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Nelson v. Keefer and Its Implications in the Area of Jurisdictional Amount

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It has also been asked what effect the prior determination of invalidity will have on two other possible offensive uses of collateral estoppel.[72] Will the courts allow such use in a suit for reimbursement of license or royalty costs assessed prior to the judgment?[73] Will findings of fraudulent procurement open the door to uncontested antitrust actions under *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*?[74]

Whether the Court's hoped-for economy of time and expense will be achieved is equally uncertain. Will the second court be able to quickly and efficiently (as well as justly) decide the issue of whether the patentee-plaintiff had a full and fair opportunity to litigate the merits of the action? Or, will the second court's review become itself in the nature of an appeal?

The *Blonder-Tongue* decision has taken a step in the right direction toward curing some of the injustices inherent in the area of patent litigation. It is time for Congress to make use of the myriad studies, commentaries, and case precedent in fashioning a more efficient patent litigation system.[75]

J. Anthony Patterson, Jr.

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In a personal injury action the plaintiff claimed $603.50 for physician, hospital, and drug bills, and $727.69 in property damage. The remainder of the claim was for inconvenience, pain, and suffering. The attending physician, in his hospital records, made no reference to any accident, and the treatment was evidently for diarrhea, pre-existing hemorrhoids, and symptoms of an ulcer.

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of invalidity), or the First, Second, and Eighth Circuits in which to institute his suit. Rollins, *supra* note 16, at 565. The appropriate answer is a single system of courts to hear patent suits, or at least a single appellate court. Perhaps the inaction of the Court in *Blonder-Tongue* on this problem will prompt Congress to act on the many proposals submitted in the past advocating such a result. *See generally* SUBCOMM. ON PATENTS, TRADEMARKS, & COPYRIGHTS OF THE SENATE COMM. ON THE JUDICIARY, 85TH CONG., 2D SESS., SINGLE COURT OF PATENT APPEALS—A LEGISLATIVE HISTORY 21 (Comm. Print 1959).

[72] Evans & Robins, *supra* note 16, at 208. Note also the extension of the *Blonder-Tongue* decision into trademark actions in Aloe Creme Labs., Inc. v. Aloe 99, Inc., 170 U.S.P.Q. 538 (Patent Office Trademark Trial & Appeal Bd. 1971).

[73] What effect is a federal court, or even another state court, to give a defensive plea of collateral estoppel based on a state court finding of invalidity? In a suit for royalties the defendant may assert as a defense the invalidity of the plaintiff's patent. Lear, Inc. v. Adkins, 395 U.S. 653 (1969). Moreover, "it is well settled that state courts have jurisdiction to determine matters of title, infringement or validity of patents where such determination is ancillary and necessary to the main action." Blumenfeld v. Arneson Prods., Inc., 172 U.S.P.Q. 76, 78 (Cal. Dist. Ct. App. [1st Dist.] 1971); *accord*, Pratt v. Paris Gas, Light & Coke Co., 168 U.S. 225, 259 (1897); Imperial Appliance Corp. v. Hamilton Mfg. Co., 430 F.2d 185 (7th Cir. 1970); Zemba v. Rodgers, 145 U.S.P.Q. 628 (N.J. Super. Ct. 1965); American Harley Corp. v. Irvin Indus., Inc., 167 U.S.P.Q. 553 (N.Y. Ct. App. 1970). *But cf.* the recent decision of Thiokol Chem. Corp. v. Burlington Indus., Inc., 437 F.2d 1328 (3d Cir. 1971), *cert. denied*, 92 S. Ct. 684 (1972), *noted* at p. 443 *supra*, urging state court abstention when the central issue in a case is the validity of a patent.

[74] 382 U.S. 172 (1965); *see* text accompanying note 66 *supra*.

[75] *See generally* Lieberman & Nelson, *supra* note 16; Rollins, *supra* note 16, and the authorities cited therein.

At a pre-trial conference, the trial judge stated that he would retain the case for thirty days to allow the plaintiff to provide the court with medical reports to sustain the causal connection between the medical bills and the accident in question. When the plaintiff failed to provide such reports, the district judge dismissed, stating that "with minor injuries, small medical bills of uncertain causal connection, no loss of income, no absence from work,"[1] the plaintiff's claim could not in good faith reach the jurisdictional minimum. *Held, affirmed*: Since the trial court was convinced to a legal certainty that the evidence would not permit it to sustain a verdict for $10,000 or more, the district court properly dismissed the action for lack of jurisdictional amount. *Nelson v. Keefer*, 451 F.2d 289 (3d Cir. 1971).

