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# Amount in Controversy and Removal: Current Trends and Strategic Considerations

*Case law is evolving almost daily, and defense counsel must be alert to avoid the pitfalls and problems they may encounter*

BY QUENTIN F. URQUHART JR.

IN 1988, Congress amended the U.S. Code in an attempt to limit the number of cases that can be removed to federal court.<sup>1</sup> Although these revisions took a number of forms, perhaps the most significant restriction was an increase in the amount in controversy requirement for diversity jurisdiction from \$10,000 to \$50,000. This increase, combined with the enactment of state court rules prohibiting specification of damages in state court complaints, has raised significant questions in determining whether amount in controversy exists for purposes of removal.

This article will attempt to answer some of these questions and provide an analysis of current trends. It also will attempt to provide strategic guidance to defense counsel.

## REMOVAL JURISDICTION

In general, a defendant may remove a state court proceeding to federal court under 28 U.S.C. § 1441(a) if it could have been brought there originally. Pursuant to 28 U.S.C. § 1332(a), a federal district court has original jurisdiction over any civil action in which (1) the amount in controversy exceeds \$50,000, exclusive of interest and costs, and which (2) is between citizens of different states. Section 1332(a) does not define "amount in controversy" other than to exclude interest and costs.

Accordingly, every item of damage conceivably recoverable by the plaintiff should be included in the amount in controversy calculation, unless state law expressly prohibits recovery of the type of damage claimed.<sup>2</sup> Plaintiffs may not aggregate their claims to satisfy the jurisdictional amount unless they are suing to enforce a common and undivided interest.<sup>3</sup> In class actions, each member of the class must have a claim for jurisdictional amount, and class members may not aggregate their claims to reach the \$50,000 threshold.<sup>4</sup>

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## AMOUNT IN CONTROVERSY AND TIMING

28 U.S.C. §1446(b) governs the timing of removal to federal court and provides in relevant part:

The notice of removal of a civil action or proceeding shall be filed within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within 30 days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter. . . .

If the case stated by the initial pleading is not removable, a notice of removal may be filed within 30 days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, or other paper from which it may be first ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of

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

2. See, e.g., *Sellers v. O'Connell*, 701 F.2d 575 (6th Cir. 1983) (absence of jurisdictional amount where there was no authority supporting recovery of punitive damages under law of relevant jurisdiction).

3. *Zahn v. Int'l Paper Co.*, 414 U.S. 291 (1973); *Packard v. Provident Nat'l Bank*, 994 F.2d 1039 (3d Cir. 1993).

4. *Zahn*, 994 F.2d 1039; *Synder v. Harris*, 394 U.S. 332 (1969). *But see* *In re Abbott Laboratories*, 51 F.3d 524 (5th Cir. 1995) wherein the court held that pursuant to the Judicial Improvements Act of 1990, it could exercise jurisdiction over the claims of class members whose damages did not exceed \$50,000 under the "Supplemental Jurisdiction" provision of 28 U.S.C. § 1367.



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## 2. Chapman "Bright Line" Rule

The Fifth Circuit recently declined to follow the totality of the circumstances test in *Chapman v. Powermatic Inc.*<sup>9</sup> The plaintiff initially filed suit in state court but, following a Texas rule of civil procedure, did not plead a specific amount of damages. After the plaintiff answered a set of interrogatories indicating damages in excess of \$800,000, the defendant filed a notice of removal. The plaintiff then moved to remand on the ground that removal was not timely. The district court denied plaintiff's motion, finding that the case was timely removed by the defendant within 30 days from the time that it received answers to the interrogatories. After an adverse jury verdict, the plaintiff appealed the denial of the motion to remand.

Relying on *Mielke*, the plaintiff contended that the court should use a "due diligence" standard. Because the defendant "knew or in the exercise of due diligence should have known that the amount in controversy exceeded \$50,000," the plaintiff argued that removal should have occurred within 30 days from defendant's receipt of the initial pleading. After conducting an in-depth review of the jurisprudence on this issue, the Fifth Circuit rejected the plaintiff's contention in favor of a bright line rule:

We disagree with the opinion of the district court in *Mielke*, and conclude that for the purposes of the first paragraph of Section 1446(b), the 30-day time period in which a defendant must remove a case starts to run from defendant's receipt of the initial pleading only when that pleading *affirmatively reveals* on its face that the plaintiff is seeking damages in excess of the minimum jurisdictional amount of the federal court. We adopt this rule because we conclude that it promotes certainty and judicial efficiency by not requiring courts to inquire into what a particular defendant may or may not subjectively know. . . .

We believe the better policy is to focus the parties' and the court's attention on what the initial pleading sets forth, by adopting a *bright line rule* requiring the plaintiff, if he wishes the 30-day time period to run from the defendant's receipt of the initial pleading, to place in the initial pleading a specific allegation that damages are in excess of the federal jurisdictional amount.<sup>10</sup>

The court further rejected the plaintiff's contention that the defendant's prior receipt of medical bills and a demand letter indicating that the amount in controversy exceeded

\$50,000 were sufficient to start the 30-day time period from the receipt of the initial pleading. The court noted that the medical bills and demand letter were "other papers" that could be considered only under the second paragraph of Section 1446(b). Under the plain language of the statute, the defendant must receive those "other papers" after receiving the initial pleading in order to commence the 30-day time period. Because the "other papers"—the medical bills and demand letter—were received by the defendant before the initial pleading, they could not be used to commence the 30-day time period. The court expressly declined to follow *Central Iowa Agri-Systems v. Old Heritage Advertising and Publishers Inc.*,<sup>11</sup> an earlier district court case that reached a contrary result.

Thus, under *Chapman* it would appear that defense counsel need not be concerned about the running of the 30-day time period until their client has received an initial pleading affirmatively revealing that the amount in controversy is in excess of \$50,000. This rule will hold true even if the defendant may already know through "other papers," such as medical bills or demand letters, that the case is worth more than \$50,000. The time period for removal under the second paragraph of Section 1446(b) will commence only when an amended pleading or "other papers" are received after receipt of the initial pleading.

## 3. Recent Applications of Chapman

Despite the Fifth Circuit's establishment of a bright line rule, two Louisiana federal district courts recently reached opposite results when presented with this issue.

In *Schild v. Tymco Inc.*<sup>12</sup> a wrongful death action was filed by the surviving parents of a teenage boy killed when his automobile struck a street sweeper manufactured and/or owned by the defendants. Following Louisiana law, the original petition did not pray for a specified amount of damages but only such damages "as may be reasonable in the premises." The case was removed 31 days after the first defendant was served, and the plaintiff moved to remand on the basis that removal was untimely. The defendants contended that under *Chapman*, the 30-day period had not commenced because the

9. 969 F.2d 160 (5th Cir. 1992).

10. *Id.* at 163 (emphasis added).

11. 727 F.Supp. 1304 (S.D. Iowa 1989).

12. 842 F.Supp. 225 (M.D. La. 1994).

state court petition did not expressly allege that damages were in excess of the federal jurisdictional minimum.

The court rejected this contention:

In the case before this court, defendant concedes that it determined that the case was removable by a review of the allegations of the state court petition—it sets forth a straightforward wrongful death claim by the surviving parents of a college age decedent. The defendant does not claim to have received any “other paper” following receipt of the original petition which clearly revealed that the case was removable; rather, it seeks to convert the “bright line” rule of *Chapman* into a “head in the sand” rule. This court does not agree!<sup>13</sup>

Although the holding in *Schild* appears to be a resurrection of the “totality of the circumstances test,” it is distinguishable from *Chapman* and should do no overt harm to the bright line rule it created. Unlike the defendant in *Chapman*, the defendants in *Schild* did not base their removal on the receipt of an “other paper” that affirmatively indicated the “true” value of the case. Therefore, when the defendants in *Schild* removed the case only 31 days after receipt of the initial pleading, they implicitly conceded that the original petition had informed them that the jurisdictional minimum was met. The district court judge was not going to let them use the holding in *Chapman* as a means to escape a dilatory removal.

In 20/20 hindsight, the defendants in *Schild* probably would have had a better argument if they had not removed the case one day late but had propounded an interrogatory to the plaintiffs requesting specification of their damages. On receipt of that interrogatory answer, which presumably would have indicated damages greater than \$50,000, the defendants could have

then removed by taking advantage of the second paragraph of Section 1446(b), exactly as the defendant in *Chapman* did.

