

AUTOMATIC FOR REMOVAL?: THE USE OF POST-PETITION EVIDENCE TO ESTABLISH THE AMOUNT IN CONTROVERSY FOR DIVERSITY JURISDICTION

I. INTRODUCTION

Paul had worked as a shipping associate for one of the branches of The Boxer Corporation (Boxer). Paul worked there for six years, and Boxer promoted him to the position of Branch Shipping Manager. Within one month after the promotion, Paul discovered that one of the shipping associates, Arthur, was falsifying the weight of many shipments and thus overcharging Boxer's clients. Paul reported the misconduct to the Director of Human Resources and continued his normal duties. In the months following Paul's action, his supervisors began to express displeasure with Paul's performance. Three months after Paul reported Arthur, Boxer terminated Paul's employment.

Paul filed a complaint in state A's state court, alleging that Boxer violated state A's whistleblowing statute and illegally terminated him in retaliation for reporting Arthur. He sought compensatory damages and reinstatement, alleging that damages were "in excess of \$10,000," in accordance with state A's rules of procedure. Paul is a citizen of state A. Boxer, however, filed a notice of removal to federal court under diversity jurisdiction because Boxer is incorporated in state B and has its principal place of business in state B. In response, Paul filed a motion for remand, arguing that the amount in controversy did not exceed the federal jurisdictional requirement of \$75,000. The court, at its discretion, determines which evidence may prove the amount in controversy because there is no clear rule on whether the court may look beyond the notice of removal for evidence to establish the requisite jurisdictional amount.

The previous hypothetical demonstrates the competing interests involved in a state case removed to federal court. The venue of a case can greatly affect the cost, convenience, and outcome of a case.¹ The plaintiff is master of the complaint² and has control over the forum for his action.³ In contrast,

1. For a discussion on the costs and inconvenience of litigation in the federal courts, see *infra* note 174.

2. *Webster v. Reproductive Health Serv.*, 492 U.S. 490, 492 (1989).

3. See *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 398-99 (1987) (stating that the plaintiff may choose the forum, as master of the complaint). For more discussion of the plaintiff as master of the

the defendant should have access to federal courts and a trial free from the bias of the plaintiff's home state.⁴ At the same time, there is a strong preference that state courts settle state claims because of issues of federalism and efficiency.⁵

To understand the different issues involved, one should first examine the process of removal. When a plaintiff brings suit in a state court, the case does not necessarily remain in state court. Title 28 of the United States Code creates the process of removal by which a defendant⁶ can move a state case to a federal court if the court has subject matter jurisdiction.⁷ Subject matter jurisdiction consists of either federal question jurisdiction⁸ or diversity jurisdiction.⁹

However, neither Title 28 nor the Federal Rules of Civil Procedure state the manner in which the parties must establish the amount in controversy requirement for diversity jurisdiction.¹⁰ All courts examine the plaintiff's pleadings for an allegation of an amount in excess of the minimum jurisdictional requirement,¹¹ but the plaintiff's complaint in state court is usually ambiguous and does not allege a specific amount.¹² Without an established method of determining this amount, the courts must apply their discretion.

complaint, see *infra* note 142 and accompanying text.

4. See S. REP. NO. 106-420, at 11 (2000) (stating that state juries are often unfairly biased against out-of-state defendants).

5. For a discussion on the issues of federalism and efficiency, see *infra* notes 143-44 and accompanying text.

6. Only defendants may file notice of removal, and all defendants must file jointly. 14B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3723, at 563 (3d ed. 1998). If the defendant asserts a counter-claim that would normally trigger federal jurisdiction, the plaintiff, though in a defending position, may not remove the case to federal court. Sidney Powell & Deborah Pearce-Reggio, *The Ins and Outs of Federal Court: A Practitioner's Guide to Removal and Remand*, 17 MISS. C. L. REV. 227, 230 (1997).

7. 28 U.S.C. § 1332 (1994).

8. "Federal question" jurisdiction derives from cases that "arise under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331 (Supp. II 1996). See 13B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3561 (2d ed. 1984).

9. 28 U.S.C. § 1332 (Supp. II 1996). For more details on the requirements of diversity jurisdiction, see *infra* notes 28-31 and accompanying text.

10. See *McNutt v. Gen. Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 185 (1936) (asserting that in relation to the amount in controversy, the Act of 1875 "did not prescribe any particular mode in which the question of jurisdiction was to be brought to the attention of the court, nor how, when raised, it should be determined"); Alice M. Noble-Allgire, *Removal of Diversity Actions When the Amount in Controversy Cannot Be Determined from the Face of Plaintiff's Complaint: The Need for Judicial and Statutory Reform to Preserve Defendant's Equal Access to Federal Courts*, 62 MO. L. REV. 681, 684 (1997).

11. See *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288 (1938) ("[T]he sum claimed by the plaintiff controls . . .").

12. See *infra* note 50 for examples of state procedural rules that mandate ambiguous pleadings.

The courts follow different approaches to prove the amount in controversy,¹³ and various circuits use completely divergent standards to establish the amount. Generally, the circuits follow two different approaches. Some circuits look at evidence after the defendant has filed the petition for removal.¹⁴ Other circuits do not look beyond the defendant's notice for facts establishing the amount in controversy.¹⁵ The circuits disagree on the defendant's ability to use evidence established after the petition for removal to prove the amount in controversy in diversity cases. None of the circuits' approaches fully address the opposing interests of both the plaintiff, choice of venue¹⁶—and the defendant, avoiding prejudice.¹⁷ At the same time, principles of federalism and judicial efficiency mandate that state claims remain in state court.¹⁸

An amendment to the removal statute would reconcile the competing interests of the plaintiff, the defendant, and the court system. An amendment would clarify how the courts should handle the typical situation in which the plaintiff's complaint does not reveal the amount in controversy in a diversity jurisdiction case. This Note proposes an amendment to the removal statute that explicitly permits an allegation in good faith to establish the amount in controversy.¹⁹

Part II of this Note discusses the background of removal in diversity cases and modern circuit court rulings. First, Part II examines the statutes that permit the removal of state cases to federal courts. It also discusses how several Federal Rules of Civil Procedure directly affect the execution of removal and create opposing interests in the removal of cases. Second, Part II examines the most important case law that has applied removal principles. Part III analyzes the different approaches that the circuits have taken and the opposing interests of the parties and the court system.²⁰ Part IV proposes an

13. This Note does not examine the effect of post-removal damage stipulations by the defendant. The circuits hold that post-removal stipulations that limit damages to an amount less than the amount in controversy do not destroy diversity jurisdiction in federal court. *See, e.g., Rogers v. Wal-Mart Stores*, 230 F.3d 868 (6th Cir. 2000).

14. For a discussion on the circuit courts that allow post-petition evidence, see *infra* notes 103-40 and accompanying text.

15. For a discussion on the circuit courts that strictly prohibit post-petition evidence, see *infra* notes 85-102 and accompanying text.

16. For a discussion on the plaintiff's control of venue as master of the complaint, see *infra* note 142 and accompanying text.

17. For a discussion on the defendant's right to a trial free from bias, see *infra* note 143 and accompanying text.

18. For a discussion on the reasons why state claims should remain in the state courts, see *infra* notes 143-44 and accompanying text.

19. For a discussion on the proposed amendment, see *infra* notes 205-23 and accompanying text.

20. For an analysis of the circuits' holdings and the opposing interests involved, see *infra* notes

amendment to the removal statute that effectuates a compromise of the different interests within the context of the common law principles applied by the circuits in diversity jurisdiction cases.

II. HISTORY

A. *The Legislative Foundation for Diversity Jurisdiction*

In 1948, Congress enacted §§ 1332 and 1441 of Title 28 of the United States Code and detailed the basis of federal jurisdiction.²¹ Section 1332 establishes the requirements necessary to gain federal diversity jurisdiction.²² If a plaintiff brings an action in state court, the defendant may still have access to the federal court system by the process of removal.²³ Section 1441(a) states that a defendant can remove an action from state court to federal court when the federal court has original jurisdiction.²⁴ Original jurisdiction²⁵ requires either federal question jurisdiction²⁶ or diversity jurisdiction.²⁷ Diversity jurisdiction, in turn, requires (1) complete diversity

141-204 and accompanying text.

21. See 28 U.S.C. § 1332 (1948) (“The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between . . . citizens of different States[.]”).

22. 28 U.S.C. § 1332 (Supp. II 1996). The Judiciary Act of 1789 first established the statutory basis of lower federal courts. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 142 (2d ed. 1985). The Judiciary Act of 1789 created districts and circuits, which were the seeds of the modern federal system. The Judiciary Act of 1789, Act of Sept. 24, 1789, 1 Stat. 73. The Judiciary Act provided that “original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of five hundred dollars.” *Id.* at 78.

23. 28 U.S.C. § 1441(a) provides that “any civil action brought in a State court of which the district courts of the United States have original jurisdiction, [sic] may be removed by the defendant or the defendants, to the district court . . . embracing the place where such action is pending.” 28 U.S.C. § 1441(a) (1991). See also U.S. Comp. Stat. 1901, § 2 at 509 (providing for the removal of “any suit of a civil nature, . . . of which the circuit courts of the United States are given original jurisdiction . . . and which may now be pending . . . in any State court, may be removed by the defendant or defendants therein to the circuit court of the United States for the proper district”). The statute further provides that when there is “a controversy which is wholly between citizens of different[s]tates . . . then either one or more of the defendants . . . may remove said suit into the circuit court of the United States for the proper district.” *Id.*

24. 28 U.S.C. § 1441(a) (1994).

25. “Original jurisdiction” is a court’s jurisdiction to hear a case first before any other court. BLACK’S LAW DICTIONARY 856 (Bryan A. Garner et al. eds., 7th ed. 1999). See 28 U.S.C. § 1441 (1994) (“[A]ny civil action brought in a State court of which the district courts of the United States have *original jurisdiction*, may be removed by the defendant or the defendants, to the district court of the United States . . .”) (emphasis added).

