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## *I. Introduction*

It is hornbook law that the plaintiff is master of his complaint.[1] Traditionally, a plaintiff's control of the complaint implied control to choose a state or federal forum for a diversity case.[2] According to the long-standing rule of *St. Paul Mercury Indemnity Co. v. Red Cab Co.*,[3] if a plaintiff prefers a state court forum and is willing to seek damages below the federal jurisdictional amount, then the plaintiff may prevent a geographically diverse defendant from removing to federal court.[4] More recently, however, many states have adopted procedural rules that do not limit recovery to the plaintiff's

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1. *See* 14B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3702, at 46 (3d ed. 1998) ("[P]laintiff is the master of his or her claim; if the plaintiff chooses to ask for less than the jurisdictional amount, only the sum actually demanded is in controversy."); *see also* The Fair v. Kohler Die & Specialty Co., 228 U.S. 22, 25 (1913) ("Of course the party who brings a suit is master to decide what law he will rely upon . . . .").

2. *See* Horton v. Liberty Mut. Ins. Co., 367 U.S. 348, 353 (1961) (stating that general federal rule is that complaint determines amount in controversy and, consequently, federal or state jurisdiction); Pullman Co. v. Jenkins, 305 U.S. 534, 538 (1939) (stating that plaintiff's pleading controls question of separable controversy, thereby controlling possibility of removal to federal court).

3. 303 U.S. 283 (1938).

4. *See* St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 294 (1938) (stating that if plaintiff wants to avoid 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"); *see also* 1A JAMES WM. MOORE & BRETT A. RINGLE, MOORE'S FEDERAL PRACTICE ¶ 0.158, at 203-04 (2d ed. 1996) (discussing validity of *St. Paul Mercury*'s "expedient" to prevent removal); 14C WRIGHT ET AL., *supra* note 1, § 3725, at 84-85 & n.20 (stating that plaintiff may prevent removal even when claim is for more than jurisdictional amount by choosing to bring state action for less than statutory minimum).

demand.[5] In these states, civil plaintiffs may now receive awards greater than the specific amounts prayed for in their complaints.[6] A plaintiff may force a defendant to litigate in a state forum, yet the defendant may stand to lose more than the jurisdictional amount. Thus, federal courts are beginning to allow defendants to challenge the validity of a specifically pleaded damage amount.[7]

A court allowing a removing defendant to challenge a plaintiff's specific damages then confronts the question of what burden the defendant should bear to show that the requisite amount truly is in controversy.[8] Federal judges have proposed three different standards.[9] First, the "reverse legal certainty" standard[10] requires a defendant to show that it is *not* a legal certainty that the plaintiff would recover less than the jurisdictional amount.[11] Stated simply,

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5. *See infra* notes 102-03 and accompanying text (discussing state counterparts to Federal Rule of Civil Procedure 54(c) permitting judgment in excess of pleaded amount of damages).

6. *See infra* notes 104-06 and accompanying text (explaining effect of state counterparts to Federal Rule of Civil Procedure 54(c)).

7. *See, e.g.*, McCool v. State Farm Fire & Cas. Co., No. 4:98CV71-B-B, 1998 WL 527280, at *2 (N.D. Miss. July 20, 1998) (allowing defendant to challenge plaintiff's specifically pleaded damages of $74,480 because plaintiff possibly could amend initial damages to seek more); Parnell v. State Farm Mut. Auto. Ins. Co., 173 F.R.D. 446, 447 (W.D. Ky. 1997) (stating that plaintiff may claim amount below federal requirement in complaint to defeat jurisdiction while actually seeking and obtaining damages in excess of requirement); Lane v. Champion Int'l Corp., 844 F. Supp. 724, 731-32 (S.D. Ala. 1994) (recognizing that plaintiffs may manipulate pleadings and defeat constitutional purpose of diversity jurisdiction); Vail v. Orkin Exterminating Co., No. 91-C-3053, 1991 WL 134275, at *2 (N.D. Ill. July 12, 1991) (stating that plaintiff was not limited to amount pleaded in her ad damnum clause and therefore amount cannot govern removal); Cole v. Freightliner Corp., No. 91-C-733, 1991 WL 42163, at *1 (N.D. Ill. Mar. 21, 1991) (according plaintiff's complaint deference but entertaining possibility that he might recover more than jurisdictional amount); Corwin Jeep Sales & Serv., Inc. v. American Motors Sales Corp., 670 F. Supp. 591, 596 (M.D. Pa. 1986) (stating that plaintiff may not defeat removal by seeking less than jurisdictional amount when court is informed that amount in controversy exceeds required amount); Steele v. Underwriters Adjusting Co., 649 F. Supp. 1414, 1416 (M.D. Ala. 1986) ("A plaintiff should not be allowed to deprive a defendant of his right to remove through artful pleading practices.").