A more straightforward application of *Chapman* occurred in *Mitchell v. Flexcon Co.*,<sup>14</sup> in which the plaintiff filed suit in state court for personal injuries after injuring his hand in a laminating machine. The original petition did not make a claim for a specific amount of damages. After judgment was entered in state court dismissing defendant’s exceptions of improper venue and lack of personal jurisdiction, the defendant answered the petition and propounded a set of interrogatories. The plaintiff responded by claiming damages in excess of \$50,000, and the defendant removed within 30 days of receipt of the answers to the interrogatories. The plaintiff moved to remand, arguing that the defendant should have been able to ascertain from the initial pleading that the case was worth in excess of the jurisdictional amount. Relying on *Chapman*, the U.S. District Court for the Eastern District of Louisiana held that removal was timely.<sup>15</sup>

## B. Supplemental Removal

As is evident from the discussion above, Section 1446(b) provides for removal not only within 30 days after receipt of the initial pleading, but also within 30 days from receipt by the defendant of an amended pleading, motion or “other paper” from which it can first be ascertained that the case is or has become removable. While the courts have had little difficulty in applying this section when removal is based on an amendment to the original complaint,<sup>16</sup> considerable uncertainty may exist when the timeliness of removal hinges on the receipt of an “other paper.”

### I. “Other Papers”

Section 1446(b) does not define “other paper.” Interrogatory answers have generally been recognized as “other papers” sufficient to trigger the supplemental removal period.<sup>17</sup> Although some courts have interpreted this provision as applying only to papers actually filed in the case,<sup>18</sup> most have read it more expansively. The essential purpose of Section 1446(b) is to commence the running of the 30-day period once the defendant receives the requisite notice that the case has become removable.<sup>19</sup> Thus, the receipt of any “paper” indicating that the federal jurisdictional minimum has been satisfied

13. *Id.* at 226 (emphasis added).  
 14. 1994 WL 117782 (E.D. La. 1994).  
 15. See also *Johnson v. Dillard Dep’t Stores Inc.*, 836 F.Supp. 390 (N.D. Tex. 1993).  
 16. See, e.g., *Miller v. Stauffer Chem. Co.*, 527 F.Supp. 775 (D. Kan. 1981).  
 17. See, e.g., *Chapman*, 969 F.2d 160; *Mitchell*, *supra* footnote 14; *Kojac v. Chrysler Corp.*, 794 F.Supp. 794 (E.D. Mich. 1992 (“other paper” could be plaintiff’s response to summary judgment motion, or answers to interrogatories, or statements of plaintiff).  
 18. See, e.g., *Phillips v. Allstate Ins. Co.*, 702 F.Supp. 1466, 1468-69 (C.D. Cal. 1989); *Hollenbeck v. Burroughs Corp.*, 664 F.Supp. 280 (E.D. Mich. 1987).  
 19. See *Sunburst Bank v. Summit Acceptance Corp.*, 878 F.Supp. 77 (S.D. Miss. 1995); 14A WRIGHT, MILLER & COOPER, FEDERAL PRACTICE & PROCEDURE, § 3732 [hereinafter WRIGHT, MILLER & COOPER].

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While interrogatory responses may be the best examples of "other papers," they are not the only ones. Counsel should be cognizant that answers to questions put at depositions, settlement offers, responses to requests for production, and verifications of special damages also may be sufficient to commence the 30-day time period.<sup>20</sup> The removal period can even start without the receipt of a real "paper." In *Vail v. Orkin Exterminating Co.*<sup>21</sup> the defendant removed the case within 30 days after opposing counsel orally indicated that she was looking for a lot more than \$15,000 and would discuss settlement if the defendant offered \$500,000. The court found removal was timely based on the "receipt" of that information.<sup>22</sup>

Defense counsel should be aware that this principle can cut both ways. In *Van Gosen v. Arcadian Motor Carriers*<sup>23</sup> the plaintiff originally filed suit in state court and claimed damages of only \$50,000. While the case was pending there, the plaintiff served interrogatory answers on the defendant itemizing his damages at \$52,771. This quantification was later confirmed at a deposition, during which the plaintiff indicated that his claim exceeded \$52,000. However, the defendant did not remove until four months later when the plaintiff was granted leave to amend his complaint to set forth damages of \$75,000. The Kansas federal district court granted the plaintiff's motion to remand, finding that the 30-day time period began to run from the date the defendant received the interrogatory and deposition answers and not from the date that leave to amend was granted.

The lesson to be learned from *Van Gosen* is that when defense counsel propound interrogatories or take depositions in a case in which diversity may exist, they should be prepared to remove promptly on receipt of answers indicating that the jurisdictional minimum has been met.<sup>24</sup>

## 2. The One-year Limit

The supplemental removal period provided in the second paragraph of Section 1446(b) is subject to a very important limit—that is, a diversity case may not be removed more than one year after commencement of the action in state court. *Perhats Associates Inc. v. Fasco Industries Inc.*<sup>25</sup> demonstrates the potential impact of

this limit. The plaintiffs' claims for damages were initially unliquidated, and therefore the defendant served interrogatories in an effort to ascertain their true value. After considerable delay, the plaintiffs answered the interrogatories and indicated that the claims were far in excess of \$50,000. The defendant timely removed the case to federal court within 30 days after receiving the interrogatory answers, but because more than a year had passed since the case was first filed, the federal district court had no choice but to remand.<sup>26</sup>

## C. Suggested Analysis

Defense counsel faced with an indeterminate complaint can be confronted with a real dilemma: whether to wait until damages can be verified at more than \$50,000, thus running the risk that the plaintiff's attorney may then claim noncompliance with the 30-day limit, or whether to file a prompt notice of removal, thereby running the risk of remand because federal jurisdiction has not yet been affirmatively established.<sup>27</sup>

At least in the federal courts governed by *Chapman*, there is a bright line rule that does not require a defendant to file its notice of removal under the first paragraph of Section 1446(b) unless plaintiff's initial pleading affirmatively reveals on its face that the amount in controversy is in excess of \$50,000. This is true even though the defendant, prior to suit being filed, may be in possession of additional information such as demand letters, medical bills, etc., that clearly suggest the jurisdictional minimum will be met.

In the courts that still adhere to the totality of the circumstances test, defense counsel will need to be vigilant to ensure a timely removal if they have received any information indicating

20. See *Smith v. Int'l Harvester Co.*, 621 F.Supp. 1005, 1007 (D. Nev. 1985) (answer given at deposition was "other paper"). See also *Sunburst Bank*, 878 F.Supp. at 80-82 and cases cited therein.

21. 1991 WL 134275 (N.D. Ill.).

22. See also *Hessler v. Armstrong World Indus. Inc.*, 684 F.Supp. 393, 394-95. (D. Del. 1988) (utterances from counsel and statements made in court constituted "other paper").

23. 825 F.Supp. 981 (D. Kan. 1993).

24. See also *Roberson v. Orkin Exterminating Co.*, 770 F.Supp. 1324 (N.D. Ind. 1991).

25. 843 F.Supp. 424 (N.D. Ill. 1994).

26. See also *Olson v. Gen. Am. Life Ins. Co.*, 1993 WL 87645 (N.D. Cal.).

27. *Schacht v. Ethicon Inc.*, 881 F.Supp. 348 (N.D. Ill. 1995).

that the federal jurisdictional minimum has been met. As *Schild* aptly demonstrates, the defendant is not entitled to bury its "head in the sand" if it knows that the federal jurisdictional minimum has been met.

If the case is not initially removable, the defendant can still remove within 30 days of receipt of an amended pleading, motion or "other paper" that indicates the jurisdictional minimum has been met. In utilizing this supplemental removal period, defense counsel must be cognizant that removal will be subject to the one-year limit.

#### BURDEN OF PROOF

Although removal may be accomplished in a timely manner, the fight to keep a case in federal court may be just beginning. The failure to meet the amount in controversy requirement is fatal to subject matter jurisdiction and can be raised at any time prior to final judgment.<sup>28</sup> When a motion to remand is filed by the plaintiff on the ground that the jurisdictional minimum of \$50,000 has not been met, it is the defendant's burden to prove that subject matter jurisdiction exists.<sup>29</sup> If the defendant fails to maintain that burden, then 28 U.S.C. § 1447(c) provides that the case "shall be remanded" to state court.

When a motion to remand is based on the alleged failure to satisfy the amount in controversy requirement, what is the defendant's burden of proof? This question has been the subject of a great deal of debate within the courts and the resulting decisions have been inconsistent, confusing and sometimes just plain wrong.

Although recent cases have helped to clarify the extent of the defendant's burden under these circumstances, there continues to be a vast amount of uncertainty, especially when the amount in controversy is indeterminate from the initial pleading. Because maintenance of a federal forum will likely turn on the burden imposed on the removing party, it is critical that defense counsel be prepared to convince the court of the proper standard if remand is to be defeated.