26. See 28 U.S.C. § 1331 (1994) (“The district courts have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”).

27. See 28 U.S.C. § 1332(a) (Supp. II 1996) (providing that the federal district courts possess original jurisdiction “where the matter in controversy . . . is between—citizens of different States”).

between the plaintiffs and defendants²⁸ and (2) an amount in controversy²⁹ in excess³⁰ of the statutory amount, currently \$75,000.³¹

When Congress first created diversity jurisdiction, \$500 fulfilled the amount in controversy requirement.³² Since then, Congress has codified diversity jurisdiction in Title 28 of the United States Code and repeatedly amended the minimum dollar amount required for the amount in controversy.³³ Congress increased the requisite amount to \$2,000 in 1887,³⁴ to \$3,000 in 1911,³⁵ to \$10,000 in 1958,³⁶ and to \$50,000 in 1988.³⁷ In 1996, Congress raised it to the current statutory amount of \$75,000.³⁸

28. See *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806) (establishing the rule that diversity exists when the parties on one side are from different states than the parties on the other side). The Supreme Court later specified that “diversity jurisdiction does not exist unless *each* defendant is a citizen of a different State from each plaintiff.” *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 373 (1978). Co-plaintiffs or co-defendants may be from the same state; opposing parties only need diversity from each other. ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 292 (3d ed. 1999). If the plaintiff is a citizen of a state and the defendant is a citizen of a foreign state, the courts deem them to possess complete diversity. 28 U.S.C. § 1332(a)(4) (Supp. II 1996).

29. The “amount in controversy” is the total of “damages claimed or relief demanded by the injured party in a lawsuit.” BLACK’S LAW DICTIONARY, *supra* note 25, at 84.

30. The case does not qualify for diversity jurisdiction if the amount in controversy is equal to or less than \$75,000. The amount in controversy must amount to at least \$75,000.01. See 28 U.S.C. § 1332(a) (Supp. II 1996) (providing that the federal courts possess jurisdiction when the “matter in controversy exceeds the sum or value of \$75,000”).

31. 28 U.S.C. § 1332(a) (Supp. II 1996).

32. The Judiciary Act of 1789, Act of Sept. 24, 1789, § 11, 1 Stat. 73, 78.

33. Congress first codified diversity jurisdiction in 1940. 28 U.S.C. § 41(1) (1940). In 1948, Congress amended Title 28 to create Title 28’s modern structure. Act of June 25, 1948, § 1, 62 Stat. 869.

34. Act of March 3, 1887, 24 Stat. 552.

35. Act of March 3, 1911, 36 Stat. 1091.

36. Act of July 25, 1958, Pub. L. No. 85-554, 72 Stat. 415 (amending 28 U.S.C. § 1332(a)). The Committee on the Judiciary believed that the increase would raise the amount in controversy requirement to a level that would reduce the federal court workload. S. REP. NO. 85-1830, at 3 (1958). The amount would also allow “all substantial controversies” to have access federal court without granting time to “petty controversies.” *Id.* at 21.

37. The Judicial Improvements and Access to Justice Act, Act of November 19, 1988, § 201, Pub. L. No. 100-702, 102 Stat. 4646 (1988) (amending 28 U.S.C. § 1332(a)). Congress raised the amount in controversy to reduce the number of diversity of citizenship cases in the federal courts and to factor inflation in the amount. H.R. REP. NO. 100-889, at 44 (1988).

38. Federal Courts Improvement Act of 1996, § 205, Pub. L. No. 104-317, 110 Stat. 3847 (1996) (amending 28 U.S.C. § 1332(a)). There is not substantial legislative history for the latest increase. Taking into account the legislative history of the prior increase, one might surmise that Congress wanted to reduce the number of diversity cases in federal court and to factor inflation into the amount. 14B CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3701, at 3-4 (3d ed. 1998).

Under § 1446, removal must follow a specific process.³⁹ To remove a case from a state court to a federal court,⁴⁰ the defendant must file a notice of removal pursuant to Rule 11 of the Federal Rules of Civil Procedure.⁴¹ The notice must contain a “short and plain statement of the grounds for removal.”⁴² The defendant must file the notice within thirty days⁴³ of the defendant’s receipt of a copy of the pleading of the action, or within thirty days of the service of summons if the pleading has been filed in court and need not be served, whichever is shorter.⁴⁴ If the action is not initially removable,⁴⁵ the defendant may remove within thirty days after the plaintiff amends the complaint, but never more than one year after the action commences.⁴⁶ However, the case does not necessarily remain in federal court.⁴⁷ Subsection (4) of § 1446(c) states, “If it clearly appears on the face of

39. 28 U.S.C. § 1446 (1994 & Supp. II 1996).

40. The case moves to the federal court that “embraces” the original state court. 28 U.S.C. § 1441(a) (1994).

41. 28 U.S.C. § 1446(a) (1994). Prior to 1948, the removal process followed a different procedure. Previously, the defendant filed the notice of removal in state court. Rule 11 details the requirements of representations to the court. FED. R. CIV. P. 11.

42. FED. R. CIV. P. 11(b). Notice may consist of “a pleading, written motion, or other paper.” *Id.*

43. Not all courts agree on when to begin counting the thirty-day period for removal. Some courts begin counting only after the defendant receives formal service. *See, e.g.,* Love v. State Farm Mut. Auto Ins. Co. 542 F. Supp. 65 (N.D. Ga. 1982). Other courts begin counting after the defendant “otherwise” receives service. *See, e.g.,* Reece v. Wal-Mart Stores, Inc., 98 F.3d 839 (5th Cir. 1996).

44. 28 U.S.C. § 1446(b) (1994). The courts strictly and narrowly apply the thirty-day deadline. *See* Robert F. Koets, Annotation, *What Constitutes “Initial Pleading” for Purposes of Computing Time for Removal of Civil Action from State to Federal Court under 28 U.S.C.S. § 1446(b)*, 130 A.L.R. FED. 581 §2[a], at 590 (1996); 32B AM. JUR. 2D *Federal Practice & Procedure* § 2492 (1995) (stating that the defendant must strictly comply with the time requirement). If a removal petition claims that the defendant received the pleading “on or about” thirty days prior to filing, the district court must remand the case because the petition “does not [demonstrate] . . . the requisite certainty” that the filing occurred within the thirty-day deadline. *Id.* Moreover, the courts do not have any authority to extend the thirty-day deadline put upon defendants by § 1446. 16 A.L.R. FED. 287 § 2[a], at 292 (1996). *See, e.g.,* Dutton v. Moody, 104 F. Supp. 838, 840 (D.C.N.Y. 1952); Youngson v. Lusk, 96 F. Supp. 285 (D. Neb. 1951).

45. The defendant often does not know whether or not the action is removable because of the ambiguous pleading. Different courts handle the strict statutory limit of thirty days differently. On one hand, some courts begin counting the thirty days after the plaintiff files the complaint because the defendant should have ascertained removability from the complaint. *See, e.g.,* Richman v. Zimmer, Inc., 644 F. Supp. 540 (S.D. Fla. 1986). On the other hand, some courts begin counting the thirty days after the defendant has enough evidence to determine removability. *See, e.g.,* Marcel v. Pool Co., 5 F.3d 81, 84 (5th Cir. 1993); Marler v. Amoco Oil Co., Inc., 793 F. Supp. 656, 659 (E.D.N.C. 1992); Cent. Iowa Agri-Sys. v. Old Heritage Adver. and Publishers, 727 F. Supp. 1304, 1305 (S.D. Iowa 1989).

46. 28 U.S.C. § 1446(b) (1994).

47. 28 U.S.C. § 1446(c) (Supp. II 1996).

the notice . . . that removal should not be permitted, the court shall make an order for summary remand.’⁴⁸

A plaintiff’s complaint often does not allege damages sufficient to satisfy the amount in controversy requirement.⁴⁹ Many states prohibit alleging damages in a specific amount and require an allegation of damages, for example, of an amount “in excess of \$10,000” for the purposes of determining the proper state court.⁵⁰ In addition, plaintiffs often prefer state court to federal court,⁵¹ and most plaintiffs do not allege damages large

48. 28 U.S.C. § 1446(c)(4) (1994).

49. This evidentiary situation manifests itself in two fundamental cases: (1) the “indeterminate” complaint, the case in which the plaintiff does not allege a specific amount, and (2) the “lowball” complaint, the case in which the plaintiff alleges an amount of damages less than the amount in controversy simply to avoid removal. See Noble-Allgire, *supra* note 10, at 686.

50. Plaintiffs previously alleged an exact amount of damages in the complaint. The amount of damages sought determined which division of state court had jurisdiction, such as state district court or state superior court. Most states had the same jurisdictional amount of \$10,000 as the federal court, and thus, defendants could easily establish the amount in controversy from the complaint. While Congress increased the amount in controversy requirement, most state legislatures have not increased the jurisdictional amount for state courts. Jack E. Karns, *Removal to Federal Court and the Jurisdictional Amount in Controversy Pursuant to State Statutory Limitations on Pleading Damage Claims*, 29 CREIGHTON L. REV. 1091, 1092 (1996). In fact, a plaintiff risks dismissal in state court for pleading a specific amount in excess of the state requirement. *Id.* at 1092-93. Some states require allegations of a different amount but follow a similar pattern. As a result, defendants suffer from the setback that plaintiffs only state damages that are sufficient to meet state circuit court jurisdiction. Steven L. Brannock & Carol Jean LoCicero, *Forum Selection—The Art of Removal and Remand*, 63 FLA. B. J. 45, 46 (1989). Florida courts, for example, require that the complaint allege damages “in excess of \$15,000” to satisfy their circuit court jurisdictional amount. Charles A. Carlson, *Removal to Federal Court on the Basis of Diversity Jurisdiction: The “Amount in Controversy” Controversy*, 69 FLA. B. J. 77 (1995). See, e.g., *Gaitor v. Peninsular & Occidental S.S. Co.*, 287 F.2d 252, 254-55 (5th Cir. 1961) (ruling that remand is proper when the plaintiff’s ambiguous complaint did not establish the amount in controversy requirement). In contrast, some states’ rules of civil procedure do not allow a plaintiff to allege any amount in the complaint whatsoever. See, e.g., COLO. R. CIV. P. 8(a) (providing that in Colorado “[n]o dollar amount shall be stated in the prayer or demand for relief”). In Colorado, some courts allow the defendant to collect evidence on damages, such as the evidence used in summary judgment motions. Michael J. Hofmann, *A Practitioner’s Guide to Removal*, 29 COLO. LAW., 49, 52 (2000). See also IOWA R. CIV. P. 70(a) (“[A] pleading shall not state the specific amount of money damages sought but shall state whether the amount of damages meets applicable jurisdictional requirements for amount in controversy. The specific amount and elements of monetary damages sought may be obtained through discovery.”). Moreover, the Iowa Code provides that “[i]n an action for personal injury or wrongful death, the amount of money damages demanded shall not be stated in the petition, original notice, or any counterclaim or cross-petition.” IOWA CODE § 619.18 (1998).