I. MONETARY JURISDICTIONAL REQUIREMENTS AND INTANGIBLE CLAIMS

From the early stages of the United States judiciary, there has been a jurisdictional minimum imposed on plaintiffs seeking to have their cases tried in federal courts.[2] As early as 1796 the Supreme Court of the United States recognized the problem of determining the amount in controversy when unliquidated damages were claimed, and held that the amount claimed should control.[3] By 1884, however, the amount claimed was not afforded such great weight, and the trial court was allowed to dismiss when it found that the claim had been "laid beyond the amount of a reasonable expectation of recovery, for the purpose of creating a case removable" to the federal court.[4] Two years later, in *Barry v. Edmunds*,[5] a case involving damages for trespass, the Court stated that the trial court could not look beyond the pleadings in a case involving punitive damages. The trial judge could properly dismiss only in cases in which the terms of a contract limited the possible recovery or an amendment rendered it apparent that the amount of damages was claimed merely to meet the jurisdictional requirement of the federal court.[6] In 1943 the Supreme Court

[1] Nelson v. Keefer, 451 F.2d 289, 297 (3d Cir. 1971).

[2] The First Judiciary Act required an amount in controversy of $500. Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 78. The amount has been increased three times: Act of March 3, 1887, ch. 373, § 1, 24 Stat. 552 ($2,000); Act of March 3, 1911, ch. 231, § 24, 36 Stat. 1091 ($3,000); Act of July 25, 1958, PUB. L. NO. 85-554, §§ 1, 2, 72 Stat. 415, *amending* 28 U.S.C. §§ 1331-32 (1971) ($10,000). A major reason for the increase to $10,000 was to facilitate the reduction of the federal caseloads. S. REP. NO. 1830, 85th Cong., 2d Sess. 3 (1958); H.R. REP. NO. 1706, 85th Cong., 2d Sess. 2-3 (1959). This goal has not been met. Address by Chief Justice Earl Warren, 1959 ALI PROCEEDINGS 27. *See also* Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483 (1928); Phillips & Christenson, *The Historical and Legal Background of the Diversity Jurisdiction*, 46 A.B.A.J. 959, 963 (1960).

[3] Hulsecamp v. Teel, 2 U.S. (2 Dall.) 358 (1796). The Court stated that "whatever distinction might be made in other respects, between suits instituted to recover a sum certain, and brought to recover damages for a tort, certain it is, that . . . there can be no rule to ascertain the jurisdiction of the court, but the value laid in the declaration. . . . [T]he amount of the plaintiff's claim must be considered as the amount in dispute . . . ." *Id.* at 359.

[4] Smith v. Greenhow, 109 U.S. 669, 671 (1884). The plaintiff had claimed $100 in actual and $6,000 in punitive damages for trespass.

[5] 116 U.S. 550, 560 (1886). The Court stated that the error in dismissing was compounded by the erroneous statement that a jury verdict in the amount of the jurisdictional minimum would have been excessive and therefore set aside; no such statement of the upper limit of a jury award should have been made before the verdict was in fact rendered. *Id.* at 565.

[6] *Id.* at 561-62.

reiterated its holding that a trial judge could not be justified in dismissing a claim for punitive damages when evidence could be introduced at trial justifying a claim for the jurisdictional minimum.[7]

The Supreme Court has thus seemingly precluded a trial judge from finding a claim for unliquidated damages to be jurisdictionally insufficient unless a specific rule of law, a contract provision, or independent facts show that the plaintiff would have no right whatsoever to a verdict in that amount. In addition, there are no statutory guidelines to aid the trial court in determining the permissible scope of its inquiry when making such a determination.