28. 28 U.S.C. § 1447(c); *Ross v. Inter-Ocean Ins. Co.*, 693 F.2d 659 (7th Cir. 1982); *State v. Ivory*, 906 F.2d 999, 1000 n.1 (4th Cir. 1990).

29. *Gaitor v. Peninsular & Occidental S.S. Co.*, 287 F.2d 252 (5th Cir. 1961).

30. 303 U.S. 283 (1938).

31. *Id.* at 288-90 (emphasis added).

#### A. *St. Paul Case*

The starting point for discussion in this area is *St. Paul Mercury Indemnity Co. v. Red Cab Co.*,<sup>30</sup> in which the U.S. Supreme Court considered whether a removed case could be remanded where the damages alleged in the original state court complaint were greater than the amount required for federal jurisdiction, but a post-removal amended complaint listed a schedule of damages less than the jurisdictional minimum.

The Court began with a general discussion of federal jurisdiction:

The intent of Congress drastically to restrict federal jurisdiction in controversies between citizens of different states has always been rigorously enforced by the courts. The rule governing dismissal for want of jurisdiction in cases brought in the federal court is that, unless the law gives a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal. The inability of plaintiff to recover an amount adequate to give the court jurisdiction does not show his bad faith or oust the jurisdiction. Nor does the fact that the complaint discloses the existence of a valid defense to the claim. But if, from the face of the pleadings, it is apparent, to a legal certainty, that the plaintiff cannot recover the amount claimed, or if, from the proofs, the court is satisfied to a like certainty that the plaintiff never was entitled to recover that amount, and that his claim was therefore colorable for the purpose of conferring jurisdiction, the suit will be dismissed. Events occurring subsequent to the institution of suit which reduce the amount recoverable below the statutory limit do not oust jurisdiction.<sup>31</sup>

Having set forth the rules applicable to cases brought in federal court, the Court then embarked on a discussion of how amount in controversy should be judged in cases removed to federal court:

A different situation is presented in the case of a suit instituted in a state court and thence removed. There is a strong presumption that the plaintiff has not claimed a large amount in order to confer jurisdiction on a federal court or that the parties have colluded to that end. For if such were the purpose, suit would not have been instituted in the first instance in the state but in the federal court. . . .

[T]he fact that it appears from the face of the complaint that the defendant has a valid defense, if asserted, to all or a portion of the claim, or the

circumstance that after removal below the jurisdictional amount, the plaintiff remands the case, and then, by stipulation, reduces the amount of the claim to less than the jurisdictional amount, does not constitute a waiver of the jurisdictional amount.

Thus, events which reduce the amount of the claim below the jurisdictional amount, do not constitute a waiver of the jurisdictional amount.

Based on the fact that the Court is completely distinct and the plaintiff brings a separate and distinct claim, the defendant seeks to avoid the jurisdictional amount by presenting original claim with a jurisdictional amount. The defendant places the burden of proof on the plaintiff to prove that the amount in controversy is less than the jurisdictional amount. The defendant does not show his bad faith or oust the jurisdiction.<sup>33</sup> The court's examination of the facts leads the court to suspect that the parties may have colluded.

However, a case removed to federal court, as will be discussed in *St. Paul*, as presenting a separate and distinct claim, once the plaintiff brings the federal jurisdictional amount, the defendant's removal of the case to federal court is an amendment or a change in the amount in controversy in the federal court.

#### B. *Subsequent*

The most striking case in *St. Paul* occurs in the plaintiff's attempt to remove the case to federal court after removal to state court. In *IV Salina N.A.*, the suit was filed in state court with a claim greater than \$50,000. The case was removed to federal court after the plaintiff amended its claim and costs, and the defendant's contention that the federal jurisdictional amount had been met.

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*Thus, events occurring subsequent to removal which reduce the amount recoverable, whether beyond the plaintiff's control or as a result of his volition, do not oust the district court's jurisdiction once it has attached.<sup>32</sup>*

Based on the foregoing discussion, it is clear that the Court in *St. Paul* set forth two completely distinct sets of rules. In cases where a plaintiff brings an action in federal court and a defendant seeks dismissal on amount-in-controversy grounds, the case will not be dismissed unless it appears, to a "legal certainty," that the original claim was really for less than the jurisdictional amount. The "legal certainty" test thus places the burden of proof on the defendant to prove that the plaintiff's claim is actually for less than the requisite amount if it desires to divest the federal court of its original jurisdiction.<sup>33</sup> The court also can undertake its own examination of the amount in controversy if it suspects that the plaintiff and the defendant may have colluded to confer jurisdiction.

However, a different set of rules applies in cases removed by a defendant to federal court. As will be discussed in greater detail below, the Court in *St. Paul* did not view this circumstance as presenting a burden of proof issue. Rather, once the plaintiff's prayer for damages exceeds the federal jurisdictional minimum and the defendant removes, the plaintiff cannot, by amendment or stipulation, subsequently reduce the amount in controversy and thereby divest the federal court of jurisdiction.

### B. Subsequent Reduction

The most straightforward application of *St. Paul* occurs in those circumstances in which a plaintiff attempts to reduce the amount in controversy after removal to federal court. In *Bank IV Salina N.A. v. Aetna Casualty & Surety Co.*<sup>34</sup> suit was filed in state court alleging damages greater than \$50,000, and the defendant removed to federal court. The plaintiff later amended its claim to only \$50,000, plus interest and costs, and moved to remand based on the contention that the claim no longer exceeded the federal jurisdictional minimum. Citing *St.*

*Paul*, the Kansas federal district court denied the motion, finding that subsequent events could not destroy the court's jurisdiction once it had been acquired. Other courts consistently have reached identical results.<sup>35</sup>

The Supreme Court in *St. Paul* did not expressly address the question of what standard should be applied when jurisdiction is challenged after removal, despite an affirmative allegation of damages in excess of the federal jurisdictional minimum. For example, take a case where the plaintiff files suit in state court alleging damages of \$100,000, although it is clear that his injuries, even if liability is proved, are minimal. If the defendant timely removes on the basis of diversity, can the plaintiff move to remand on the basis that, despite his allegations to the contrary, it is a "legal certainty" his damages will never exceed \$50,000?

Although at least one circuit court has indicated that the answer to this question is in the affirmative,<sup>36</sup> that appears to run contrary to this language from *St. Paul*:

*We think this well established rule is supported by ample reason. If the plaintiff could, no matter how bona fide his original claim in state court, reduce the amount of his demand to defeat federal jurisdiction, the defendant's supposed statutory right of removal would be subject to the plaintiff's caprice. The claim, whether well or ill founded in fact, fixes the right of the defendant to remove, and the plaintiff ought not to be able to defeat that right and bring the cause back to state court at his election. If he does not desire to try his case in federal court, he may resort to the expedient of suing for less than the jurisdictional amount, and though he would be justly entitled to more, the defendant cannot remove.<sup>37</sup>*

From the above discussion, a strong argument can be made that the "legal certainty" test

32. *Id.* at 291-93 (emphasis added).

33. *See, e.g.,* Klepper v. First Am. Bank, 916 F.2d 337 (6th Cir. 1990); Nationwide Mut. Ins. Co. v. McGill, 1992 WL 245921 (E.D. Pa.).

34. 783 F.Supp. 1315 (D. Kan. 1992).

35. *See, e.g.,* Core v. S.W. Bell Tel. Co., 673 F.Supp. 974 (W.D. Ark. 1987), *aff'd*, 847 F.2d 497 (8th Cir. 1988) (subsequent amendment reducing claim below jurisdictional minimum does not warrant remand); Lewis v. Charles H. Bentz Assoc. Inc., 601 F.Supp. 109 (E.D. Wis. 1985) (plaintiff's amendment after mitigation of her damage claim cannot form basis for remand); Morris v. Naugle, 722 F.Supp. 1285 (D. Md. 1989) (plaintiff's assertion in motion to remand that her "good faith belief at present is that her claim does not exceed \$50,000" did not warrant remand where original demand was for \$200,000).

36. Gafford v. Gen. Elec. Co., 997 F.2d 150, 157 (6th Cir. 1993).

37. 303 U.S. at 294 (emphasis added).

should not apply in a removed case, even when the amount in controversy is affirmatively alleged to be above \$50,000. In other words, once the plaintiff makes a "claim" above the federal jurisdictional minimum, the right to remove is "fixed," and jurisdiction becomes essentially unchallengeable.