51. Plaintiffs often try to defeat federal jurisdiction, either by alleging an amount of damages less than the jurisdictional minimum or by joining a defendant who is a citizen of the state in which the plaintiff brought action. EDWARD A. PURCELL, JR., *LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870-1958*, 107 (1992). Joinder of a resident defendant defeats removal because “[a]ny other such action . . . shall be removable only if none of the parties . . . served as defendants is a citizen of the State in which such action is brought.” 28 U.S.C. § 1441(b) (1994). See also 28 U.S.C. § 1447(e) (1994) (providing that if the court permits joinder of a defendant that defeats subject matter jurisdiction, the court should “remand the action to the State

enough to meet the federal jurisdictional requirement of \$75,000.⁵²

The legislative history of the statutes does not give much guidance to practitioners.⁵³ Although, Congress has not completely ignored the statute that confers diversity jurisdiction; it has not made many amendments to provide clarification since that time.⁵⁴

In 1996, Congress clarified part of the removal process when it enacted Senate Bill 533.⁵⁵ The bill amended § 1447 to allow remand for lack of subject matter jurisdiction at any time during trial and before final judgment.⁵⁶ This change allows a federal court to remand a case back to the state court if at any time the amount in controversy does not meet the requisite amount.⁵⁷ When a court remands a case, the defendant must bear the costs that result from a wrongful removal.⁵⁸

court”).

52. See generally Noble-Allgire, *supra* note 10, at 686-92. See, e.g., Sierminski v. Transouth Fin. Corp., 216 F.3d 945, 947 (2000) (stating that the plaintiff alleged damages in her complaint “in excess of \$15,000”). The alleged amount met the jurisdictional minimum for the state court. *Id.*

53. Although there is not definitive evidence of its intent, Congress created the amount in controversy to correspond with the amount that state courts required for jurisdiction. The ambiguity of the removal statute was, thus, irrelevant when Congress established the amount in controversy requirement. Since then, Congress increased the amount in controversy requirement, but the states have left the amount required for state court jurisdiction unchanged. The Senate conceded the misstep in the context of class actions. S. REP. NO. 106-420, at 11 (2000).

54. The Senate acknowledged the problem of an increased workload in the federal courts. Congress increased the amount in controversy requirement in order to improve the situation and reduce the number of cases brought into the district courts. S. REP. NO. 85-1830, at 3 (1958). At the same time, the Senate wanted to preserve the venue of federal courts to all “substantial controversies” where the other requirements of jurisdiction were fulfilled. *Id.* at 34. For more discussion on Congress’s intent to reduce the workload of the federal courts, see *infra* notes 143-44.

55. Act of Oct. 1, 1996, Pub. L. No. 104-219, 110 Stat. 3022 § 1 (1996).

56. *Id.* Prior to the amendment, § 1447(c) read: “A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under § 1446(a).” 28 U.S.C. § 1447(c) (1948).

The amended § 1447(c) provides: “A motion to remand the case on the basis of *any defect other than lack of subject matter jurisdiction* must be made within 30 days after the filing of the notice of removal under § 1446(a).” 28 U.S.C. § 1447(c) (Supp. II 1996) (emphasis added). See Bailey v. Wal-Mart Stores, Inc., 981 F. Supp. 1415, 1416 (N.D. Ala. 1997) (asserting that the 1988 amendments to § 1447 (c) and (e) “clearly overruled” the Supreme Court’s holding in *St. Paul Mercury Indem. Co.* and advocated the “primacy of state courts”). The court reasoned that the specific changes to the statute’s language demonstrate that a court should remand a case whenever the parties can show a lack of subject matter jurisdiction. *Id.* at 1417.

57. Congress once again left little legislative history to guide practitioners in the amendment’s application. Act of Oct. 1, 1996, Pub. L. No. 104-219, 110 Stat. 3022 (1996).

58. See 28 U.S.C. § 1447(c) (Supp. II 1996) (“An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal.”).

B. The Effect of the Federal Rules of Civil Procedure

First enacted in 1937,⁵⁹ the Federal Rules of Civil Procedure further guide the process of removal.⁶⁰ Rule 11 governs pleadings and motions to the court.⁶¹ To remove a case, a defendant must make an “inquiry reasonable under the circumstances” for justification.⁶² The defendant bears the burden of demonstrating proper jurisdiction.⁶³ Without such proof, a court must follow Federal Rule of Civil Procedure 12(b)(1) and remand a case back to the state court for lack of proper jurisdiction.⁶⁴

Federal Rule of Civil Procedure 54(c), as well as its state court counterparts,⁶⁵ allows a court to grant an award to a plaintiff whether or not the plaintiff has requested such relief in the pleadings.⁶⁶ Because of this rule, a plaintiff rarely specifies the amount sought in the pleadings for strategic reasons.⁶⁷ The defendant must establish the amount in controversy on his own accord,⁶⁸ and the plaintiff gets the benefit of a low amount in controversy without giving up the possibility of a high award.⁶⁹

The discovery provisions of the Federal Rules of Civil Procedure create

59. Act of June 19, 1934, 48 Stat. 1064 (1937).

60. See 28 U.S.C. § 1446(a) (1994) (“A defendant . . . shall file . . . a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure . . .”).

61. FED. R. CIV. P. 11. The title of Rule 11(b) is “Representations to Court.” The Rule provides that “whether by signing, filing, submitting, or later advocating,” these “representations” explicitly include “pleading, written motion, or other paper.” FED. R. CIV. P. 11(b).

62. *Id.* Rule 11(b) requires that an attorney “to the best of the person’s knowledge, information, and belief,” make all representations to the court after “an inquiry reasonable under the circumstances.” *Id.*

63. See *Gibbs v. Buck*, 307 U.S. 66, 72 (1939) (“The burden of showing by the admitted facts that the federal court has jurisdiction rests upon the complainants.”). *But see* 14 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3730, at 195 (2d ed. 1984) (stating that the defendant’s notice for removal “need only state the grounds for removal, and not the facts supporting removal” to follow Federal Rule of Civil Procedure 11).

64. FED. R. CIV. P. 12(b)(1). Rule 12(b)(1) states that “lack of jurisdiction over the subject matter” is a sufficient reason to dismiss a removed case from federal court. *Id.* Subject matter jurisdiction for federal court requires either federal question jurisdiction or diversity jurisdiction. 28 U.S.C. §§ 1331, 1332 (1994). For a discussion on the requirements of diversity jurisdiction, see *supra* notes 28-31 and accompanying text.

65. See, e.g., MISS. R. CIV. P. 54(c).

66. FED. R. CIV. P. 54(c). The Rule provides that except in the case of a default judgment, “every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party’s pleadings.” *Id.*

67. A plaintiff probably will not allege a specific amount of damages and thus render removal more difficult. See, e.g., *Gafford v. Gen. Elec. Co.*, 997 F.2d 150, 157-58 (6th Cir. 1993).

68. See 16 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE, § 107.14[2][g][vi] (3d ed. 1997) (stating that the defendant bears a “heavy burden” of demonstrating that the plaintiff’s allegation of an amount less than the jurisdictional minimum is clearly erroneous).

69. The Senate stated the principle clearly: “In tort cases the amount claimed oftentimes bears little relation to the actual recovery.” S. REP. NO. 85-1830, at 5 (1958).

further hardship for defendants seeking removal because the defendant does not necessarily receive discovery evidence before the removal deadline.⁷⁰ Federal Rule of Civil Procedure 33(b)(3) grants a party thirty days to respond to an interrogatory⁷¹ unless the court directs a different length of time.⁷² Similarly, in the case of a request of admission, Federal Rule of Civil Procedure 36(a) also gives a party thirty days to respond.⁷³ These thirty-day limits match the thirty-day limit for removal.⁷⁴ Therefore, defendants often do not receive information before they must file for removal.

C. Courts' Handling of the Amount in Controversy

1. The Supreme Court's Foundation

Some early Supreme Court opinions provided initial guidance on the issue of the establishment of the amount in controversy. In *McNutt v. General Motors Acceptance Corp. of Indiana*,⁷⁵ the Supreme Court stated that Congress intended to leave the question of whether an allegation was sufficient to establish the amount in controversy "to the discretion of the trial judge."⁷⁶ The Supreme Court, while reversing the district court, affirmed the trial court's ruling that the burden is on the complainant to establish the facts

70. See 28 U.S.C. § 1446(b) (1994) ("The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant . . .").

71. A defendant who serves a plaintiff with an interrogatory may not even receive the answer to the interrogatory within thirty days. There is a general consensus that "interrogatories spawn a greater percentage of objections and motions than any other discovery device." FED. R. CIV. P. 33 advisory committee's note. Objections result in additional response time. *Id.* See William H. Speck, *The Use of Discovery in United States District Courts*, 60 YALE L.J. 1132, 1144 (1951) (stating that parties virtually expect to receive responses to interrogatories late). Even though the 1970 amendments added sanctions for unjustified objections, the delays did not decrease. FED. R. CIV. P. 33 advisory committee's note.

72. The Rule provides that if the defendant gives the plaintiff an interrogatory in the hope of establishing the requisite amount in controversy, the plaintiff "shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories." FED. R. CIV. P. 33(b)(3). The court may direct, or the parties may agree on, a longer or shorter length of time for response. *Id.* The court does not often interfere in such a manner, and it is unlikely that the plaintiff will voluntarily give up such information before the thirty days have elapsed. See Speck, *supra* note 71, at 1144.

73. Requests of admission are not helpful for defendants to establish that the amount in controversy surpasses the jurisdictional minimum because of restrictions in the discovery process. Rule 36(a) provides that "requests for admission may not be served before the time specified in Rule 26(d)." FED. R. CIV. P. 36(a). Rule 26(d) cross-references Rule 26(f). FED. R. CIV. P. 26(d). The cross-reference states that neither party may use a request for admission before the discovery conference. FED. R. CIV. P. 26(f).