II. Circuit Court Interpretations

The absence of any definite guideline has produced two approaches in the federal courts on the question of whether a trial court is precluded from dismissing a claim involving unliquidated damages. One approach, represented by two Fifth Circuit decisions,[8] has allowed the trial judge to dismiss the cause if he finds that a verdict for the jurisdictional minimum would be only a remote possibility and that the jurisdictional amount is far in excess of the amount the plaintiff could reasonably recover. The courts evidently either ignored the language of *Barry* concerning the prohibition of the pre-award determination of the limit or decided that the holding of *Barry* applied only to claims for punitive damages.[9]

The second approach is represented by *Wade v. Rogala*,[10] a Third Circuit case in which the court considered the intangible items of recovery and stated that "[t]o determine *in limine* that the plaintiff could not produce evidence to support a verdict in excess of $3,000 would not be justifiable; nor could it be said that a verdict in excess of $3,000 should be set aside before it was rendered."[11] Other courts and authorities have taken this language of *Rogala* to mean that any case involving unliquidated damages should proceed to trial if the issue is closely tied to the merits.[12] The *Rogala* court itself used language which would imply this meaning:

> Indeed, since the issue of jurisdictional amount in this case is so closely tied to the merits of the cause, insistence upon evidence with respect thereto must be

[7] Bell v. Preferred Life Assurance Soc'y, 320 U.S. 238, 243 (1943). The Fifth Circuit had dismissed on the basis that it was "legally inconceivable" that plaintiff could recover a sum in excess of $3,000 when the policy sued upon was valued at no more than $1,000. The Supreme Court reversed the dismissal because punitive damages were recoverable under the state law. *Id.* at 240-41.

[8] Matthiesen v. Northwestern Mut. Ins. Co., 286 F.2d 775 (5th Cir. 1961) (claiming pain and suffering, no loss of work, and $50 in medical expenses); Leehans v. American Employers Ins. Co., 273 F.2d 72 (5th Cir. 1959) (claiming $13,045 for pain, suffering, disability, and disfigurement from acid allegedly in soap). *See also* Turner v. Wilson Line, 242 F.2d 414 (1st Cir. 1957) (only mild pain for 7-8 hours, no loss of working time).

[9] The Court in *Barry* did not necessarily limit its holding to punitive damages, but stated that "nothing is better settled than that, in . . . actions for torts . . . it is the peculiar function of the jury to determine the amount [of recoverable damages]." Barry v. Edmunds, 116 U.S. 550, 565 (1886).

[10] 270 F.2d 280 (3d Cir. 1959). *See also* Tullos v. Corley, 337 F.2d 884 (6th Cir. 1964); Fireman's Fund Ins. Co. v. Railway Express, 253 F.2d 780 (6th Cir. 1958).

[11] 270 F.2d at 285. The court cited *Barry* and *Bell*. *See* notes 5, 7 *supra*.

[12] Jones v. Landry, 387 F.2d 102 (5th Cir. 1967); Deutsch v. Hewes Street Realty Corp., 359 F.2d 96 (2d Cir. 1966); C. WRIGHT, THE LAW OF FEDERAL COURTS 113 (2d ed. 1970).

> limited 'lest, under the guise of determining jurisdiction, the merits of the controversy between the parties be summarily decided without the ordinary incidents of a trial, including the right to a jury.' . . . The necessary choice, except in the flagrant case, where the jurisdictional issue cannot be decided without . . . a ruling on the merits, is to permit the cause to proceed to trial.[13]

In *Jones v. Landry*[14] the Fifth Circuit quoted the language of Professor Wright's comparison of the Fifth Circuit "reasonable" test and the Third Circuit "flagrant" test.[15] Professor Wright had concluded that allowing the trial judge discretion in determining the reasonable limit of a jury award before trial comes very close to depriving a claimant of his right to a jury trial. Apparently the Fifth Circuit agreed that the Third Circuit had enunciated the preferable test: only the flagrant cases should be dismissed.[16] Nevertheless, instead of expressly adopting the Third Circuit test, the Fifth Circuit attempted to justify its earlier decisions adhering to the more liberal rule. The court said:

> We do not read the *Leehans* and *Matthiesen* cases as departing from the rule advocated by the Third Circuit . . . , except possibly to the extent of holding that when it can be conclusively determined in advance that the pain, suffering, and other intangible factors are so slight that no substantial evidence can be offered to support a verdict for as much as the jurisdictional amount, then the legal certainty test is met.[17]

The Second Circuit also construed *Rogala* to mean that the trial judge may not exercise his judgment in this manner. Examining the two rules and citing the Fifth and Third Circuit cases, the court in *Deutsch v. Hewes Street Realty Corp.* chose what it thought to be the *Rogala* rule and allowed a plaintiff whose special damages totaled $141 to proceed to trial.[18] However, the court stated that the jurisdictional minimum was far in excess of any verdict that the plaintiff could reasonably recover.[19] It is significant that the Second Circuit interpreted *Rogala* to mean that despite the improbability of recovering the jurisdictional minimum, the court could not validly dismiss without evidence independent from the merits indicating that the claim was inflated for the sole purpose of entering the federal courts.[20]

It is not surprising that the Second and Fifth Circuits adopted what they interpreted as the Third Circuit's *Rogala* holding concerning the permissible scope of the trial judge's inquiry. What is surprising is that about the same

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[13] 270 F.2d at 285.