8. *See* Burns v. Windsor Ins. Co., 31 F.3d 1092, 1095 (11th Cir. 1994) ("So, the critical question is to what extent must defendant prove jurisdiction exists despite plaintiff's express claim to less than the minimum jurisdictional sum?").

9. *See infra* notes 10-16 and accompanying text (discussing three standards for removing defendants).

10. *See* Kliebert v. Upjohn Co., 915 F.2d 142, 147-48 (5th Cir. 1990) (Jolly, J., dissenting) (proposing "reverse legal certainty" standard as correct burden for removing defendant), *vacated for reh'g en banc*, 923 F.2d 47 (5th Cir.), *appeal dism'd per stipulation of settlement*, 947 F.2d 736 (5th Cir. 1991). Courts also refer to the "reverse legal certainty" standard as the "converse legal certainty" test or standard. *See* De Aguilar v. Boeing Co., 47 F.3d 1404, 1411 (5th Cir. 1995) [hereinafter *De Aguilar II*] (describing standard as "converse legal certainty" standard).

11. *See infra* notes 129-31, 144-46 and accompanying text (discussing "reverse legal certainty" standard).

a defendant bears the burden of showing only that the plaintiff possibly could recover more than the jurisdictional amount.[12] Second, the "preponderance of the evidence" standard[13] attempts to strike a balance between a plaintiff's right to choose a state forum and a defendant's right to remove by requiring a defendant to prove the jurisdictional amount by a preponderance of the evidence.[14] Third, the stringent "legal certainty" standard[15] forces a defendant to prove to a legal certainty that a prevailing plaintiff cannot recover less than the jurisdictional amount.[16]

This Note explores the three removal standards by examining two federal court of appeals opinions regarding removed cases with specified damages below the jurisdictional amount: one opinion in which the United States Court of Appeals for the Eleventh Circuit adopted the "legal certainty" standard and one in which the United States Court of Appeals for the Fifth Circuit adopted the "preponderance of the evidence" standard. Part II.A provides an overview of the statutory basis for removal to federal court.[17] Part II.B identifies changing judicial attitudes toward specifically pleading jurisdictionally insufficient damages to secure a state court forum.[18] Part II concludes with an examination of case law preceding the current willingness of some courts to allow defendants to attempt to remove facially unremovable cases.[19] Part III.A analyzes *Kliebert v. Upjohn Co.*,[20] a vacated Fifth Circuit opinion from whose reasoning both the Fifth and Eleventh Circuits drew heavily in later opinions.[21] Part III.B examines the Eleventh Circuit's adoption of

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12. *See infra* notes 129-31, 144-46 and accompanying text (discussing "reverse legal certainty" standard).

13. *See De Aguilar II*, 47 F.3d at 1412 (establishing "preponderance of the evidence" standard as equitable burden for removing defendant).

14. *See infra* note 238 and accompanying text (discussing competing interests that "preponderance of the evidence" standard balances).

15. *See* Burns v. Windsor Ins. Co., 31 F.3d 1092, 1095-96 (11th Cir. 1994) (establishing "legal certainty" standard as appropriate burden on removing defendant).

16. *See infra* Part IV.C (discussing aptness of "legal certainty" standard).

17. *See infra* Part II.A (summarizing federal removal statutes).

18. *See infra* Part II.B (identifying conflict between Fifth and Eleventh Circuits' standards for defendants removing actions with jurisdictionally insufficient damages).

19. *See infra* Part II.C-E (examining traditional judicial approach to attempted removal of jurisdictionally insufficient claims and exploring effect of new pleading rules on traditional approach).

20. 915 F.2d 142 (5th Cir. 1990).

21. *See infra* Part III.A (examining *Kliebert* opinion). In *Kliebert*, the Fifth Circuit concluded that for a removing defendant to sustain federal jurisdiction, the defendant must show to a legal certainty that the jurisdictional amount is in controversy. Kliebert v. Upjohn Co., 915 F.2d 142, 146-47 (5th Cir. 1990), *vacated for reh'g en banc*, 923 F.2d 47 (5th Cir.), *appeal dism'd per stipulation of settlement*, 947 F.2d 736 (5th Cir. 1991). The Fifth Circuit then vacated its opinion for rehearing en banc. Kliebert v. Upjohn Co., 923 F.2d 47 (5th Cir.), *appeal*