74. See 28 U.S.C. § 1446 (1994) ("The notice of removal . . . shall be filed within thirty days . . .").

75. 298 U.S. 178 (1936).

76. *Id.* at 185 (quoting *Wetmore v. Rymer*, 169 U.S. 115, 121 (1898)).

that confer jurisdiction.⁷⁷ Without such facts, a court must dismiss for lack of jurisdiction.⁷⁸

In *St. Paul Mercury Indemnity Co. v. Red Cab Co.*,⁷⁹ the Supreme Court stated that when a plaintiff brings a case in state court and the case is removed, “if, upon the face of the complaint, it is obvious that the suit cannot involve the necessary amount, removal will be futile and remand will follow.”⁸⁰ The Court reasoned that without the benefit of discovery the plaintiff’s complaint controls the venue.⁸¹ The Court further stated that events which occur subsequent to removal to reduce the amount in controversy, such as an amendment to the pleading that reduces the alleged damages, whether in the control of the plaintiff or not, do not destroy federal jurisdiction.⁸²

2. *The Circuits’ Standards*

The Supreme Court left lower courts room for clarification, resulting in sharply contrasting approaches between the circuits. More specifically, during the past ten years, several circuits examined the use of post-petition evidence and developed inconsistent approaches.⁸³ Those circuits allowed varied methods to prove the amount in controversy for removal.⁸⁴

Some circuits give little weight to the defendants’ interests and apply the removal statute strictly.⁸⁵ In *Gaus v. Miles, Inc.*,⁸⁶ the defendant tried to remove the action when the plaintiff’s complaint was ambiguous concerning the amount in controversy.⁸⁷ Nevada Rule of Civil Procedure 8(a) prohibited a specific numeric request for damages exceeding \$10,000;⁸⁸ therefore, the

77. *Id.* at 187.

78. *Id.*

79. 303 U.S. 283 (1938).

80. *Id.* at 292.

81. *Id.* at 291.

82. *Id.* at 293. In the different situation when the plaintiff brings the claim in federal court, in terms of sum, the complaint controls if made in good faith. *Id.* at 288. The Supreme Court further detailed that dismissal is justified if it appears “to a legal certainty” that the claim is for less than the jurisdictional amount. *Id.* at 289.

83. For an examination of the circuits’ approaches, see *infra* notes 84-140 and accompanying text.

84. For a discussion of the Ninth and Tenth Circuits’ strict approaches, see *infra* notes 86-92 and accompanying text, and see *infra* notes 93-102 and accompanying text.

85. See *Shamrock Oil Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941) (stating that a court should strictly construe the removal statutes in favor of remand).

86. 980 F.2d 564 (9th Cir. 1992).

87. *Id.* at 565. In the complaint, *Gaus* stated that the damages were “in excess of \$10,000” but did not state the specific amount sought. *Id.*

88. NEV. R. CIV. P. 8(a). Rule 8 of the Nevada Rules of Civil Procedure provides that “[a]

plaintiff simply alleged damages in excess of \$10,000 without alleging a specific number.⁸⁹ The Ninth Circuit stated that there is a “strong presumption” against removal.⁹⁰ The court also stated that the defendant bears the burden of proving facts that establish the amount in controversy when the amount of damages sought is unclear.⁹¹ The court held that the case did not meet the amount in controversy requirement, and the court denied removal because the defendant did not satisfy his burden of proving the necessary facts “in the removal petition itself.”⁹²

Similarly, in *Laughlin v. Kmart Corp.*,⁹³ the Tenth Circuit held that the defendant must “affirmatively establish” the amount in controversy on the face of the petition for removal or the removal notice.⁹⁴ In the defendant’s jurisdiction brief,⁹⁵ the defendant alleged an amount in controversy above the minimum jurisdictional requirement.⁹⁶ However, the court of appeals remanded the case back to the district court with instructions to remand the case to state court⁹⁷ because neither the plaintiff’s petition nor the defendant’s notice of removal included any allegation of an amount in controversy to fulfill the jurisdictional minimum.⁹⁸ The court stated that the defendant must include the proper facts in the notice of removal.⁹⁹ The court reached this conclusion by asserting the presumption against removal.¹⁰⁰ The

pleading which sets forth a claim . . . shall contain (1) a short and plain statement of the claim . . . and (2) a demand for judgment Where a claimant seeks damages of more than \$10,000, the demand shall be for damages ‘in excess of \$10,000’ without further specification of amount.” *Id.*

89. 980 F.2d at 565.

90. *Id.* at 566.

91. *Id.* at 566-67.

92. *Id.* at 567. The defendant alleged only that the amount in “controversy . . . exceed[ed] the sum of \$50,000.” *Id.*

93. 50 F.3d 871 (10th Cir. 1995).

94. *Id.* at 873. The Tenth Circuit cited the U.S. Supreme Court in *Ins. Corp. v. Compagnie des Bauxites*, stating that “[t]he rule . . . is inflexible and without exception, which requires [a] court, of its own motion, to deny its jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record.” 456 U.S. 694, 702 (1982) (quoting *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884)) (emphasis added). Notably, the Supreme Court applied this rule in a case where the plaintiff originally brought the action in federal court. *Id.*

95. 50 F.3d at 873. The defendant’s jurisdictional brief alleged that the amount in controversy was “well above” the minimum requirement, which was \$50,000 at the time. *Id.*

96. *Id.*

97. *Id.* at 874.

98. *Id.* at 872. The plaintiff’s complaint alleged damages “in excess of \$10,000.” *Id.* The defendant’s notice of removal did not allege any amount to satisfy the amount in controversy. *Id.* The defendant simply attached the plaintiff’s complaint to its notice of removal. *Id.*

99. *Id.* at 873.

100. *Id.* See *Mulcahey v. Columbia Organic Chems. Co., Inc.*, 29 F.3d 148, 151 (4th Cir. 1994) (stating that the court must strictly construe removal jurisdiction and remand a case when the existence of federal jurisdiction is in doubt). In *Ins. Corp. v. Compagnie des Bauxites*, the Supreme Court stated

court stated that because parties may not concede jurisdiction,¹⁰¹ the defendant has to demonstrate facts on the face of the petition.¹⁰²

In contrast to the Ninth and Tenth Circuits, other circuits allow the defendant to establish the amount in controversy after removal. In *Allen v. R & H Oil & Gas Co.*,¹⁰³ the Fifth Circuit held that diversity jurisdiction exists when the defendant alleges an amount in controversy above the minimum jurisdictional amount.¹⁰⁴ The court reasoned that the burden rests on the defendant because of the general policy that plaintiffs should control jurisdiction.¹⁰⁵ The court stated that the “defendant must prove by a preponderance of the evidence” the minimum jurisdictional requirement.¹⁰⁶ The court further stated that a defendant may use post-petition evidence to establish the jurisdictional requirement for removal.¹⁰⁷ The Fifth Circuit, therefore, established two situations in which a defendant may remove a case to federal court in a diversity case: when the plaintiff alleges the amount in controversy in the complaint, or when the defendant proves the existence of the amount in controversy by a preponderance of the evidence.¹⁰⁸

The *Allen* court used a “facially apparent” standard.¹⁰⁹ This standard requires that the court look at the face of the complaint and decide whether or not the amount in controversy “was likely to exceed” the jurisdictional amount.¹¹⁰ For removal, the court prefers that the defendant establish the amount in controversy with facts in the removal petition,¹¹¹ but the court also permits the defendant to establish those facts in an affidavit.¹¹²

The Seventh Circuit applies a similar standard. In *Shaw v. Dow Brands*,

that the failure to challenge jurisdiction does not necessarily establish jurisdiction, because subject matter jurisdiction cannot be conferred or waived. 456 U.S. 694, 702 (1982).

101. 50 F.3d at 874.

102. *Id.* at 873.

103. 63 F.3d 1326 (5th Cir. 1995).

104. *Id.* at 1337. One should note that there were 512 plaintiffs in the case. *Id.* at 1329. The amount in controversy, which was then \$50,000, would have been easy to reach because the number of plaintiffs was so high and the case consisted of a joint, state-law tort action. *Id.*

105. *Id.* at 1335. The court claimed that “[o]f course . . . [the plaintiff] generally can bar a defendant from removal” by pleading damages of an amount below the jurisdictional minimum. *Id.* On one hand, when the plaintiff alleges an amount in controversy greater than minimum jurisdictional amount, that amount controls if alleged in good faith. *Id.* at 1335. On the other hand, if a plaintiff alleges less than the minimum jurisdictional amount in the pleadings, he can usually bar a defendant’s removal. *Id.*

106. 63 F.3d at 1335 (citing *De Aguilar v. Boeing Co.*, 11 F.3d 55, 58 (5th Cir. 1993)).

107. 63 F.3d at 1335 (citing *Asociacion Nacional de Pescadores a Pequena Escala O Artesanales de Colombia v. Dow Quimica de Colombia S.A. (ANPAC)*, 988 F.2d 559, 565 (5th Cir. 1993)).

108. 63 F.3d at 1336.

109. *Id.* at 1336.

110. *Id.*

111. *Id.* at 1335.

112. *Id.* (citing *ANPAC*, 988 F.2d at 565).

Inc.,¹¹³ the Seventh Circuit allowed the defendant's good faith allegation of the requisite amount in the removal petition to establish the amount in controversy.¹¹⁴ The plaintiff originally stated that the amount in controversy exceeded the minimum jurisdictional requirement,¹¹⁵ but later maintained that the amount in controversy did not reach the minimum requirement.¹¹⁶ The court denied remand because it wanted to prohibit the plaintiff from manipulating the court system to keep the case in state court.¹¹⁷

The Seventh Circuit further defined its approach in *Harmon v. OKI Systems*,¹¹⁸ when it permitted the defendant to establish the amount in controversy through the use of answers to interrogatories after removal.¹¹⁹ The *Harmon* court granted one of the defendants' notice of removal on the basis of diversity jurisdiction although the defendant did allege neither the amount in controversy nor the fact that the parties had complete diversity of citizenship.¹²⁰ The parties conducted almost two years of discovery, and then the plaintiffs sought remand.¹²¹ The district court examined the plaintiffs' answers to interrogatories to establish the amount in controversy requirement.¹²² The Seventh Circuit affirmed, stating that a court should consider reliable evidence even if it was not in the record at the time of removal.¹²³

Similarly, in *Sierminski v. Transouth Financial Corp.*,¹²⁴ the Eleventh Circuit held that a court may consider post-petition evidence to establish the amount in controversy.¹²⁵ In the complaint, the plaintiff sought damages for an unlawful termination of employment.¹²⁶ She alleged damages "in excess

113. 994 F.2d 364 (7th Cir. 1993).