The Seventh Circuit appears to have adopted this approach in *In re Shell Oil Co.*,<sup>38</sup> in which the court invalidated a district judge's practice of remanding any case in which the plaintiff filed a stipulation or affidavit limiting recovery to less than the jurisdictional amount, holding that once a defendant has removed the case, *St. Paul* makes later filings irrelevant. This should be true even if it is "legally certain" that the plaintiff will not be able to recover more than the requisite sum and would be consistent with *St. Paul's* rule that events occurring subsequent to removal that reduce the amount recoverable, whether beyond the plaintiff's control or as a result of his volition, do not oust the district court's jurisdiction.

As a practical matter, it will be a relatively rare occurrence where the plaintiff initially alleges damages of more than \$50,000 and then later would be able to or would even want to sustain the burden of proving to a legal certainty that his case is actually worth less. However, if a plaintiff is desperate for state court jurisdiction, then an argument using the "legal certainty" test might be the only way out.

### C. Jurisdictional Challenges When Amount Is Indeterminate

*St. Paul* does not speak to the question of

38. 970 F.2d 355 (7th Cir. 1992).

39. See, e.g., *Kennard v. Harris Corp.*, 728 F.Supp. 453 (E.D. Mich. 1989) (applying "legal certainty" standard in case where the initial complaint was indeterminate); *Atkins v. Harcros Chem. Inc.*, 761 F.Supp. 444 (E.D. La. 1991) (applying "legal certainty" standard); *Hale v. Billups of Gonzales Inc.*, 610 F.Supp. 162 (M.D. La. 1985) (defendant has burden of proving that it "does not appear to a legal certainty that the claim is actually for less than the jurisdictional amount"); *Michael F. Ronca & Sons, Inc. v. Monarch Water Systems Inc.*, 1990 WL 140154 (E.D. Pa.) ("damages requested by plaintiff are sufficiently vague that it cannot be said to a legal certainty that they do not exceed \$50,000").

40. 752 F.Supp. 753 (E.D. Mich. 1990).

41. *Id.* at 756, citing *Nat'l Organization for Women v. Mutual of Omaha Ins. Co.*, 612 F.Supp. 100 (D. D.C. 1985). See also *Gafford v. Gen. Elec. Co.*, 997 F.2d 150, 160 (6th Cir. 1993) ("legal certainty test should not be applied to situations, such as the present case, where damages are unspecified").

42. Citing *McNutt v. Gen. Motors Acceptance Corp.* of Indiana, 298 U.S. 178 (1936).

43. 11 F.3d 55 (5th Cir. 1993), *aff'g* 790 F.Supp. 693 (E.D. Tex. 1992).

whether the "legal certainty" standard should apply in cases removed to federal court where damages are indeterminate from the original complaint. Unfortunately, in looking for an appropriate standard to apply in those circumstances, many district courts improperly extended the "legal certainty" test to these cases.<sup>39</sup>

Other district courts, however, have properly recognized that the legal certainty test should have no application in cases where the damages are indeterminate. Of particular note is *Garza v. Bettcher Industries Inc.*,<sup>40</sup> in which the federal district court in Michigan clearly articulated the practical problems that would arise if the legal certainty test were imposed on the defendant and the plaintiff under those conditions:

If the burden of proof were on the defendant to show the factual predicate for federal jurisdiction to a legal certainty, then the defendant would have to prove the plaintiff's damages to a legal certainty in order to withstand remand to state court. The application of the legal certainty test in that case would place the defendant in the unenviable position of having to prove the plaintiff's case. Conversely, if the burden of proof were shifted to the plaintiff, then he would be required to prove to a legal certainty that his damages are less than the jurisdictional amount. For all practical purposes then, whether a federal court can exercise diversity of citizenship jurisdiction over a case would depend on which party has the burden to prove or disprove the jurisdictional amount to a legal certainty.<sup>41</sup>

Having decided that "legal certainty" was not the proper standard, the court in *Garza* proceeded to engage in an in-depth analysis of the issue and ultimately adopted a "preponderance of the evidence" standard. Under that standard the defendant must establish that the plaintiff would "more likely than not" recover more than the jurisdictional amount, assuming the failure of all the defendant's affirmative defenses.<sup>42</sup>

Following the lead of *Garza*, the preponderance of the evidence standard has been adopted by an increasing number of federal appellate courts during the past three years. In *De Aguilar v. Boeing Co. (De Aguilar I)*,<sup>43</sup> an action was brought in Texas state court against an aircraft manufacturer and others arising from a Mexican air crash. After the case was removed to federal court, the plaintiffs filed affidavits purporting to limit their damages to less than \$50,000, and they moved to remand. The district court denied remand, holding that the affi-

davits were irrelevant at the time quent events did not

On appeal, the Fifth Circuit held that the plaintiffs' specific amount of damages must be proved by evidence that the defendant exceeded \$50,000. The defendant easily satisfied that the plaintiffs had injuries in excess of \$50,000. The court motion to remand plaintiffs' claims grounds.

A similar result in *Shaw v. I* Circuit in *Shaw v. I* state court com law, did not set f damages. The defe risdictional issue v first time. Relying *tors Acceptance* "preponderance o proper standard an that burden if it ca ability that more versy.

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tain legal certainty" was sought in *Garza* through analysis of the a "preponderance of the evidence" standard that the plaintiff must recover more than, assuming the defendant's affirmative de-

cision, the preponderance has been adopted in federal appellate courts for many years. In *De Guilar I*,<sup>43</sup> an appellate court against an order arising from a case was removed and affidavits were filed to be less than remand. The disallowing that the affi-

idavits were irrelevant because jurisdiction attached at the time of removal and the subsequent events did not oust jurisdiction.

On appeal, the Fifth Circuit held that because the plaintiffs' complaint did not allege a specific amount of damages, the removing defendant must prove by a "preponderance of the evidence" that the amount in controversy exceeded \$50,000.<sup>44</sup> The court found that the defendant easily satisfied this burden by showing that the plaintiffs had pleaded damages well in excess of \$50,000 in other forums for similar injuries. The court affirmed the denial of the motion to remand and the dismissal of the plaintiffs' claims on forum non conveniens grounds.

A similar result was reached by the Seventh Circuit in *Shaw v. Dow Brands Inc.*<sup>45</sup> The original state court complaint, in accord with Illinois law, did not set forth a specified amount of damages. The defendant removed, and the jurisdictional issue was raised on appeal for the first time. Relying on *McNutt v. General Motors Acceptance Corp.*,<sup>46</sup> the court found "preponderance of the evidence" to be the proper standard and held that a defendant meets that burden if it can show to a reasonable probability that more than \$50,000 is in controversy.

In *Gafford v. General Electric Co.*<sup>47</sup> the Sixth Circuit recently explained why it also felt the "preponderance of the evidence" standard did the best job of balancing the competing interests of protecting a defendant's right to remove and limiting diversity jurisdiction:

We believe that the "preponderance of the evidence" test best comports with the balance struck. It does not place upon the defendant the daunting burden of proving, to a legal certainty, that the plaintiff's damages are not less than the amount-in-controversy requirement. Such a burden might well require the defendant to research, state and prove the plaintiff's claim for damages. On the other end of the spectrum, requiring the defendant to prove that the amount in controversy "may" meet the federal requirement would effectively force the plaintiff seeking remand to prove in rebuttal that only a relatively small amount of damages is legally possible.<sup>48</sup>

District courts also have begun to recognize the circumstances that call for application of the "preponderance of the evidence" test as opposed to the "legal certainty" standard. For example, in *Printworks Inc. v. Dorn Co.* the federal district for the Eastern District of Louisiana

expressly held that "preponderance of the evidence" and not "legal certainty" is the "governing standard" in cases where the amount in controversy is indeterminate.<sup>49</sup>

#### D. Attempts to Defeat Removal Through Preemptive Allegations

Can a plaintiff defeat removal simply by pleading that damages are less than \$50,000? Under *St. Paul*, a plaintiff who does not "desire to try his case in federal court . . . may resort to the expedient of suing for less than the jurisdictional amount, and though he would be justly entitled to more, the defendant cannot remove."<sup>50</sup>

This statement undoubtedly was premised on the notion that the plaintiff ultimately would not be able to recover more in state court than what was alleged in the original complaint. However, the majority of states have followed the example of Federal Rule of Civil Procedure 54(c) and do not limit damage awards to the amounts specified in the original complaint. Because judges and juries in those states are free to award any amount of damages, regardless of the amount actually prayed for, significant questions have arisen as to what weight such preemptive allegations should be given when removal to federal court is at issue.

Two federal circuits recently addressed this issue and came to quite different conclusions.