[14] 387 F.2d 102 (5th Cir. 1967).

[15] C. WRIGHT, *supra* note 12, at 113.

[16] The court rejected the defendant's reliance on *Leehans* and *Matthiesen* after quoting Professor Wright's approval of the Third Circuit test. 387 F.2d at 106.

[17] *Id.*

[18] 359 F.2d 96, 101 (2d Cir. 1966).

[19] *Id.* at 98.

[20] *Id.* at 100-01. The Second Circuit decided the famous case which involved independent evidence that a claim had been inflated to gain a federal forum. In *Arnold v. Troccoli*, when counsel for plaintiff learned that his client would be required to wait for jury trial for two years in the state courts, he dismissed and raised the amount of the claim in order to enter the federal court. The record stated that counsel had stated that he was dismissing because a much earlier trial could be had in a "different" court. 344 F.2d 842, 845 (2d Cir. 1965). *See also* Brown v. Bodak, 188 F. Supp. 532 (S.D.N.Y. 1960), in which counsel evidently was unaware of the 1958 amendment raising the jurisdictional minimum until the case had been pending for several months.

time, the Third Circuit began to inform the other courts that *Rogala* was not meant to apply so broadly.

One year before the Fifth Circuit's "adoption" of *Rogala*, the Third Circuit in *Jaconski v. Avisun Corp.*[21] indicated that it was amenable to a pre-trial dismissal even though the plaintiff had claimed unliquidated damages representing his alleged loss of earnings. The plaintiff claimed $200 in medical bills and $58,500 for past and future earnings, but the appellate court sent the case back to the trial judge for further pre-trial hearings regarding the issue of jurisdictional amount. The court intimated that the district judge should have plainly informed counsel for the plaintiff that the failure to produce the requested medical reports could result in a jurisdictional dismissal. The position of the appellate court clearly indicated that the trial court could validly dismiss if it found on remand that the claim for $10,000 was not valid. The trial judge had not specifically set forth the basis for the jurisdictional dismissal and the record was so meager that the appellate court was unable to conclude to a legal certainty that the plaintiff could not recover the jurisdictional amount.[22] The fact that the Second and Fifth Circuits apparently misconstrued the Third Circuit's decision emphasizes the ambiguity of *Rogala*. Unfortunately, the subsequent *Jaconski* opinion did not sufficiently clarify the ambiguity.

III. NELSON V. KEEFER

A. *The Reasoning of Nelson*

In *Nelson v. Keefer*[23] the Third Circuit recognized that *Wade v. Rogala* had been misinterpreted. Attempting to explain its true meaning, the court in *Nelson* used the standard words of "legal certainty" and repeated the language of *Jaconski*.[24] The Third Circuit evidently felt that this cursory treatment showed that the Fifth and Second Circuit opinions were obvious misinterpretations of *Rogala*.

The *Jaconski* opinion stated that there is no exact guideline for determining the presence of the jurisdictional minimum when unliquidated damages are claimed. The courts have, however, developed the requirement of "good faith," which has been defined as the requirement that "[i]t must appear to a legal certainty that the claim is really for less than the jurisdictional amount . . . ."[25] This language has been used frequently by federal courts, but it has not proved to be an actual test; instead, it has often been a label for the result reached.[26]

[21] 359 F.2d 931 (3d Cir. 1966).

[22] *Id.* at 937.

[23] 451 F.2d 289 (3d Cir. 1971).

[24] *Id.* at 292-93. The *Jaconski* court had merely recited the good faith and the legal certainty language. 359 F.2d at 934-35. *See* notes 25-28 *infra*, and accompanying text.

[25] St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 288 (1938).