114. *Id.* at 366.

115. *Id.* The Illinois statute on pleadings provides that "no ad damnum may be pleaded except to the minimum extent necessary to comply with the circuit rules of assignment where the claim is filed." 735 ILL. COMP. STAT. 5/2-604 (1993). In this case the amount that met the circuit rules was \$15,000. 994 F.2d at 366.

116. *Id.*

117. *Id.* at 367-68.

118. 115 F.3d 477 (7th Cir. 1997).

119. *Id.* at 478. The plaintiffs sued the manufacturer and the servicing company of a forklift for injuries suffered during use and for loss of consortium. *Id.* at 477-78.

120. *Id.* at 478.

121. *Id.* The plaintiffs did not seek remand until the defendants scheduled arguments for their motion for summary judgment. *Id.* Moreover, the district court took the case off of the trial calendar when it scheduled the arguments for the defendants' motions for summary judgment. *Id.*

122. *Id.*

123. *Id.* at 479-80. The Seventh Circuit elaborated on its position, stating that "[t]he test should simply be whether the evidence sheds light on the situation which existed when the case was removed." *Id.* at 480.

124. 216 F.3d 945 (11th Cir. 2000).

125. *Id.* at 946.

126. *Id.* at 947. The defendant company conducted automobile loans and mortgages. *Id.* at 949.

of \$15,000” to meet the jurisdictional requirement for the state court.¹²⁷ After filing a notice of removal, the defendant provided the court with evidence specifying the plaintiff’s salary and benefits.¹²⁸ The court affirmed removal and denied remand because both the defendant’s evidence and the plaintiff’s motion for remand provided the court with facts demonstrating that the damages exceeded the amount in controversy requirement.¹²⁹

The Eleventh Circuit affirmed the district court’s decision to allow the post-petition evidence to establish the amount in controversy requirement.¹³⁰ Although the court examined previous holdings of other circuits, including *Gaus*,¹³¹ *Laughlin*,¹³² *Allen*,¹³³ and *Harmon*,¹³⁴ the Eleventh Circuit dismissed *Laughlin* as the only case that so harshly restricted the use of post-petition evidence.¹³⁵ The Eleventh Circuit further reasoned that in *Gaus*,¹³⁶ the Ninth Circuit based its decision on the premise that the defendant “offered no facts whatsoever.”¹³⁷ The court instead relied on *Allen*¹³⁸ and *Harmon*¹³⁹ as justification for its decision.¹⁴⁰

III. ANALYSIS

The question at the core of the debate becomes whether or not a defendant may use evidence established after defendant’s petition for removal to prove the amount in controversy in diversity cases.¹⁴¹ There are

The plaintiff learned that her immediate supervisor had an expired notary and used an invalid seal or failed to notarize specific documents completely. *Id.* The plaintiff objected to her employer’s illegal notary practices and informed various company officers. *Id.* at 949-50. The plaintiff’s supervisor received a demotion and the plaintiff then had the duty of repairing the backlog caused by her former supervisor. *Id.* at 950. The plaintiff had trouble resolving those problems and received several reprimands and heavy criticism. *Id.* The defendant terminated her employment. *Id.* She alleged that the defendant fired her in retaliation and thus violated Florida’s Whistle Blower’s Act, FLA. STAT. ch. 448.102 (1997). 216 F.3d at 950.

127. 216 F.3d at 947.

128. *Id.*

129. *Id.*

130. *Id.* at 949.

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

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

133. *Allen v. R & H Oil & Gas Co.*, 63 F.3d 1326 (5th Cir. 1995).

134. *Harmon v. OKI Sys.*, 115 F.3d 477 (7th Cir. 1997).

135. *Sierminski*, 216 F.3d at 948.

136. *Gaus*, 980 F.2d at 564.

137. 216 F.3d at 948 (citing *Singer v. State Farm Mutual Auto Ins. Co.*, 116 F.3d 373, 376 (1997)).

138. *Allen*, 63 F.3d at 1326.

139. *Harmon*, 115 F.3d at 477.

140. 216 F.3d at 949 (citing *Harmon*, 115 F.3d at 477; *Allen*, 63 F.3d at 1326).

141. See 14B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3702, at 59-60 (3d ed. 1998) (“[A] debate exists as to how much further the district court should

three competing interests: (1) the plaintiff should be the master of the complaint;¹⁴² (2) a defendant should have access to federal courts equal to that of a plaintiff;¹⁴³ and (3) the courts prefer that state law claims go through the state court system.¹⁴⁴

The parties' competing interests become critical because of the thirty-day limit on removal. Much of the controversy surrounding potentially removable cases derives from the fact that the defendant cannot benefit from discovery before the removal deadline.¹⁴⁵ The defendant must wrestle with issues of time when seeking evidence to affirmatively prove an amount in controversy.¹⁴⁶ As a result of the thirty-day limit, the defendant probably will

investigate . . ."). Wright gives examples of potential actions the district court could use to determine whether or not the action meets the requisite amount in controversy: "requiring additional pretrial documents, conducting hearings, or exercising its discretion to request the submission of more information." *Id.*

142. 14B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3702, at 46 (3d ed. 1998). See *Allen*, 63 F.3d at 1335 ("[I]n the typical diversity case, the plaintiff remains the master of his complaint."). The Supreme Court in *St. Paul Mercury Indemnity Co. v. Red Cab Co.* even stated that a plaintiff may avoid removal by "suing for less than the jurisdictional amount, and though he would be justly entitled to more, the defendant cannot remove." *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 294 (1938). See also LARRY W. YACKLE, RECLAIMING THE FEDERAL COURTS 104 (1994) (posing the argument for deference to the plaintiff). The argument states that a plaintiff should have the freedom to choose state court litigation even if the claim qualifies for the federal courts. *Id.*

143. The importance of access to the federal courts lies in the fact that out-of-state defendants may suffer prejudice in state courts in front of state juries. The Senate stated this principle:

To deny the right to resort to the Federal courts means that, in controversies between citizens of different states, one must seek justice in the courts of the state of his adversary where he will find, in many of the States, that trial by jury has been stripped of many of its safeguards and the judge has been denied the common-law powers necessary to the proper administration of justice.

S. REP. NO. 85-1830, at 18 (1958). Furthermore, the use of federal judges allows an additional benefit in cases that address controversial or political issues. Federal judges, unlike state judges, have life tenure under Article III and need not worry about political motives or the stigma of unpopular decisions. Paul E. McGreal, *Ambition's Playground*, 68 FORDHAM L. REV. 1107, 1144 (2000). See *Peretz v. United States*, 501 U.S. 923, 938 (1991). See also Brian M. Hoffstadt, *Normalizing the Federal Clemency Power*, 79 TEX. L. REV. 561, 619 (2001) (stating that life tenure protects the judiciary's independence).

144. See CHEMERINSKY, *supra* note 28, at 288 §5.3.2 (stating the preference that federal courts handle federal claims); HOWARD P. FINK & MARK V. TUSHNET, FEDERAL JURISDICTION: POLICY AND PRACTICE 436 (2d ed. 1987) (summarizing the problem in exhausting federal judicial resources to resolve state law claims). *But see* John P. Frank, *The Case for Diversity Jurisdiction*, 16 HARV. J. ON LEGIS. 403, 411 (1979) (posing the idea that there might not be such a phenomenon as a "state case"). See also *In re Burrus*, 136 U.S. 586, 593-94 (1890) (stating, "[T]he whole subject of domestic relations . . . belongs to the laws of the States and not to the laws of the United States."); CHEMERINSKY, *supra* note 28, at 300 § 5.3.3 (stating that domestic relations cases are barred from federal court and may not use diversity jurisdiction). The Supreme Court later noted "the longstanding tradition of reserving domestic relations matters to the States." *Thompson v. Thompson*, 484 U.S. 174, 186 n.4 (1988).

145. For a discussion on why the Federal Rules of Civil Procedure do not allow the benefit of discovery, see *supra* notes 59-74 and accompanying text.

146. For a discussion on a defendant's time limitations, see *supra* notes 70-74 and accompanying

not have had time to collect any evidence to establish the amount in controversy requirement. The discovery process is at odds with the thirty-day limit on the removal notice.¹⁴⁷ As a result, the defendant cannot rely on the use of an interrogatory.¹⁴⁸ The defendant usually does not receive the necessary evidence because the plaintiff often delays his response so that the defendant cannot use such discovery in the petition for removal.¹⁴⁹ The Federal Rules of Civil Procedure render removal difficult¹⁵⁰ because the defendant bears the burden of proof.

Without evidence before the removal petition, a defendant can only use post-petition evidence to establish the amount in controversy. Ambiguous statutory language does not reveal whether a court should allow the use of post-petition evidence.¹⁵¹ The circuits apply the same statutes in such disparate manners that a perfect rule is difficult to attain.¹⁵² The circuits give extreme deference to either the plaintiff¹⁵³ or the defendant¹⁵⁴ and avoid any middle ground. Although the circuits' various holdings demonstrate that a single rule is difficult to establish, they also present many strengths from which to craft a new rule.

Some circuits give extreme deference to the plaintiff's position as master of the complaint. In *Gaus v. Miles, Inc.*,¹⁵⁵ the Ninth Circuit recognized the "strong presumption" against removal.¹⁵⁶ The court took this strong presumption to an extreme. The court held that the defendant did not satisfy the burden of supplying facts that supported the contention of the amount in controversy.¹⁵⁷ Even though the defendant bears the burden of proof, the court required too much concrete evidence in the removal petition.¹⁵⁸ The

text.

147. 28 U.S.C. § 1446(a)-(c) (1994).