In *Burns v. Windsor Insurance Co.*<sup>51</sup> the plaintiff filed suit in an Alabama state court seeking an award of actual and punitive damages "in such sums as the jury determines to be just, lawful and fair, but not more than \$45,000." The defendant removed, fearing that

44. Citing *Gaus v. Miles Inc.*, 980 F.2d 564 (9th Cir. 1992).

45. 994 F.2d 364, 366 n.2 (7th Cir. 1993).

46. 298 U.S. 178 (1936).

47. 997 F.2d 150 (6th Cir. 1993).

48. *Id.* at 159.

49. 869 F.Supp. 436, 441 n.9 (E.D. La. 1994). See also *Shear Healthcare Resources Inc. v. TNI Inc.*, 1994 WL 383936 (M.D. Fla.) (where it is unclear what amount of damages are sought, "legal certainty" test is inapplicable). But see *Carmadelle v. Texaco Inc.*, 1994 WL 247408 (E.D. La.), in which the court incorrectly applied the preponderance of the evidence standard in ordering remand following the plaintiff's agreement to limit his recovery to no more than \$50,000. The plaintiff initially prayed for trial by jury, which was not available under Louisiana law unless the amount in controversy exceeded \$50,000. Because the amount of damages requested in the original complaint was known (that is, at least \$50,000), the preponderance of the evidence standard should not have been utilized.

50. 303 U.S. at 294.

51. 31 F.3d 1092 (11th Cir. 1994).

an award greater than \$45,000 could (and would) ultimately be sought in state court, since an Alabama rule of civil procedure allows a fact finder to give plaintiffs any relief to which they are entitled, even if less is prayed for. After the plaintiff filed a motion to remand, the district judge entered an order requiring the plaintiff to file a statement that she would not attempt to collect more than \$50,000 in the future. After the plaintiff responded that her "present claim" was \$45,000 but that the amount may change "upon a worsening health condition" or evidence that greater punitive damages should be awarded, the court denied the motion to remand.

The 11th Circuit held that the plaintiff's allegations as to jurisdictional amount were entitled to "deference and a presumption of truth." To avoid remand, the court stated, the defendant must prove "to a legal certainty" that the plaintiff's claim must exceed \$50,000. In placing this burden on the defendant, the court distinguished other cases that imposed only a "preponderance of the evidence standard" on the basis that the amount of damages sought in those cases was unspecified, whereas in the case before it the damages were expressly alleged to be less than \$50,000.

The court concluded:

Having determined what defendant must show to remain in federal court, we find defendant has not met its burden of proof. Defendant has offered nothing more than conclusory allegations that predict that plaintiff intends to wait a year from her filing date and then boost her damage request. Plaintiff on the other hand has offered to settle the case for \$45,000. While this settlement offer, by itself, may not be determinative, it counts for something. Defendant also offered no proof that plaintiff's prayer is grossly inconsistent with her alleged damages. Her awareness that she "could" —given the power of the court to award more than is requested—recover more is not enough to prove jurisdiction in the face of plaintiff's specific pleading. The case should have been remanded to state court.<sup>52</sup>

The most recent pronouncement on this issue emanates from the Fifth Circuit in *De Aguilar v. Boeing Co. (De Aguilar II)*,<sup>53</sup> a continuation of the earlier litigation involving the crash of

the Mexican airliner. After the district court had dismissed the original claim on forum non conveniens grounds, the plaintiffs' attorneys filed another petition in state court specifically alleging that the amount in controversy did not exceed \$50,000 per claimant. They attached to the original petition an affidavit of one of the attorneys stating that the plaintiffs had agreed on an irrevocable cap on the amount of damages that could be awarded.

The defendants attempted to clarify whether this affidavit constituted a binding limitation on damages. When they could not do so, the case was removed. The district court denied the plaintiffs' motion to remand, finding that the plaintiffs' attorneys had not shown the necessary authority to limit damages. After the case was again dismissed on forum non conveniens grounds, the plaintiffs appealed.

The Fifth Circuit began its analysis by acknowledging that under Texas law a plaintiff's damage award is not restricted to the amount set forth in the ad damnum clause of the state pleading. The court went on to state that these "rules have created the potential for abusive manipulation by plaintiffs, who may plead for damages well below the jurisdictional amount in state court with the knowledge that the claim is actually worth more, but also with the knowledge that they may be able to avoid federal jurisdiction by virtue of the pleading. Such manipulation is surely characterized as bad faith."<sup>54</sup>

In order to protect defendants against such manipulation, the court set forth the following rule:

Accordingly, we hold that if a defendant can show that the amount in controversy actually exceeds the jurisdictional amount, the plaintiff must be able to show that, as a matter of law, it is *certain* that he will not be able to recover more than the damages for which he has prayed in the state court complaint. Such a rule is necessary to avoid the sort of manipulation that has occurred in the instant case.<sup>55</sup>

In order to invoke this rule, the defendant must produce evidence establishing by a preponderance of the evidence that the actual amount in controversy exceeds \$50,000. Once the defendant has pointed to an adequate jurisdictional amount, the court characterized the situation as being analogous to the "typical" case in which the *St. Paul* "legal certainty" test is applicable—that is, it must appear to a legal

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52. *Id.* at 1097.

53. 47 F.3d 1404 (5th Cir. 1995).

54. *Id.* at 1410, citing *Boelens v. Redman Homes Inc.*, 759 F.2d 504, 507 (5th Cir. 1985).

55. *Id.* at 1411 (emphasis added).

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certainty that the claim is really for less than the jurisdictional amount to justify dismissal.

The court offered the following advice as to how a plaintiff might go about meeting this burden:

Plaintiff's "legal certainty" obligation might be met in various ways; we can only speculate, without intimating how we might rule in such a case. Plaintiff's state complaint might cite, for example, to a state law that prohibits recovery of damages that exceed those requested in the ad damnum clause and that prohibits the initial ad damnum to be increased by amendment. Absent such a statute, "[P]litigants who want to prevent removal must file a binding stipulation or affidavit with their complaints: once a defendant has removed the case, St. Paul makes later filings irrelevant." *In re Shell Oil Co.* 970 F.2d 355, 356 (7th Cir. 1992) (per curiam).<sup>56</sup>

The court ultimately concluded that the plaintiffs in *De Aguilar II* had failed to meet the "legal certainty" standard because their attorneys did not have the authority to cap their damages at less than \$50,000.

*Burns* and *De Aguilar II* are clearly in conflict as to the burden that must be met to maintain or defeat jurisdiction when the amount in controversy is explicitly alleged to be less than \$50,000. While both cases resurrect *St. Paul's* "legal certainty" standard, they apply it differently. Under *Burns*, the defendant must meet the burden of proving, to a legal certainty, that the plaintiff's damages exceed \$50,000 in order to avoid remand. Under *De Aguilar II*, it is the plaintiff who must prove, to a legal certainty, that damages are less than \$50,000 once the defendant makes an initial showing of jurisdictional amount.

Although good arguments can be made in support both positions, it is submitted that the procedure established in *De Aguilar II* is more equitable in light of the manipulation that can take place if the plaintiff's allegations alone were sufficient to invoke the "legal certainty" standard. Under *De Aguilar II*, the defendant must initially prove, by a preponderance of the evidence, that the amount in controversy exceeds the federal jurisdictional minimum. If the defendant cannot meet this burden through submission of appropriate evidence, then remand will be ordered without further inquiry. However, if the defendant can meet this burden, then placing the onus on the plaintiff to satisfy the "legal certainty" standard by submitting a binding affidavit would seem to be a modest

requirement that ought to be easily satisfied. It is essentially a test of the plaintiff's "good faith." If the plaintiff is unwilling to submit such an affidavit, then there is an inference of "bad faith" and the initial pleading should be disregarded.

## MAINTAINING FEDERAL JURISDICTION

Although adoption of the "preponderance of the evidence" standard has significantly clarified the defendant's burden of proof when jurisdictional amount is challenged, a great deal of jurisprudence is now being devoted to how that burden is met and, once met, whether there are any circumstances under which a plaintiff's post-removal stipulation will nevertheless defeat removal.

### A. Evidence Available

#### 1. Historical Case Law

One of the most persuasive forms of evidence that can be offered by a defendant in meeting its burden of proof is prior case law demonstrating the probable value of the plaintiff's claim. In *Kennard v. Harris Corp.*<sup>57</sup> the plaintiff's pleadings contained no averment as to the amount in controversy and the defendants removed. After taking judicial notice of the fact that within the past three years juries sitting in the same county as the court had returned verdicts well in excess of the jurisdictional prerequisite in several product liability actions, the federal district court denied the plaintiff's motion to remand.<sup>58</sup>

#### 2. Plaintiff's Refusal to Stipulate

Also considered by courts as an important factor in determining whether to order remand is the plaintiff's refusal to stipulate or otherwise restrict recovery to \$50,000 or less. In *Achord*

56. *Id.* at 1412.