[26] For a thorough discussion of the good faith requirement see Note, *Good Faith Pleading of Jurisdictional Amount*, 48 IOWA L. REV. 426 (1963). For a collection of cases showing that the term "good faith" has often been a mere statement of a result, see *id.* at 429 n.18. Basing the determination of "legal certainty" upon the judge's personal conviction that a certain claim merely should not be decided in the federal courts violated the language of the Supreme Court: "It might happen that the judge, on the trial or hearing of a cause, would receive impressions amounting to a moral certainty that it does not really and substantially involve a dispute or controversy within the jurisdiction of the court. But upon such a personal conviction, however strong, he would not be at liberty to act . . . ." Barry v. Edmunds, 116 U.S. 550, 559 (1886).

In cases involving unliquidated damages, the real problem is that there has been no adequate definition of the term "legal certainty." Where damages are limited by contract or statute and where the state law forbids recovery of certain damages claimed, "legal certainty" has relevance as a test.[27] However, in the area of unliquidated damages, the courts have used language which has never clearly established what is meant by the term. Instead, the courts have used such terms as "good faith" and "colorable claim."[28] Both of these terms contain the same fault. They are nebulous, subjective, and relevant to the state of mind of the claimant, which is difficult if not impossible to determine. It is relatively easy to determine that a claim has been inflated when there are objective factors such as an amendment to increase a claim with no increase in pain and suffering between the time of the original claim and the amendment. Such a determination cannot, however, validly be based upon the great disparity between the actual and unliquidated damages claimed. The courts which have made such a determination have done so subjectively, since such a claim does not show positively that the claimant did not act in good faith. How then can a court say that it is convinced to a legal certainty that the jurisdictional amount was not claimed in good faith?

The *Nelson* court likewise used the standard words of "good faith" and "legal certainty" to explain the term "flagrant"[29] and thus failed to provide a justification for its statement that a claim for unliquidated damages should be dismissed only if the claim was flagrant. The court seemed to equate the term "flagrant" with "lacking in good faith."[30] Actually, the term would seem to require independent facts showing an inflated claim for the sole purpose of entering the federal courts.[31] The court did not decide if the term "flagrant" also included those cases in which the actual damages were so slight that the claim for the unliquidated damages was wholly unreasonable.[32] This mere repetition of ambiguous language did not justify the Third Circuit's statement that the other circuit courts had misinterpreted *Rogala.* Instead it provided support for the Second and Fifth Circuit interpretations.

The *Nelson* court glossed over the ambiguity[33] of its previous holding and

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[27] There are four areas in which the good faith and legal certainty terminology has been used as a test rather than a mere statement of the result according to one author: (1) where the plaintiff has amended subsequent to the commencement of the action; (2) where the plaintiff has failed to offer proof of something easily proved; (3) where the plaintiff mistakenly makes a claim barred by a certain fact situation; and (4) where actual damages are far below the jurisdictional minimum and there is a large claim for pain and suffering. Note, *supra* note 26, at 428-34. Legal certainty can also be successfully applied where a claim is barred by contract, statute, or judicial fiat. Barry v. Edmunds, 116 U.S. 550, 561-62 (1886).

[28] St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 289 (1938).

[29] 451 F.2d at 292-93.

[30] *Id.*

[31] The Second Circuit interpreted it in this manner. Deutsch v. Hewes Street Realty Corp., 359 F.2d 96, 101 (2d Cir. 1966).

[32] The Fifth Circuit was uncertain whether such cases would be included. Jones v. Landry, 387 F.2d 102, 106 (5th Cir. 1967).

[33] The fact that the court had previously used ambiguous language in its test in the area of unliquidated damages indicates that the court should not have upheld the summary judgment in this particular case. The Third Circuit has always been careful to preserve the rights of claimants when it has established a new rule of law. In McSparran v. Weist, 402 F.2d 867 (3d Cir. 1968), the court carefully defined the prospective effect of its holding when it overruled prior decisions concerning the real party in interest; it then decided

instead dwelt upon the arguments in favor of limiting federal caseloads. The Third Circuit stressed the congressional purpose of decreasing the burdensome caseloads and chastised all of the federal courts for failing to "execute the congressional mandate in personal injury actions."[34] The court emphasized that sixty percent of all diversity claims are personal injury actions and blamed this ratio on the "inflexibility" of the "good faith-legal certainty" test.[35]

