E.D. La. Nov. 4, 2004).
217. *See id.*
218. *See id.*
219. *See supra* Fifth Circuit discussion, Section II.G.
220. *See* Tedford v. Warner-Lambert Co., 327 F.3d 423, 427 n.10 (5th Cir. 2003).
221. *See* E. Kyle McNew, *Are Rules Just Meant to be Broken? The One-Year Two-Step* Tedford v. Warner-Lambert Co., 62 Wash. & Lee L. Rev. 1315, 1355-62 (2005).

inherent in the system. Defendants still have a strong incentive to attempt removal in any situation where the amount in controversy is the least bit unclear, while plaintiffs have an even stronger incentive to remain vague about the magnitude of their claims. This is because vagueness is less likely to be viewed as manipulation and unlikely to trigger the extraordinary remedy of an equitable exception.[222]

D. Scholarly Proposals

Two noted scholars at Cornell Law School, Kevin Clermont and Theodore Eisenberg, recently mentioned amount in controversy problems in their article on the Class Action Fairness Act (CAFA).[223] Although their main focus was on analyzing CAFA's implementation and shortcomings and on conducting a statistical analysis of the judiciary's reaction to the legislation, they devoted several pages to a discussion of the amount in controversy disputes in non-CAFA cases.[224] They concluded this discussion by stating that the "the best approach in general, . . . is to require that the removing defendant show to a legal certainty that any recovery will exceed the jurisdictional amount."[225] This echoes the conclusion of a 1997 article that urged the universal adoption of the legal certainty test, at least in cases in which the amount in controversy was not apparent on the face of the complaint.[226]

These suggestions are largely based upon the recognition that the plaintiff is the master of the claim and that plaintiff's choice of forum should not be lightly put aside. They also recognize that lower standards, such as the preponderance of the evidence, will inevitably lead to defendants successfully removing cases that would otherwise not have fallen under the court's original jurisdiction.[227] Unfortunately, this suggestion only addresses one side of the problem. It would most assuredly prevent defendants from removing cases to federal court that do not belong there. But adopting a universal "legal certainty" test in a legal regime that includes the one-year bar would make removal of an unwilling plaintiff virtually impossible, assuring that many cases which "belong" in federal court would not end up there.

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222. *See* Foster v. Landon, No. Civ. A. 04-2645, 2004 WL 2496216, at *2 (E.D. La. Nov. 4, 2004).

223. *See generally* Kevin M. Clermont & Theodore Eisenberg, *CAFA Judicata: A Tale of Waste and Politics*, 156 U. Pa. L. Rev. 1553 (2008).

224. *See id.* at 1569-79.

225. *Id.* at 1578.

226. *See* Alice M. Noble-Allgire, 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, 62 Mo. L. Rev. 681, 754 (1997).

227. *See* Clermont & Eisenberg, *supra* note 223, at 1577.

V. UNIFYING PROPOSAL

Any proposal to alter the way federal diversity jurisdiction is regulated must account for the principles underlying its exercise. The first of these principles is that plaintiffs are the masters of their claims.[228] Our system allows plaintiffs to choose among all proper venues and jurisdictions; it allows them to assert as many or as few claims as they choose and to eschew available federal claims to ensure their jurisdictional preference.[229] It has long been established that the plaintiff's choice of forum should not lightly be disturbed, and any proposal aimed at addressing the problems created by the one-year bar must take that into account.

The plaintiffs' interest in choice of forum is balanced against a diverse defendant's interest in access to federal courts for cases of a certain magnitude. While Congress has indicated that it considers the defendants' interest to be subordinate to the plaintiffs' choice of forum, there is no indication that Congress intended to allow clever plaintiffs to eliminate defendants' access to the federal courts entirely. To create a policy that properly balances these interests it is critical to acknowledge the realities of litigation, to understand the distribution of information, and to create incentives that reward straightforward behavior and penalize "tactical chicanery" by either side.

The realities of litigation are that both sides are convinced that defendants, in most cases, benefit from federal jurisdiction. As a result, defendants will attempt to remove almost any case between completely diverse parties regardless of the amount in controversy in the hope that the complaint's lack of specificity, the uncertain treatment of a plaintiff's stipulations, the varying standards for determining the amount in controversy, the potential for punitive damages, and other issues will be sufficient to support removal. Conversely, plaintiffs that are completely diverse from out of state defendants will want to remain in state court without limiting the upside potential of their claims. To that end they are encouraged to make their damages pleas as vague as possible and to delay and dissemble in their discovery responses to avoid either limiting their recovery or providing the necessary information to allow for removal.

At the outset of litigation, plaintiffs have the most information about their claim's value, but they have very little incentive to carefully consider the magnitude of their claim. Settlement negotiations are probably months or even years away, and discovery may always yield additional bases for damages. If anything, plaintiffs have every incentive to conceal any information about the magnitude of their claim from both the defendant and the court. Any proposal aimed at altering behavior and eliminating abuse of the procedural rules must give plaintiffs an incentive to share that information, without improperly impinging upon their choice of forum. That incentive is time.

228. *See, e.g.*, Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987).

229. *See* McNew, *supra* note 221, at 1337 (summarizing statutory and case law authority that allows the plaintiff great latitude in framing and prosecuting her claim).