57. 728 F.Supp. 453 (E.D. Mich. 1989).

58. See also *Marcel v. Pool Co.*, 5 F.3d 81 (5th Cir. 1993) (survey of jurisprudence on each of plaintiff's injuries established that amount in controversy was significantly more than \$50,000); *Chittick v. Farmers Ins. Exch.*, 844 F.Supp. 1153 (S.D. Tex. 1994) (defendant met burden under *De Aguilar I* by demonstrating that in "similar" cases awards in excess of \$50,000 had been made); *Callaway v. BASF Corp.*, 810 F.Supp. 191, n.6 (S.D. Tex. 1993) (court noted prior jury verdicts of \$460,000 and \$521,660 in denying plaintiff's motion to remand wrongful discharge case); *Cedus v. Asplundh Tree Expert Co.*, 759 F.Supp. 319 (W.D. La. 1990) (court refused to remand where several Louisiana cases have found back injuries to be worth more than \$50,000).

*v. Monsanto Co.*<sup>59</sup> the plaintiffs filed suit in state court praying "for those damages to which petitioners may be entitled in this case, which damages do not exceed the sum of Fifty Thousand Dollars (\$50,000)." The defendant removed anyway but agreed to remand if the plaintiffs would stipulate to maximum damages of \$50,000 as to each defendant. When they refused to do so, the federal district court denied the motion to remand.<sup>60</sup>

An interesting attempt was made to use the defendant's failure to stipulate in support of a motion to remand in *Aucina v. Amoco Oil Co.*<sup>61</sup> In accord with Iowa law, the original petition did not allege a specific amount of damages. One day after the defendant removed, the plaintiff asked the defendant to admit that if the plaintiff was damaged by the defendant's conduct, the plaintiff's damages exceeded \$50,000. When the defendant refused to stipulate, the plaintiff moved to remand.

The Iowa federal district court denied the motion, finding that the defendant met its burden of proving by a preponderance of the evidence that the jurisdictional amount was satisfied (punitive damages were claimed). The court further rejected the plaintiff's contention that the defendant's refusal to stipulate to damages of more than \$50,000 should warrant remand. The court found that such a stipulation would put the defendant in the awkward position of embracing a concession on the important issue of damages to establish the jurisdictional requirements for diversity. "Defendant need not do so," the court remarked.<sup>62</sup>

### 3. Demand Letters

Offers of settlement also have been considered as evidence of the amount in controversy. In *Pantiledes v. Wal-Mart Stores Inc.*<sup>63</sup> the plaintiff did not allege a specific amount of

damages in his state court petition, but the defendant removed. The plaintiff moved to remand, along with a stipulation by counsel (but not by the plaintiff) that the jurisdictional amount did not exceed \$50,000.

Citing *St. Paul*, the U.S. District Court for the Eastern District of Louisiana refused to remand based solely on the plaintiff's unilateral stipulation. The court went on to find that the defendant had met its burden of proving jurisdictional amount by submission of a letter from the plaintiff's attorney indicating that "the judgment value of the case may be \$50,000" and a report from the plaintiff's expert economist estimating damages in excess of \$2.3 million.<sup>64</sup>

A contrary result was reached by another judge of the same court in *McKnight v. K-Mart Corp.*,<sup>65</sup> in which the plaintiff initially filed suit claiming "severe and disabling injuries" and the defendant removed. The evidence showed that the plaintiff had made two settlement offers—one in excess of \$50,000 and a later one for less than \$50,000. Although the court expressed some doubt regarding the usefulness of settlement offers in computing jurisdictional amount, it concluded that the settlement offers failed to establish to a "legal certainty" that the matter exceeded the federal jurisdictional minimum.

The result in *McKnight* can be questioned on two grounds. First, because the case was decided before the Fifth Circuit's decision in *De Aguilar I*, it did not apply the "preponderance of the evidence" standard. A different result might have occurred had that standard been utilized. Second, the opinion in *McKnight* also does not indicate whether the later settlement offer (below \$50,000) occurred before or after removal. If it occurred after removal, then, regardless of which standard applied, the case should not have been remanded under the subsequent reduction rule of *St. Paul*.

### 4. Deposition Testimony

In *Ball v. Hershey Foods Corp.*<sup>66</sup> an advertising consultant brought suit against a candy manufacturer for "misappropriation of an idea" for a commercial. The case was removed. Because it was not clear as to whether the jurisdictional minimum had been met, the court ordered the parties to brief this issue and ultimately concluded that the defendant had met its burden of establishing jurisdiction through sub-

mission of the plaintiff that his concept was worth "\$200,000 or \$400,000."

A similar result occurred in *Gas Inc.*<sup>67</sup> The plaintiff's quantum of damages was less than \$50,000. In *Gas Inc.* they cited their own testimony of plaintiff's injuries, the court

### 5. Affidavits

If the evidence does not fit any of the categories, the defendant can convince the court to prove the amount in controversy. In *Orkin Exterminating Co. v. Orkin Exterminating Co.* the plaintiff's injuries were valued at \$15,000, in accordance with the plaintiff's injury. The defendant moved to remand the case to federal court. The court denied the motion to remand because the amount in controversy was \$50,000, the defendant's offer of one of its attorneys to separate occasions discussed possible "in part on this regard" the motion to remand.

### B. Post-Removal

Although the defendant to establish the amount in controversy need not sit on the defendant presents evidence that the plaintiff truly is worth more than \$50,000, the plaintiff stipulate to that fact. The stipulation is "in part" of an other

In *Asociacion Dow Quimica v. Dow Chemical Co.* a Colombian fisherman alleged that he was injured by a fisherman in Texas law, no relief was made. The federal court, the remand coupled with the attorney stating that the plaintiff suffered damages, the district court de-

59. 1992 WL 365325 (E.D. La.).

60. See also *Relf v. Wal-Mart Stores Inc.*, 1992 WL 245629 (E.D. La.) (plaintiff's refusal to stipulate to limit claim to less than \$50,000 factor in denial of motion to remand); *Johnson*, 836 F.Supp. 390 (plaintiff's refusal to stipulate that damages do not exceed \$50,000 considered in denying motion to remand); *Reid v. Delta Gas Inc.*, 837 F.Supp. 751 (M.D. La. 1993) (same).

61. 871 F.Supp. 332 (S.D. Iowa 1994).

62. Citing *Kelderman v. Remington Arms Co.*, 734 F.Supp. 1527 (S.D. Iowa 1990).

63. 1994 WL 374303 (E.D. La.).

64. See also *Relf*, *supra* note 60 (plaintiff's offer to settle for \$287,000 considered by court in denying motion to remand).

65. 1993 WL 410099 (E.D. La.).

66. 842 F.Supp. 44 (D.Conn. 1993).

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mission of the plaintiff's deposition testimony that his concept might be worth \$40,000, or "\$200,000 or \$400,000."

A similar result was reached in *Reid v. Delta Gas Inc.*<sup>67</sup> The plaintiffs sued for an unspecified quantum of damages but, after removal, contended that the amount in controversy was less than \$50,000. In support of this contention, they cited their prior settlement offer of \$25,000. However, relying on the deposition testimony of plaintiff as to the extent of his injuries, the court denied the motion to remand.

### 5. Affidavits

If the evidence sought to be introduced does not fit any of the categories outlined above, the defendant can consider submitting affidavits to prove the amount in controversy. In *Vail v. Orkin Exterminating Co.*<sup>68</sup> the original complaint only specified damages in excess of \$15,000, in accord with Illinois law. However, the plaintiff's injuries appeared to be quite severe, and the defendant removed the case to federal court. The plaintiff responded with a motion to remand. In support of its contention that the amount in controversy exceeded \$50,000, the defendant submitted the affidavit of one of its attorneys who swore that on two separate occasions the plaintiff's counsel discussed possible "six figure damages." Relying in part on this representation, the court denied the motion to remand.

### B. Post-Removal Stipulation

Although the burden of proof is on the defendant to establish jurisdiction, the plaintiff need not sit on the sidelines while the defendant presents evidence in support of removal. If the plaintiff truly does not believe that the case is worth more than \$50,000 and is willing to stipulate to that fact, remand may be obtained if the stipulation is viewed only as a "clarification" of an otherwise indeterminate complaint.