These considerations laid the foundation for the Third Circuit's enunciation of a standard for allowing the trial judge great pre-trial discretion to determine the presence of the jurisdictional amount in cases involving unliquidated damages. The justifications for this rule were: (1) the congressional intent to relieve the over-burdened federal courts;[36] (2) the plethora of personal injury actions which did not result in awards for the jurisdictional amount;[37] and (3) the power of the trial judge to determine the reasonableness or excessiveness of an award after it was rendered.[38] The court stated that it found "no difficulty" in allowing the court to "evaluate a case prior to trial where sufficient information has been made available through pre-trial discovery and comprehensive pre-trial narrative statements which disclose medical reports."[39] The court may now determine the "upper limit" of a permissible award including both actual and intangible items of recovery. If the upper limit does not "bear a reasonable relation to the minimum jurisdictional floor," the court perceived "no legal obstacle" to a pre-trial dismissal on jurisdictional grounds.[40]

B. *The Effect of Nelson*

The Third Circuit did not explain what effect the new rule would have upon the good faith and legal certainty test. Instead, it stated that since the trial court was "[c]onvinced to a legal certainty that the evidence would not permit it to sustain a verdict for plaintiffs of $10,000 or more,"[41] the claim could not be allowed to proceed to trial. Whether the Third Circuit now equates the legal certainty test with a determination of unreasonableness upon the hearing of evidence remains unclear. By its continued use of the standard words of "legal certainty"[42] and "good faith,"[43] the court intimates that it is unwilling to recognize explicitly the imposition of a stricter standard than it has previously applied to unliquidated claims.

The Third Circuit has again given an inadequate explanation of the legal certainty test and has again failed to state its position with sufficient clarity for the other courts to be able to discern and follow its test. It is indeed

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McSparran on the merits. *See also* Esposito v. Emery, 402 F.2d 878 (3d Cir. 1968). The *Nelson* court should have decided the case on the merits; instead it did not even mention the availability of a different forum when it dismissed.

[34] 451 F.2d at 295.

[35] *Id.* at 294-95.

[36] *Id.* at 294.

[37] *Id.* at 294-95 n.11.

[38] *Id.* at 295.

[39] *Id.* at 296.

[40] *Id.* There is, of course, the possibility that *Barry v. Edmunds* does present a "legal obstacle." *See* note 9 *supra*, and accompanying text.

[41] 451 F.2d at 298.

[42] *Id.*

[43] The Third Circuit quoted the statement of the trial court that it was impossible to see how plaintiff's claim could in "good faith" have reached $10,000. *Id.* at 297.

possible that the other circuit courts will take the *Nelson* opinion to mean that the trial judge's determination of the upper limit of a permissible jury award is equivalent to determining to a legal certainty the absence of the jurisdictional minimum. The Third Circuit possibly will respond that it has set up a test which is a standard in addition to, rather than a part of, legal certainty.[44]

It is evident that the Second and Fifth Circuits will be required to re-examine their holdings which purported to follow *Rogala*.[45] However, they still have no explanation of what the Third Circuit intends to include within the meaning of the term "flagrant."[46] They may interpret the term according to the reasoning of their previous opinions, or they may interpret the term to include those claims in which the actual damages are so slight as to make the claim for unliquidated damages wholly unreasonable.

If the other courts choose to follow *Nelson*, they may be relieved of the burden of deciding whether to revise the meaning of the term "flagrant." By adopting the *Nelson* standard, the trial judge could dismiss after pre-trial hearings should he determine that a verdict for the jurisdictional minimum would be excessive. This test would indeed seem to be the easiest to apply, since the question of the state of mind of the claimant would be immaterial.[47]

If this interpretation prevails, the remaining question is whether the *Nelson* standard will reduce the federal caseloads. It is submitted that it will not. First, the determination by the trial judge at pre-trial will simply divert trial time into pre-trial hearings. This increase in pre-trial time would cause an illusion of reducing trial time, but the end result could be an actual increase in the total time spent in hearing the cause. The hearing of pre-trial testimony and evidence would often involve as much time as proceeding to trial and dismissing as soon as the absence of jurisdictional amount becomes apparent.

Secondly, the question of a jury requirement for the determination of jurisdictional issues remains unanswered.[48] Since evidence at the pre-trial stage may be inadmissible at the trial on the merits, two juries might even be required. A pre-trial jury requirement would greatly overburden the federal judiciary system.