With few exceptions, plaintiffs are interested in a prompt resolution of their claim while defendants go to great lengths to delay resolution (and payment) for as long as possible. A primary purpose for the one-year bar is to prevent defendants from delaying the final reckoning by removing a case after substantial progress has been made in state court.[230] In cases where the amount in controversy is an issue, courts should utilize the authority granted them by the remand statute to encourage plaintiffs to both evaluate their claims and share that information promptly with defendants or the court.[231]

Under § 1447(a), "the district court may issue all necessary orders and process to bring before it all proper parties" as part of any remand decision.[232] Whenever courts are faced with a motion to remand on the grounds that the amount in controversy requirement is not satisfied, rather than relying on the variety of tests and standards currently utilized, they should directly question the plaintiff on the matter and then act on the plaintiff's representation. If a plaintiff asserts that the amount in controversy requirement will not be met, the court should grant the motion to remand without further inquiry.

This procedure differs from the use of stipulations discussed in section II.h, because it does not attempt to limit plaintiff's possible recovery at an early stage in litigation when, in some cases, it will be legitimately difficult to know the true extent of the damages. It also provides a greater degree of deference for the plaintiff's choice of forum than is currently provided by any of the currently used standards, including "legal certainty." But these advantages would come at a price to the plaintiff. In exchange for remanding the case based solely on the plaintiff's non-binding representation, the court would require that the plaintiff waive any use of the one-year bar to prevent a future removal of the case. If it later became clear that the amount in controversy is, in fact, greater than the statutory threshold, the defendant would be allowed to remove again, no matter how long the case had been pending.

This waiver would not prevent the plaintiff from challenging any subsequent removal, but would merely prevent the use of the one-year bar to defeat removal. Defendants' right to remove a second time would still be governed by § 1446(b), which requires removal to be exercised "within thirty days after receipt . . . 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."[233] This would prevent the evil of removal occurring "after substantial progress has been made in state court" that Congress was concerned with when it enacted § 1446(b), un-

230. *See* H.R. Rep. No. 100-889, at 72 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5982, 6032.

231. *See* 28 U.S.C. § 1447(a). I would like to thank Prof. John B. Oakley for his suggestion that a broad interpretation of the statutory remand provisions might offer the solution sought.

232. § 1447(a).

233. 28 U.S.C. § 1446(b).

less the plaintiff was responsible for the delay by failing to disclose the true amount in controversy.[234] It is, after all, well within the plaintiff's capacity to start the thirty-day clock running at any time by simply and clearly describing the damages sought. Even in states that prohibit claims for specific damage amounts, the plaintiff may start the clock by providing notice of the amount in controversy through "other paper" such as a discovery response or a settlement demand.

This proposal would allow defendants to remove during any part of the state court process, even during trial. Of course such an extraordinary event would only occur in reaction to obvious cases of manipulation. If plaintiff's claim suddenly increased from $50,000 in discovery responses to $100,000 in opening arguments then removal would be appropriate. Defendants will not complain about the delay caused by such late removals because they retain the option of remaining in state court, and plaintiffs will have little grounds to complain about a delay that they authored.

When such secondary removals occur, the defendant will have meaningful evidence to support its claim that the jurisdictional minimum is met, eliminating the "naked pleading" problem discussed in Section II.M, *supra*. Because this unifying proposal represents a change in decisional law, not in the statute, the varying standards that currently exist across the circuits cannot be unified with one stroke of the pen. While each circuit will continue to use its current standards, Judge Easterbrook's thorough opinion in *Meridian* makes a compelling argument for the "preponderance of the evidence" standard. Whatever standard is used, courts will benefit from a much clearer understanding of what is at stake in the litigation, and plaintiffs will retain control of when and how that information is provided.

This procedure will provide the proper incentive for all parties where disputes over the amount in controversy are concerned. It establishes a uniform approach for dealing with questions of federal jurisdiction that is not affected by the vagaries of state law pleading rules, while preserving the plaintiff's legitimate choice of forum. It will discourage defendants from speculatively removing cases on the gamblers' chance that unclear "reasonable probability" or "preponderance of the evidence" standards can be satisfied.[235] Instead, defendants will remove most cases facing the near certainty of remand. As a result, they are only likely to do so if they believe that the amount in controversy will ultimately exceed the jurisdictional minimum. This is because it will be difficult to convince clients to pay for a removal motion, the costs of which are borne almost entirely by defendants, unless there is some possibility of long-term success. Further, any misuse of the second removal opportunity to disrupt or delay state

234. H.R. Rep. No. 100-889, at 72 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5982, 6032.

235. *See, e.g.* King v. Retailers Nat'l Bank, 388 F. Supp. 2d 913, 917 (N.D. Ill. 2005) (holding that plaintiff's claim for $5,000-$15,000 filed in a court whose jurisdictional limit for compensatory and consequential damages is $30,000, allegedly premised on potential punitive damage awards and attorneys' fees, is a clear example of improper removal).

court proceedings can be punished by the imposition of attorneys' fees and costs against the defendant.[236]

It may be argued that this proposal is too friendly toward plaintiffs who will abuse the initial "remand at will" offered by this proposal to conduct more settlement negotiations while cases remain in state courts. But that advantage is limited to cases for which settlement demands are below $75,000; in other words, it is limited to cases which unquestionably belong in state court. More importantly this proposal will eliminate any incentive for the plaintiffs to disguise the amount in controversy in larger cases, the ones which belong in federal court, because such deception will only result in delay, not in avoidance of the federal forum.

236. *See, e.g.*, Whisenant v. Roach, 868 F. Supp. 177, 178-79 (S.D. W.Va. 1994) (awarding plaintiff attorneys' fees and costs because defendants' removal was "ill-founded").