In *Asociation Nacional de Pescadores v. Dow Quimica de Colombia (ANPAC)*,<sup>69</sup> 700 Colombian fishermen filed suit for damages allegedly caused by a chemical spill. Pursuant to Texas law, no specific claim for monetary relief was made. After the defendants removed to federal court, the plaintiffs filed a motion to remand coupled with an affidavit from their attorney stating that no individual plaintiff had suffered damages in excess of \$50,000. The district court denied remand.

On appeal, the Fifth Circuit held that the post-removal affidavit could be considered in deciding whether remand was proper. The court avoided the *St. Paul* rule by construing the affidavit not as a change in the jurisdictional amount after removal but only as a clarification of an indeterminate complaint. The court outlined the circumstances under which a post-removal stipulation could be offered to defeat jurisdiction:

(1) the complaint did not specify an amount of damages, and it was not otherwise facially apparent that the damages sought or incurred were likely above \$50,000;

(2) the defendants offered only a conclusory statement in the notice of removal that was not based on direct knowledge of about the plaintiffs' claims; and

(3) the plaintiffs timely contested removal with a sworn, un rebutted affidavit indicating that the requisite amount in controversy was not met.<sup>70</sup>

Although ANPAC has been described as "narrowly drawn and circumscribed" and "an unusual case in which the defendant did little to defeat removal,"<sup>71</sup> other cases have embraced this clarification theory in granting remand where stipulations of damages of less than \$50,000 have been made.

In *Griffin v. Holmes*<sup>72</sup> the plaintiff's complaint set forth damages of approximately \$30,000, plus punitive damages "in excess of \$10,000." After the defendant timely removed the case, the plaintiff moved to remand and attached a stipulation that the total amount of damages sought from the defendants was less than \$50,000. The federal district court granted remand, finding "itself in agreement with the decisions characterizing a post-removal amount-in-controversy stipulation as a clarification permitted by *St. Paul*, and not an amendment forbidden by *St. Paul*."<sup>73</sup>

67. 837 F.Supp. 751 (M.D. La. 1993).

68. 1991 WL 134275 (N.D. Ill.).

69. 988 F.2d 559 (5th Cir. 1993).

70. *Id.* at 566.

71. See *Marcel v. Pool Co.*, 5 F.3d 81, 84-85 (5th Cir. 1993).

72. 843 F.Supp. 81 (E.D. N.C. 1993).

73. *Id.* at 88. See also *Angus v. Shiley Inc.*, 989 F.2d 142, 145 n.3 (3d Cir. 1993) ("[W]here a complaint is ambiguous as to the damages asserted and the controversy seems small, it is conceivable that a court might justifiably consider a subsequent stipulation as clarifying rather than amending an initial pleading. There is, after all, a distinction between explaining and amending a claim."); *Cole v. Great Atl. & Pac. Tea Co.*, 728 F.Supp. 1305 (E.D. Ky. 1990); *Robinson v. Quality Ins. Co.*, 633 F.Supp. 572 (S.D. Ala. 1986).

A number of federal district courts in Louisiana have recently reached similar results.<sup>74</sup>

### C. Suggested Analysis

Certain conclusions can be drawn as to the burden each party in a removed case will have to bear when jurisdiction is challenged via a motion to remand.

#### 1. Amount in Excess of \$50,000

If at the time of removal, the plaintiff has made an affirmative allegation, whether in the complaint or by interrogatory answers, of an amount in controversy in excess of \$50,000, then removal should take place within one of the 30-day time periods outlined by Section 1446(b). There is no burden of proof issue here because the amount in controversy is self-evident.

Should the plaintiff nevertheless file a motion to remand based on the contention that the case is "really" not worth more than \$50,000, the defendant can defeat remand by citing the *St. Paul* rule that a subsequent reduction in jurisdictional amount cannot divest the federal court of jurisdiction once properly vested. If the plaintiff is truly desperate to get out of federal court, he can attempt to prove that the amount in controversy is "legally certain" to be less than \$50,000 despite his prior assertions to the contrary. If this occurs, the defendant should strongly argue that *St. Paul* does not make the "legal certainty" test available under those circumstances.

#### 2. Amount Indeterminate

If, however, at the time of removal the amount in controversy is indeterminate, it will be the defendant's burden to prove by a "pre-

74. See, e.g., *Printworks Inc. v. Dorn Company Inc.*, 869 F.Supp. 436 (E.D. La. 1994) (where amount in controversy was not "facially apparent", deliberate representations to court that damages did not exceed \$45,000 were "convincing and credible evidence that jurisdiction was not proper at the time of removal"); *Winnier v. Shoney's Inc.*, 1993 WL 322977 (E.D. La.) (counsel's post-removal stipulation determinative in remanding case where amount in controversy was ambiguous); *St. Mary Galvanizing Co. v. Foster Wheeler U.S.A. Corp.*, 1993 WL 54291 (E.D. La.) (remand ordered where "only evidence" as to amount in controversy was plaintiff's stipulation that its damages were not in excess of \$50,000); *Mannuel v. Wal-Mart Stores Inc.*, 779 F.Supp. 56 (W.D. La. 1991) (where plaintiff's damages had always been "uncertain", counsel's pretrial stipulation that claim "is and will be in an amount less than \$50,000" warranted remand).

ponderance of the evidence" that the jurisdictional amount has been satisfied. The defendant must prove that the plaintiff's recovery would "more likely than not" exceed the jurisdictional amount, assuming the failure of all affirmative defenses.

To meet that burden, defense counsel should be prepared to cite prior case law demonstrating the likely value of the plaintiff's claim. If the plaintiff has refused to stipulate that the amount in controversy is less than \$50,000, this should be brought to the court's attention. Prior demand letters and deposition testimony can also be offered as proof in support of the defendant's contention that the jurisdictional amount has been satisfied. Finally, affidavits can be offered by the defendant or his counsel as to the amount in controversy.

#### 3. Allegation of Less than \$50,000

Where the original complaint makes an affirmative allegation that damages are less than \$50,000, the analysis will depend on the law of the circuit. Under *Burns*, it will be the defendant's burden to prove to a legal certainty that the plaintiff's damages exceed \$50,000. Under *De Aguilar II*, it will be the plaintiff who must prove to a legal certainty that the damages are less than \$50,000 once the defendant makes an initial showing that jurisdictional amount has been satisfied. If the plaintiff wishes to avoid removal, he must make a legally binding averment or stipulation.

#### 4. No Amount Specified

Finally, when the original complaint does not specify an amount of damages and the amount in controversy was not otherwise determinable, a plaintiff's post-removal stipulation that the amount in controversy is less than \$50,000 can be considered by the court. If the defendant offers no contrary proof as to the amount in controversy, remand will be ordered based on the theory that the post-removal stipulation was only a "clarification" of an otherwise indeterminate complaint.

### PROCEDURAL AND STRATEGIC CONSIDERATIONS

Given the complex and somewhat unpredictable nature of maintaining federal jurisdiction when the amount in controversy is at issue, defense counsel would be well advised to avoid as many of these issues as possible. This can be

accomplished through a strategy designed to lay removal that will be a challenge.

#### A. Content of Notice

Prior to 1988, Section 1446 required that the "short and plain statement of the grounds which jurisdiction rests upon" be included in the pleadings. Since this provision to require an affirmative showing of diversity jurisdiction, the 1988 amendments to 1446(a) so as to require a statement of the grounds rather than the "facts" jurisdiction, thus eliminated the requirement of 1446(a) might require for removal. Congressional applicability of Rule 1446(a) to the Civil Procedure to require

However, despite the need to allege grounds, courts have become more lenient in their removal pleading when the amount in controversy is less than \$50,000.

In *Garza v. Bett*, the defendant merely stated that the controversy exceeds \$50,000. Although the federal court denied the plaintiff's motion for removal on the basis of information in the defendant's motion for removal, the procedure the

Yet, the court's denial of a diverse jurisdiction motion in a case involving protracted controversy. It would be for the plaintiff's removal petition if it is its assertion exceeds \$50,000.

Thus, the court's authority, under this case to state anything other than the original removal motion and others six warned that the this procedure is

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**CONSIDERATIONS**

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accomplished through a well-thought-out strategy designed to lay the groundwork for a removal that will be immune from later challenge.