Finally, the availability of a pre-trial jurisdictional hearing might encourage a plaintiff to test his frivolous claim of federal jurisdiction. Since the decision of the judge at the pre-trial hearing will carry great weight, it will be difficult for the trial court or the appellate court to deny the presence of the jurisdictional minimum which has previously been found. Thus, the courtrooms will be filled with plaintiffs who otherwise might have hesitated to claim federal jurisdiction.

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[44] The situation may then be a repetition of the events following the *Rogala* decision with the various courts attempting to justify their previous decisions in light of the new interpretation.

[45] *See* text accompanying notes 16, 17 *supra*.

[46] *See* note 32 *supra*, and accompanying text.

[47] *See* text accompanying note 28 *supra*.

[48] *See, e.g.*, Note, *Trial by Jury of Preliminary Jurisdictional Facts in Federal Courts*, 48 IOWA L. REV. 471 (1963).

IV. CONCLUSION

The chronic difficulty of establishing a standard in the area of unliquidated damages may never be resolved. It is submitted that there are only two possible standards which will reduce the caseloads of the federal courts. Both measures are drastic, but necessary in view of the current caseloads. First, the courts can impose a mathematical relationship between actual damages and punitive or pain and suffering damages, as well as between actual loss of income and loss of future earning capacity. This mathematical relation has drawbacks. It would provide an advantage to those who can afford expensive medical care, and eliminate from the jurisdictional question the possibility of a rather "inexpensive" injury producing intense suffering.

Another method of reducing the federal caseloads is to increase the effectiveness of the provision for allocating costs[49] when the claim does not meet the $10,000 requirement. The only way to insure the effectiveness of this sanction is to apply it to all cases in which less than $10,000 is actually recovered. This application of the provision for allocating costs has not been used effectively by the federal courts. Apparently, this standard has been rejected as too harsh, since no plaintiff can be assured of a jury award in the sum sought, regardless of the validity of his claim. Applying the sanction when it appears that the plaintiff did not in good faith assert the presence of the jurisdictional minimum only reinforces the problem. There is no reason to believe that a good faith standard will be either more definite or more effective after trial than in the pre-trial stage.

It is submitted that the *Nelson* test is a valid one, and that the trial judge should be allowed to determine the excessiveness of a verdict in the sum of the jurisdictional minimum. The real utility of the test, however, would not be in the pre-trial stage, but rather in the determination of the cost allocation after trial. The trial judge should be quick to deny costs to the plaintiff when it becomes evident at trial that the jurisdictional amount claim is unreasonable in light of the evidence offered. In addition, the court should tax costs against the claimant when it is apparent from independent facts that the plaintiff's claim was made with a realization of the insufficiency of the claim.

It can be argued that this cost allocation would deny the plaintiff a jury determination of the reasonableness of the claim. The trial judge could be allowed to make the determination if indeed there are independent facts showing that the claim was inflated for the sole purpose of entering the federal court. In the absence of such independent facts, the jury could determine the question of whether the claim was unreasonable. Even if the jury determined the question of reasonableness after trial, the time spent in such a determination would be far less cumbersome than a pre-trial hearing.

The burden upon the federal courts necessitates drastic measures. These measures may cause plaintiffs with a valid jurisdictional claim to choose the

[49] The First Judiciary Act of 1789 allowed the court, at its discretion, to require plaintiff to pay the costs. Act of Sept. 24, 1789, ch. 20, § 20, 1 Stat. 83. The applicable statute still allows the court, at its discretion, to refuse to allow the plaintiff costs and even impose costs against him if he fails to recover $10,000. Act of July 25, 1958, Pub. L. No. 85-554, §§ 1, 2, 72 Stat. 415, *amending* 28 U.S.C. §§ 1331-32 (1971).

state court over the federal; this result will definitely benefit the federal courts. Hesitance by plaintiffs to enter the federal courtroom will not cause serious injustice to them, since their hesitance would tend to show that their jurisdictional claims were doubtful. It is true that some plaintiffs who have valid jurisdictional claims will be assessed costs under this rule. However, any plaintiff in a personal injury action, regardless of the forum or the validity of his claim, risks the possibility of a jury verdict in favor of the defendant and the consequent possibility that he would be required to pay his own costs and those of the defendant. The suggested rule merely adds the possibility that even if he were awarded recovery, the court could require him to pay costs. Concededly, such a rule would produce some injustice, but the need for a federal caseload reduction is so great that there is evidently no avenue for alleviating the burden without some injustice.

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