148. For a discussion on a defendant's inability to use an interrogatory to establish the amount in controversy, see *supra* notes 71-72 and accompanying text.

149. For a discussion about the delays that follow discovery requests, see *supra* note 71 and accompanying text.

150. The defendant must meet a preponderance of the evidence test. CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3702, at 49-50 (3d ed. 1998).

151. See 28 U.S.C. § 1446 (1994).

152. For a discussion of the primary cases that address the issue of admitting post-petition evidence to establish the amount in controversy, see *supra* notes 84-140 and accompanying text.

153. For a discussion of the circuit court cases that apply a stricter standard that favors plaintiffs, see *supra* notes 85-102 and accompanying text.

154. For a discussion of the circuit court cases that apply a more lax standard that favors defendants, see *supra* notes 103-40 and accompanying text.

155. 980 F.2d 564 (9th Cir. 1992).

156. *Id.* at 566 (internal quotation marks omitted).

157. *Id.* at 567.

158. The *Gaus* court disallowed the use of the plaintiff's allegation that the damages were "in the millions of dollars." *Id.* at 566 (internal quotation marks omitted).

court's opinion prejudiced the defendant's position too strongly because the defendant could not benefit from discovery during the thirty-day limit on removal.¹⁵⁹ In some cases, without the availability of discovery, the defendant will have no information outside of the plaintiff's pleading, which may be amended later and has little effect on the damages that the plaintiff can receive in trial.¹⁶⁰

In *Laughlin v. Kmart Corp.*,¹⁶¹ the Tenth Circuit held that the defendant must affirmatively establish the amount in controversy on the removal petition.¹⁶² The defendant improperly alleged the amount in controversy by proposing facts in its jurisdictional brief only.¹⁶³ The *Laughlin* court disagreed with the *Shaw* court and stated that jurisdiction could not be "conceded."¹⁶⁴ The court also stated that the defendant's economic analysis of damages does not establish a factual basis for jurisdiction at the time of removal.¹⁶⁵ In its analysis, the Tenth Circuit implicitly agreed with the *Shaw* court's recognition of the importance of the defendant's allegation in good faith that the amount in controversy meet the jurisdictional minimum.¹⁶⁶

When one applies the above analysis to the introductory hypothetical of this Note, one realizes the problem in the Ninth and Tenth Circuits' approach. Their formalistic approach requires affirmative facts to prove the amount in controversy at the time of the removal petition. If one applies the courts' approach to the introductory hypothetical, Boxer would not have sufficient information to prove the amount in controversy because of the time delays associated with discovery. Fairness to the defendant calls for a more relaxed approach.

159. For an explanation of why a removing defendant does not get the benefit of the discovery process, see *supra* notes 70-74 and accompanying text.

160. Rule 54 of the Federal Rules of Civil Procedure allows the court to award damages that it sees fit unrestricted by the relief sought in the pleadings. FED. R. CIV. P. 54.

161. 50 F.3d 871 (10th Cir. 1995).

162. *Id.* at 873. The court also stated that the facts of jurisdiction may be established on the face of the removal notice. *Id.*

163. *Id.* The defendant simply referred to the removal statute in the removal notice. 28 U.S.C. § 1441 (1994). As the court noted, the removal statute does not refer to the requisite dollar amount for the amount in controversy. 50 F.3d at 873. Section 1441 refers to the "amount in controversy." 28 U.S.C. § 1441 (1994). Section 1332 requires the "amount in controversy" to be a value of \$75,000 or greater, exclusive of interests and costs. 28 U.S.C. § 1332(a) (Supp. II 1996).

164. 50 F.3d at 874 (citing *Shaw v. Dow Brands, Inc.*, 994 F.2d 364, 367-68 (7th Cir. 1993)).

165. 50 F.3d at 873.

166. The *Laughlin* court cited the *Shaw* analysis of the defendant's petition. *Id.* at 873-74 (citing *Shaw*, 994 F.2d at 366). Not until the following paragraph in the analysis of "conceded" jurisdiction does the *Laughlin* court disagree with the *Shaw* court. *Id.* at 874. By citing various parts of the rationale in *Shaw* and only disagreeing with the final one, the *Laughlin* court implicitly agreed with the prior lines of reasoning.

Other circuits recognize the defendant's right to access the federal courts and a fair forum. In *Allen v. R & H Oil & Gas Co.*,¹⁶⁷ the Fifth Circuit first applied the "facially apparent" doctrine.¹⁶⁸ The doctrine is ambiguous and leaves almost complete discretion to a court to make initial findings with little guidance.¹⁶⁹ The Fifth Circuit also allowed the use of post-petition affidavits.¹⁷⁰ However, post-petition affidavits should not have any bearing on the amount in controversy.¹⁷¹

The Fifth Circuit's approach reduces the importance of the notice for removal by allowing the use of all other evidence. A court should not treat the notice for removal lightly, however, because the notice is one of the only procedural requirements of removal.¹⁷² Without notice, removal would add multiple steps to an already overburdened process. In the context of establishing diversity jurisdiction, the courts often strictly read the notice requirement.¹⁷³ Even though the use of post-petition evidence is important to keep the case in federal court, many superficial claims will bog down the court simply as a delay tactic by the defendant¹⁷⁴ or as a method to avoid the

167. 63 F.3d 1326 (5th Cir. 1995).

168. *Id.* at 1336. The "facially apparent" doctrine has the district court "look only at the face of the complaint and ask whether the amount in controversy ... [is] likely to exceed [the jurisdictional requirement]." *Id.* The court further stated that "no post-petition amendment of the complaint [could] divest the district court of jurisdiction." *Id.* at 1337.

169. Under the "facially apparent" standard, the court examines the face of the complaint to see "if the amount in controversy [is] likely to exceed [the jurisdictional amount]." *Id.* at 1336 (emphasis added). The Fifth Circuit admitted that there are no explicit guidelines as to what types of proof the court should use under the standard. *Id.* at 1335.

170. *Id.* at 1335.

171. See *Rogers v. Wal-Mart Stores, Inc.*, 230 F.3d 868, 871-72 (6th Cir. 2000); *Chase v. Shop 'N Save Warehouse Foods, Inc.*, 110 F.3d 424, 429-30 (7th Cir. 1997); *Angus v. Shiley, Inc.*, 989 F.2d 142, 146 (3d Cir. 1993); *De Aguilar v. Boeing Co.*, 11 F.3d 55, 57 (5th Cir. 1993).

172. See 28 U.S.C. § 1446(a) (1994) ("A defendant ... desiring to remove ... shall file ... a notice of removal ... together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action."). See also *Resolution Trust Corp. v. Nemberg*, 3 F.3d 62, 69 (3d Cir. 1993) ("The requirement of notice to the state court is an important part of the removal process ..."); *Stephens v. Portal Boat Co.*, 781 F.2d 481, 482 n.1 (5th Cir. 1986) (stating that removal is ineffective without notice to the state court); 14B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3737 (3d ed. 1998).

173. See *Shamrock Oil Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941) (stating that the courts should construe the removal statutes strictly in favor of remand). In the case of removal based on diversity jurisdiction, the petition "must allege facts from which the court may determine" the citizenship of the parties for diversity jurisdiction. 32 AM. JUR. 2D *Federal Practice & Procedure* § 498 (emphasis added).

174. See PURCELL, *supra* note 51, at 49-50 (summarizing the reasons that delays usually benefit the defendant). Defendants can typically outlast the plaintiffs because they hold the funds at issue. *Id.* at 49. During the delay, evidence could disappear, memories could fade, and witnesses could even die. *Id.* Most importantly, poor plaintiffs in dire need of money might agree to lower settlement offers. *Id.* at 49-50. For those reasons, defense counsel oppose settlements and quick proceedings in personal injury cases, for example. *Id.* at 49. The longer the delay continues, the more the plaintiff must sustain

expiration of the thirty-day time limit on removal.¹⁷⁵

When one applies the Fifth Circuit's approach to the introductory hypothetical, one begins to anticipate the potential for widely disparate treatments of the same situation. By applying the "facially apparent" standard, the final forum of a case depends primarily on the court's senses as to what case will "likely exceed" the amount in controversy. In the hypothetical, on one hand, Boxer must heed to a court's findings, which does not rely on any firm evidence. On the other hand, if the court hearing Boxer's case allows discovery, there is no indication as to the extent of discovery the court should direct or allow. In this situation, Paul must litigate his claim against Boxer in federal court indefinitely, regardless of the amount in controversy.

In *Shaw v. Dow Brands, Inc.*,¹⁷⁶ the Seventh Circuit granted more leniency to the defendant. The court allowed the defendant to assert a good faith belief in the petition for removal to establish the amount in controversy,¹⁷⁷ taking into account the defendant's interests and foiling the plaintiff's attempt to manipulate the choice of venue.¹⁷⁸ The particular case facts, however, do not establish a firm rule that one can apply in other situations. The plaintiff originally alleged an amount in controversy in excess of \$50,000, the minimum jurisdictional requirement at the time.¹⁷⁹ In its opinion, the court avoided any generalization on the types of evidence that a court may consider to establish the amount in controversy requirement.¹⁸⁰

in-court fees, expert testimony costs, and living expenditures. *See also* REGINALD HEBER SMITH, JUSTICE AND THE POOR: A STUDY OF THE PRESENT DENIAL OF JUSTICE TO THE POOR AND OF THE AGENCIES MAKING MORE EQUAL THEIR POSITION BEFORE THE LAW WITH PARTICULAR REFERENCE TO LEGAL AID WORK IN THE UNITED STATES 84 (3d ed. 1924) (stating that defendants' and their liability insurance companies' systematic use of delay is common knowledge); PURCELL, *supra* note 51, at 27 (stating that removal allows corporate defendants to "exploit their social and economic power when confronting relatively weak individual litigants").

175. *See* 28 U.S.C. §1446(b) (1994) ("The notice of removal . . . shall be filed within thirty days."). *See, e.g.*, Rollwitz v. Burlington N. R.R., 507 F. Supp. 582, 585 (D. Mont. 1981) (stating that the defendant filed notice of removal even though jurisdiction was not yet definite so as to defeat the thirty-day limit).

176. 994 F.2d 364 (7th Cir. 1993).