**A. Content of Notice of Removal**

Prior to 1988, Section 1446(a) contained a requirement that the removal petition contain a "short and plain statement of the facts" on which jurisdiction rested if they did not appear in the pleadings. Some courts had construed this provision to require a defendant to make an affirmative showing of all requisite factors of diversity jurisdiction at the time of removal.<sup>75</sup> The 1988 amendments modified Section 1446(a) so as to require only a "short and plain statement of the grounds for removal," rather than the "facts" justifying removal. Congress thus eliminated the possibility that Section 1446(a) might require fact pleading in petitions for removal. Congress also made explicit the applicability of Rule 11 of the Federal Rules of Civil Procedure to notices of removal.<sup>76</sup>

However, despite the apparent elimination of the need to allege jurisdictional facts, some courts have become increasingly demanding in their removal pleading requirements, especially when the amount in controversy may be at issue.

In *Garza v. Bettcher Industries Inc.*<sup>77</sup> the defendant merely stated that "the amount in controversy exceeds \$50,000," without identifying any specific facts supporting that allegation. Although the federal district court ultimately denied the plaintiff's motion to remand on the basis of information contained in the defendant's motion for reconsideration, this was not the procedure the court would have preferred:

Yet, the court does not believe that every removal of a diversity of citizenship case need involve protracted inquisitions as to the amount in controversy. Instead, the preferable approach would be for the defendant to set forth in the removal petition itself, the underlying facts supporting its assertion that the amount in controversy exceeds \$50,000. . . .

Thus, the court finds that it was fully within its authority, under 28 U.S.C. § 1447(c), to remand this case to state court because of the lack of anything other than conclusory allegations in the original removal petition. Defendant's counsel, and others similarly situated, are hereby forewarned that the court will continue to adhere to this procedure in the future.<sup>78</sup>

Likewise, in *Gaus v. Miles Inc.*,<sup>79</sup> the defen-

dant simply alleged that the "matter in controversy . . . exceeds the sum of \$50,000." Relying on *Garza*, the Ninth Circuit held that this "magical incantation" neither overcame the strong presumption against removal jurisdiction nor satisfied the defendant's burden of setting forth in the removal petition itself the underlying facts supporting its assertion.

A similar result was reached by the 10th Circuit in *Laughlin v. K-Mart Corp.*,<sup>80</sup> in which the court held that both the requisite amount in controversy and the existence of diversity jurisdiction "must be affirmatively established on the face of either the petition or the removal notice."<sup>81</sup>

The preceding cases place far too great a burden on the defendant in satisfying the procedural aspects of removal. Under Section 1446(a), it is necessary only that the grounds for removal be stated in terms borrowed from the jurisdictional pleading requirement of Rule 8(a) of the Federal Rules of Civil Procedure.<sup>82</sup> It requires only that a pleading contain, among other things, "a short and plain statement of the grounds upon which the court's jurisdiction depends." An allegation that the case is between parties of diverse citizenship and "the amount in controversy exceeds \$50,000" should be sufficient to satisfy this requirement.<sup>83</sup> In their zeal, however, to avoid problems created by indeterminate complaints, some courts have improperly written into the law a requirement that the defendant set forth the "underlying facts" supporting jurisdiction. Those courts have failed to recognize the material distinction be-

75. See, e.g., Gaitor, 287 F.2d 252.

76. See generally 1A MOORE'S FEDERAL PRACTICE ¶ 0.168[3.-4].

77. 752 F.Supp. 753 (E.D. Mich. 1990).

78. *Id.* at 763-64 (emphasis in original).

79. 980 F.2d 964 (9th Cir. 1992).

80. 50 F.3d 871 (10th Cir. 1995).

81. See also *Herber v. Wal-Mart Stores*, 1995 WL 318770 (D. Wyo.) ("Practitioners in Wyoming should be made aware that under *Laughlin*, the jurisdictional allegation is determined as of the time of the notice of removal. An affidavit setting forth underlying facts will properly support a notice of removal."); *Schacht v. Ethicon Inc.*, 831 F.Supp. 348 (N.D. Ill. 1995) (court could not affirmatively find that federal subject matter jurisdiction has been established by "unconfirmed supposition" that case is worth more than \$50,000).

82. See H.R. REP. NO. 100-889, 100th Cong., 2d Sess. at 71, reprinted in 1988 U.S.C.A.N. 5982, 6032; 14A WRIGHT, MILLER & COOPER, § 3733 (Supp. 1989).

83. See, e.g., *Wilkinson v. United States*, 724 F.Supp. 1200 (W.D. N.C. 1989) (defendant's notice of removal, which plainly and concisely stated that basis for court's removal jurisdiction was Section 1441(a), held sufficient under that section).

tween a federal court assuring itself that it has subject matter jurisdiction and a federal court imposing new procedural requirements on the removing party.

It should be noted further that even if an "underlying facts" requirement were present in Section 1446(a), the defendant's failure to comply with that provision would be no more than a defect in the "procedure" of removal. Under Section 1447(c), a motion to remand on the basis of any "defect in removal procedure" must be filed within 30 days after filing the notice of removal or are deemed waived.<sup>84</sup> Such defects cannot be noticed sua sponte and must be brought to the court's attention via a timely motion to remand filed by the plaintiff.<sup>85</sup> Accordingly, it was improper for the courts in *Gaus* and *Laughlin* to notice this "defect" for the first time on appeal when it was not raised by the plaintiff within 30 days after filing of the notice of removal.

### B. Strategic Considerations

Although there may be no technical requirement that a removing party set forth the underlying facts supporting removal, as a practical matter, a defendant should do so if possible. When presented with a diversity case in which the initial pleading does not state a specified amount of damages, defense counsel has two choices.

First, the defendant can remove within the initial 30-day time period set forth in the first paragraph of Section 1446(b), based on its belief that the plaintiff is claiming more than \$50,000 in damages. As the above cases demonstrate, however, removal based solely on such an unsupported allegation may be subject to sua sponte challenge by the court. It also may leave the defendant open to a motion to remand based on a plaintiff's post-removal

"clarification" of the amount in controversy through stipulation or affidavit.

The other option is not to remove immediately but serve a set of general interrogatories, including one directed at specification of quantum. If the answer to that interrogatory confirms damages greater than \$50,000, then removal can take place within the supplemental removal period provided by the second paragraph of Section 1446(b). In the removal notice, the defendant can expressly reference and attach the interrogatory answers in support of its allegation that jurisdiction exists. By following this procedure, the defendant will likely avoid a sua sponte review of jurisdiction by the federal court and severely restrict the plaintiff's ability to "clarify" an indeterminate complaint through a post-removal affidavit or stipulation.

The supplemental removal option generally should be utilized unless there is a risk that the initial 30-day time period for removal may expire. In the jurisdictions that follow the bright line rule of *Chapman*, this should not be a major concern because the time period for removal will not commence unless there are affirmative allegations as to jurisdictional amount in the initial pleading. However, where application of the *Chapman* rule is questionable, defense counsel should consider including additional averments in the notice of removal in order to establish the basis for amount in controversy if the complaint is otherwise silent.

In this context, references to historical case law, the plaintiff's refusal to stipulate to damages less than \$50,000, offers of settlement, deposition testimony and affidavits should be sufficient. By following this procedure, the defendant will again avoid a possible sua sponte review of jurisdiction by the federal court and will lay the groundwork to meet its burden of proof if jurisdiction is later challenged through a motion to remand.

### CONCLUSION

As the cases suggest, the removal of cases to federal court and the maintenance of jurisdiction after removal can become an extremely complex issue when questions as to amount in controversy are involved. The case law in this area is evolving almost day by day, and defense counsel must remain alert as further developments occur to impact the right of removal to federal court.

84. See generally Quentin F. Urquhart Jr., *Waiver of Defects in Removal Jurisdiction: Another Path to Federal Court*, FOR THE DEFENSE 2 (Dec. 1992).

85. See, e.g., *Air-Shields Inc. v. Fullam*, 891 F.2d 63 (3d Cir. 1989) (district court exceeded "statutorily defined power" by sua sponte remanding case for procedural defects after 30-day time period of Section 1447(c) expired); *In re Shell Oil*, 932 F.2d 1523 (5th Cir. 1991) (once 30-day limit expires, district court has "no discretion" to remand for defect in removal procedure).

## Stigma and the

*Courts are slow to draw the line*

By TIMOTHY J. HARRISON

TODAY, more and more people are worried about risk about by an abandoned site or a farm waste tank, people with health problems, liability for cleanup, and environmental perception of the

An environmental problem is easy to quantify. Groundwater contamination, ground storage of the contaminants, and perception of the

Stigma, of course, is a matter of perception. It has been found that buildings that have defects or that are old. Here, too, people worry about future for the claim of damages. Claim chasers will not cause a problem remediation mission.

In short, when property owners value losses in a might be involved commonly label

NATURE

### A. What Is Stigma

Stigma can be defined as factors, including a person's fear of what