177. *Id.* at 366.

178. *Id.* at 368.

179. *Id.* at 366. *See* 14B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3702, at 44 (3d ed. 1998) (stating that the defendant bears only a light burden when the plaintiff claims a sum in excess of the jurisdictional amount). *See also* St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 290 (allowing removal when the plaintiff originally pleaded damages in excess of the amount in controversy requirement).

180. 994 F.2d at 367. The Seventh Circuit avoided creating any concrete rule. Judge Cummings stated that the court "need not decide whether such cases as a general matter should be remanded . . . because in this instance Shaw has already conceded that his claim is worth more than \$50,000[.]" which was the requisite amount in controversy at the time. *Id.*

In *Harmon v. OKI Systems*,¹⁸¹ the Seventh Circuit affirmed the district court's use of answers to interrogatories after removal to establish the amount in controversy.¹⁸² One of the defendants filed a notice of removal on the basis of diversity jurisdiction, but did not allege an amount in controversy.¹⁸³ The parties conducted almost two years of discovery.¹⁸⁴ Only after the plaintiffs realized the strong possibility of loss without trial did they seek remand.¹⁸⁵ Although the court of appeals stated that a court should consider reliable evidence after the petition for removal, the court's opinion did not closely examine the issue of post-removal evidence.¹⁸⁶ The court's rationale strongly relied on the fact that the plaintiff waited two years before seeking remand.¹⁸⁷

In *Sierminski v. Transouth Financial Corp.*,¹⁸⁸ the Eleventh Circuit allowed all post-petition evidence that the defendant presented to help the court determine the amount in controversy.¹⁸⁹ The Eleventh Circuit attempted to distinguish the facts of this case from the fact-based holdings of other circuits, but its analysis was incomplete. The Eleventh Circuit dismissed the Tenth Circuit's holding in *Laughlin*¹⁹⁰ as the only case with "such a restrictive approach."¹⁹¹ The Eleventh Circuit stated that the Ninth Circuit in *Gaus* reasoned that the defendant offered "no facts whatsoever."¹⁹² However, the Eleventh Circuit ignored the fact that the plaintiff in *Gaus* alleged that the damages were "in the millions of dollars."¹⁹³ The Eleventh Circuit admitted that a court should consider all evidence to establish the amount in controversy,¹⁹⁴ but failed to include such facts in its analysis of *Gaus*.¹⁹⁵

181. 115 F.3d 477 (7th Cir. 1997).

182. *Id.* at 479.

183. *Id.* at 478. The court of appeals admitted that the removal notice "was no model to emulate" with respect to its composition. *Id.*

184. *Id.* at 478.

185. *Id.* In fact, the district court had taken the case off of the trial calendar when it scheduled the arguments for the defendants' motions for summary judgment. *Id.*

186. *See id.* The *Harmon* court did not cite any precedent cases or principles to support its amount-in-controversy requirement. *Id.*

187. *See id.* at 479-80 (stating as its final point in its removal argument that "the Harmons were trying to forum shop").

188. 216 F.3d 945 (11th Cir. 2000).

189. *Id.* at 949.

190. *Laughlin v. Kmart Corp.*, 50 F.3d 871 (10th Cir. 1995). For a more detailed discussion of the case facts, see *supra* notes 78-86.

191. 216 F.3d at 948.

192. *Id.* at 948.

193. *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992).

194. 216 F.3d at 949.

195. *Id.* at 948.

This most recent standard for the use of post-petition evidence is too deferential to the defendant, granting excessive leeway. Allowing the defendant to use post-petition evidence to establish the amount in controversy gives the defendant too much freedom to control the venue.¹⁹⁶ This allowance also leaves the plaintiff helpless to influence the venue of his action.¹⁹⁷

When one applies the Eleventh Circuit's approach to the hypothetical, one recognizes the problem of not having a single explicit rule for the courts to apply. By considering post-petition evidence, the court is, in effect, executing the litigation in federal court longer than necessary. Even when the amount in controversy does not exceed the jurisdictional minimum, the plaintiff must endure the cost, inconvenience, and delay of the federal courts.

The preference that state claims remain in state court also deserves examination.¹⁹⁸ When appropriate, the courts favor a remand to state court,¹⁹⁹ either because state law applies,²⁰⁰ or because state juries should serve as fact finders.²⁰¹ In addition, critics contend that the courts should not exhaust

196. Corporate defendants, the most common defendant in diversity actions, have a particular preference for federal courts. PURCELL, *supra* note 51, at 23. Part of this preference results from the appearance of prestige. *Id.* Federal courts in larger cities also bring convenience to corporate attorneys. *Id.* Corporate attorneys' control of venue is particularly important because they are able to select from among different judges, favoring one judge more than another. *Id.* at 26.

197. The defendant allegedly wronged the plaintiff before the complaint. However, even after the complaint, the defendant continues to steal away the plaintiff's power.

198. During the years previous to one of the amendments that increased the amount in controversy requirement (1955-1956), diversity jurisdiction cases consisted of more than one-third of all civil cases brought in federal court. S. REP. NO. 85-1830, at 13 (1958). Congress reinforced this preference for actions in the state courts. Section 1445 of Title 28 provides that defendants may not remove certain state actions to federal court. 28 U.S.C. §1445 (Supp. II 1996). These include: actions against a railroad company, actions that arise under worker's compensation, and actions that derive from the Violence Against Women Act of 1994. *Id.* The most serious reform groups agree that courts should reduce the federal caseload by leaving state law claims in state courts. YACKLE, *supra* note 142, at 47.

199. See JAMES HAMILTON LEWIS, REMOVAL OF CAUSES 131 §35 (1923) (stating that federal jurisdiction must be certain and that "a doubt as to the jurisdiction is sufficient ground for remanding a removed case to the State court from which it has been removed").

200. See Chief Justice Warren E. Burger, *Annual Report on the State of the Judiciary*, 62 A.B.A. J. 443, 444 (1976) (stating that state judges better handle state cases under state law); *Diversity Jurisdiction, Multi-Party Litigation, Choice of Law in the Federal Courts: Hearings on S. 1876 Before the Subcomm. on Improvements in Judicial Mach. of the Comm. on the Judiciary*, 92d Cong. 114 (1971) (statement of Orison S. Marden, Attorney, White & Case, New York, NY). The increases in the amount in controversy requirement have the primary goal of reducing diversity jurisdiction cases "by eliminating the filing of cases which concern controversies purely local in nature." S. REP. NO. 85-1830, at 12 (1958).

201. S. REP. NO. 106-420, at 11 (2000). This policy does not apply to class action lawsuits. In class actions, the amount in controversy is so large, often in the millions of dollars, that state juries, who might be swayed by bias against large corporations, or even the sympathy of a large group of plaintiffs, should not decide the case. *Id.* The federal courts should not take on such cases. See S. 353, 106th Cong. § 1 (2000).

federal funds and resources to settle state claims.²⁰² The number of federal trials has become increasingly unwieldy, primarily because of diversity jurisdiction cases.²⁰³ Public policy mandates a limit on the increase of federal judges without a decrease in the quality of justice.²⁰⁴

IV. PROPOSAL

The removal doctrine should balance the many competing interests. Plaintiffs have interests in controlling the action and choosing the forum in which it takes place.²⁰⁵ Defendants have an opposing interest in obtaining a fair and equitable trial.²⁰⁶ Balancing the interests is a difficult task.²⁰⁷ The

202. See *supra* note 144. See also Yackle, *supra* note 142, at 47. One can attribute much of the federal court backlog to state claims. See *id.* In 1990, the Federal Courts Study Committee reported that diversity jurisdiction cases accounted for ten percent of federal court expenses and comprised one-fourth of district court cases and one-half of the civil trials. JUDICIAL CONFERENCE OF THE UNITED STATES, FED. COURTS STUDY COMM., REPORT OF THE FEDERAL COURT STUDY COMMITTEE 38-39 (1990). Diversity cases previously exhausted federal judicial resources as well. After World War II, the number of civil case filings increased seventy-five percent. S. REP. NO. 85-1830, at 2-3 (1958). The increase in diversity jurisdiction cases accounted for most of the increase in filings. *Id.* For example, the number of diversity cases was 7,286 in 1941 and increased to 20,524 in 1956. *Id.* at 3. See Burger, *supra* note 200, at 444 (stating that in 1976, “diversity cases represent[ed] one fourth of the civil cases in district courts”). Chief Justice Burger further stated that the cases would bring a lesser burden on the four thousand state judges than on the four hundred federal judges that existed then. *Id.* Many legal experts, including former Carter administration Attorney General Griffin Bell and former Clinton administration Solicitor General Walter E. Dellinger, agree that interstate class actions are one of the categories of state-claim cases that most warrant the use of federal courts. S. REP. NO. 106-420, at 15 (2000). The rationale is that interstate class actions affect the interests of the most people, have the largest amount of money at stake, and implicate interstate commerce to the greatest degree. *Id.*

203. Randall Samborn, ‘Nightmarish’ Future?: Judges Foresee Federal Courts Caseload Crush, NAT’L L.J., Jan. 9, 1995, at A26; *id.* at A1. In 1993, the Proposed Long Range Plan for Federal Courts stated that “if the courts’ civil and criminal jurisdiction continues to grow at the same rate it did over the past 53 years, the picture in 2020 can only be described as nightmarish.” at A1. The committee projected the filing of more than 1 million cases in 2020. *Id.* The projected number of cases dwarfs the 281,740 cases filed in the year ending June 30, 1994. *Id.* The committee projected 2,766 district judges in 2020 when only 649 presided in 1995. *Id.*

204. The Judicial Conference stated in a 1993 report that there should be a limit on the increase in number of federal judges. *Id.* at A26. Professor Erwin Chemerinsky expressed doubts that parties will obtain justice with the high number of cases without doubling or tripling the number of federal judges. *Id.* But see YACKLE, *supra* note 142, at 96 (arguing that an increase in the number of federal judgeships will not reduce the prestige of the federal judiciary).

205. For a discussion of the plaintiff’s interests as master of the complaint, see *supra* note 142 and accompanying text.

206. The Senate stressed the fact that “[t]he underlying purpose of diversity of citizenship legislation . . . is to provide a separate forum for out-of-state citizens against the prejudices of local courts and local juries by making available to them the benefits and safeguards of the Federal courts.” S. REP. NO. 85-1830, at 4 (1958). Some theorize that in modern American society there is no longer the prejudice in the courts against parties from outside of the state, but the vast majority of expert opinion agrees that prejudice continues to exist. *Id.* at 17. The Framers of the Constitution felt similarly. Judge Henry Friendly quoted James Madison to state that “strong prejudice may arise in

application of the circuits' approaches to the introductory hypothetical demonstrates that difficulty.²⁰⁸

The removal statute does not give sufficient details about the process a defendant must go through to remove a case to federal court.²⁰⁹ Public policy demonstrates that a defendant should have access to federal courts equal to that of a plaintiff.²¹⁰ The risk of prejudice against a defendant in the plaintiff's home state is extensive.²¹¹ When the amount in controversy is in excess of the minimum, \$75,000, the potential award by a court in the plaintiff's home state is significant.²¹² The plaintiff remains master of the action unless the defendant can meet the burden of establishing the amount in controversy.²¹³

some states against the citizens of others, who may have claims against them." H. J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 493 (1928). One should note that another one of the original purposes for creating diversity jurisdiction in 1789 was "to enhance the awareness of the people of the existence of the new and originally weak central government." *Diversity Jurisdiction, Multi-Party Litigation, Choice of Law in the Federal Courts: Hearings on S. 1876 Before the Subcomm. on Improvements in Judicial Mach. of the Comm. on the Judiciary*, 92d Cong. 103 (1971) (statement by Sen. Burdick).

207. The Supreme Court applied a balancing test that fulfills the requirements of due process. *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (stating that the court should weigh the private interest, the risk of deprivation to that interest, and the government's interests). Although the Supreme Court applied the test in the removal of "bad faith" workers' compensation claims cases, the test is relevant here.

First, the Court recognized the private interest of a defendant. *Id.* at 335. Second, the Court examined the "risk of an erroneous deprivation" through the procedure of a federal court. *Id.* Third, the Court considered the government's interest in the additional burdens that the procedure would entail. *Id.*

Furthermore, the federal government has the right to adjudicate disputes between the states and between the citizens of those states. Edward John Main, *Removal, Remand, and Review of "Bad Faith" Workers' Compensation Claims*, 13 T.M. COOLEY L. REV. 121, 135 (1996). A defendant should not suffer the prejudice of another state's jury. *Id.* at 136.

208. For a discussion of the circuits' approaches to the introductory hypothetical, see *supra* Part III.

209. *See* 28 U.S.C. § 1446 (1994).

210. The American Bar Association organized an extreme amount of support for diversity jurisdiction because of corporate defendants. PURCELL, *supra* note 51, at 242. *See Limiting Jurisdiction of Federal Courts: Hearings Before the Comm. on the Judiciary of the House of Representatives*, 72d Cong. 65 (1932) (statement of Washington Bowie, Fidelity & Deposit Co. of Baltimore). *See also id.* at 45 (statement of James A. Emery, general counsel of the National Association of Manufacturers). Furthermore, the federal system should not allow or encourage the plaintiff's abuse of the court system. Gordon D. Polozola, Note, *The Battle of Removal—Is Delay the Ultimate Weapon?: A Note on Martine v. National Tea Company*, 54 LOUISIANA L. REV. 1419, 1420 (1994).

211. *See* John P. Frank, *The Case for Diversity Jurisdiction*, *supra* note 144, at 406 (stating that Congress created diversity jurisdiction because of the fear of prejudice against out-of-state businesses).

212. 15 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 102.106[6][a] (3d ed. 1999). A verdict that includes attorney's fees, which do not contribute to minimum jurisdictional requirement, might reach a high amount in excess of the amount in controversy. *Id.*

213. For more discussion of the plaintiff as master of the complaint, see *supra* note 142 and

A court should not consider evidence that a defendant does not allege at the filing of notice for removal.²¹⁴ At the same time, a court should not require the defendant to prove the amount in controversy when no discovery evidence is available.²¹⁵ When the plaintiff makes an ambiguous pleading that is outside of the defendant's control, the defendant must suffer the penalty of costs for removing in good faith.²¹⁶ Thus, the defendant's allegation in good faith should be sufficient to establish the amount in controversy.²¹⁷ At any time, if the court finds that firm evidence does not prove the amount in controversy, the court may remand the case back to the state.²¹⁸ In addition, frivolous claims of meeting the amount in controversy requirement are unlikely to result because the court may apply sanctions authorized by Rule 11(c) of the Federal Rules of Civil Procedure.²¹⁹ The plaintiff's pleading gives the defendant sufficient facts to allege the jurisdictional amount in the petition in good faith. Fairness to both the plaintiff and the defendant justify the "good faith" requirement.²²⁰ This requirement renders moot the fact that a plaintiff typically answers a discovery request after the deadline for the notice of removal.

In addition, the good faith requirement would help prevent an additional

accompanying text.

214. See *Biggs Corp. v. Wilen*, 97 F. Supp. 2d 1040, 1046-47 (D. Nev. 2000) (discussing the fact that a court may not consider evidence that does not fall under the strict statutory allowances of § 1446). The plaintiff's demand letter did not qualify as "other paper" under § 1446, because it was not part of the official record of the court. *Id.* at 1047.

215. As a policy matter, the requirement of discovery evidence will result in increased costs and delays for the parties as well as in the federal court system. For further discussion of the problem associated with increased costs and delays, see *supra* note 174.

216. See 28 U.S.C. § 1447(c) (Supp. II 1996) ("An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal.")

217. The Senate stated what it believed to be an obvious application after one of the earliest amendments to the amount in controversy requirement, that "the court will undoubtedly take into consideration whether the amount claimed was made *in good faith* or whether it was made simply to get into Federal court." S. REP. NO. 85-1830, at 5 (1958) (emphasis added).

218. 28 U.S.C. § 1447 (1994).

219. FED. R. CIV. P. 11. If the representations to the court in the form of a petition for removal do not meet the burden established by Rule 11(b), "the court may . . . impose an appropriate sanction upon the attorneys, law firms, or parties." FED. R. CIV. P. 11(c). Rule 11(b)(1) lists improper purposes for the removal petition, such as to delay and to increase costs. FED. R. CIV. P. 11(b)(1).

220. The "good faith" requirement matches the provisions of Rule 11 of the Federal Rules of Civil Procedure. FED. R. CIV. P. 11(b). Rule 11 provides that representations to the court should be "formed after an inquiry reasonable to the circumstances." *Id.* According to the Advisory Committee Notes, the "good faith" requirement forces parties to "stop-and-think" when they make representations to the court. FED. R. CIV. P. 11(b) advisory committee's notes. The removing defendant does not have to worry about what the Advisory Committee calls "empty-head pure-heart" justification. *Id.* Although the defendant will not have the luxury of a specific amount in controversy pleading by the plaintiff, the defendant will have access to the facts alleged in the complaint. These facts should allow for a sufficient foundation for the defendant's good faith allegation.

backlog in the federal court system. The number of unsubstantiated petitions claiming the amount in controversy would decrease because of the explicit alleging requirement.²²¹ The good faith requirement would discourage superficial petitions because of the possibility of sanctions.²²²

For the above reasons, this Note urges Congress to add a paragraph to § 1446(b) of Title 28 that reads:

If the pleadings allege damages in an amount less than the amount in controversy conferred by § 1332 of this title or do not allege any specific amount, the defendant must file a notice of removal within the thirty-day period set forth above. The notice must allege in good faith that the amount in controversy of the action exceeds the statutory requirement conferred by § 1332 of this title.²²³

V. CONCLUSION

The proposed amendment to the removal statute reconciles the competing interests of the plaintiff, the defendant, and the court system. The plaintiff remains master of the action, because the defendant bears the burden of establishing the amount in controversy. At the same time, the defendant need not rely on discovery evidence, only alleging the amount in controversy in

221. Moreover, defendants would heavily consider the value of the removal motion because § 1447 provides that the defendant might make “payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal.” 28 U.S.C. § 1447(c) (Supp. II 1996). *See* Karns, *supra* note 50, at 1096 n.34.

222. Rule 11(c) provides for sanctions against parties for a violation of Rule 11(b). FED. R. CIV. P. 11(c). A party violates Rule 11(b) “by signing, filing, submitting, or later advocating [for an] improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.” FED. R. CIV. P. 11(b).

223. This proposal differs in language and focus from Noble-Allgire’s proposal. *See* Noble-Allgire, *supra* note 10, at 750-51. Both proposals favor the good faith requirement in the defendant’s notice of removal, but this proposal goes a step further. The language of this proposal establishes an important distinction in that this proposal of the amended statute requires an explicit allegation of the amount in controversy in good faith. Noble-Allgire’s proposal simply requires a removal notice filed with a good faith belief. *Id.* at 750-51. Without an explicit allegation, a defendant fails to meet any burden of proof.

In addition, Noble-Allgire’s proposal for an amended statute includes a provision that explicitly lists the required dollar amount needed to fulfill the amount in controversy requirement, in this case \$75,000. *Id.* at 750-51. The problem with that provision is that it takes authority away from 28 U.S.C. §§ 1332 and 1441, and renders them repetitive. Section 1446(b) refers to the procedure for a case that is removable. 28 U.S.C. § 1446(b) (1994). Section 1441 defines a removable action as an action in which “the district courts have original jurisdiction.” 28 U.S.C. § 1441 (1994). Section 1332 defines original jurisdiction and more specifically defines diversity jurisdiction. Within that definition, the statute lists the amount in controversy requirement. 28 U.S.C. § 1332(a) (Supp. II 1996). Attempting to clarify, Noble-Allgire proposes an oversimplification that deconstructs the statutory organization of the removal statute.

good faith. In addition, the court system has safety measures in place to prevent frivolous petitions for removal. More importantly, the proposed amendment clarifies the proper approach for the courts to establish the amount in controversy in a diversity case when the plaintiff pleads damages of an unspecified amount. The explicit language of the proposed amendment directs a court's application of the removal statute and would allow the circuit to apply a uniform and fair rule to the cases before them.

*C. Kinnier Lastimos**

* B.A. (1998), Northwestern University; J.D. (2002), Washington University School of Law.