*Kliebert*'s "legal certainty" standard.[22] Part III.C examines the Fifth Circuit's decision to adopt the more permissive "preponderance of the evidence" standard and to reject *Kliebert*.[23] Part IV analyzes removal standards in light of the historical and practical reasons for Congress's statutory requirement that a minimum amount be in controversy in order to restrict access to federal courts in diversity cases.[24] Part V concludes that the difficult "legal certainty" burden is preferable because it comports more closely with the rationale of the jurisdictional amount than does the less onerous "preponderance of the evidence" standard or the permissive "reverse legal certainty" standard.[25]

## *II. Removal to Federal Court and the Amount in Controversy Requirement*

> Removal is a peculiar procedure in that it permits defendants to remove an action properly brought in one system of courts, our state courts, into another set of courts, our federal district courts.[26]

### *A. Applicable Federal Statutes*

A defendant who seeks to remove a diversity case to federal court confronts several sections of United States Code Title 28, including § 1332, § 1441, § 1446, and § 1447.[27] The process begins with the general removal statute, 28 U.S.C. § 1441, which provides that

> any civil action brought in a State court of which the district courts of the United States have *original jurisdiction*, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.[28]

Original subject matter jurisdiction in federal courts for diversity of citizenship cases requires, pursuant to 28 U.S.C. § 1332, a minimum amount in

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*dism'd per stipulation of settlement*, 947 F.2d 736 (5th Cir. 1991). The parties then settled, and the court dismissed the appeal. Kliebert v. Upjohn Co., 947 F.2d 736 (5th Cir. 1991).

22. *See infra* Part III.B (examining Eleventh Circuit's adoption of "legal certainty" standard).

23. *See infra* Part III.C (examining Fifth Circuit's adoption of "preponderance of the evidence" standard).

24. *See infra* Part IV (discussing three removal standards and their applicability to cases in which plaintiffs plead specific damages below jurisdictional amount).

25. *See infra* Part V (concluding that "legal certainty" standard provides better fit with rationale of minimum amount in controversy requirement than do more permissive standards).

26. 16 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 107.03, at 107–19 (3d ed. 1998).

27. *See* 28 U.S.C. §§ 1332, 1441, 1446, 1447 (1994 & Supp. II 1996) (providing removal regime).

28. 28 U.S.C. § 1441(a) (1994) (emphasis added).

controversy and opposing parties from different states.[29] Section 1441(b) additionally requires that no defendant be a citizen of the forum state.[30]

Section 1446 governs removal procedure.[31] Under § 1446, a removing defendant must file a removal notice with the district court within thirty days of receipt of the initial pleading setting forth a removable claim or within thirty days of notification that the action is removable.[32] Section 1446 further

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29. *See* 28 U.S.C. § 1332 (1994 & Supp. II 1996) (granting original jurisdiction to federal district courts for civil actions in which amount in controversy exceeds $75,000 and is between citizens of different states). Specifically, § 1332 grants jurisdiction when the requisite amount is in controversy and the action

> is between (1) citizens of different States; (2) citizens of a State and citizens or subjects of a foreign state; (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

28 U.S.C. § 1332 (1994).

This Note examines a specific problem involving the amount in controversy requirement for removal of diversity cases. Problems involving geographical diversity of parties are beyond its scope. Unless otherwise noted, parties have stipulated or courts have determined that geographic diversity exists. For thorough discussions of the rules to determine the citizenship of parties, see 15 MOORE ET AL., *supra* note 26, §§ 102.30-102.58, and 13B WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE §§ 3611-3630 (2d ed. 1984 & Supp. 1998), which provide detailed examinations of case law governing determining citizenship of individuals, corporations, and other entities.

30. *See* 28 U.S.C. § 1441(b) (1994) ("Any [diversity] action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.").

31. *See* 28 U.S.C. § 1446 (1994 & Supp. II 1996) (stating requirements of filing notice of removal, of contents of removal notice, and of time limits for filing notice with court and for notice to parties for civil actions).

32. *See* 28 U.S.C. § 1446(a), (b) (1994) (stating procedural requirements for removal from state court to federal district court). Subsections (a) and (b) of § 1446 state:

> (a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.
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> (b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.
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> If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become remov-

provides that no defendant may remove a case more than one year after the plaintiff commences the action.[33]

Once a defendant has removed a case to federal court, a plaintiff desiring to petition for remand based on a procedural defect must file within thirty days.[34] However, if the district court discovers that it lacks subject matter jurisdiction at any time before final judgment, § 1447 requires remand even without a petition from the plaintiff.[35] Furthermore, should a district court remand a case to state court, appellate courts typically cannot review the order.[36]

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able, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

*Id.*

33. *See* 28 U.S.C. § 1446(b) (stating that "a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action"). Congress added the one-year limit in 1988 as part of the Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 1016(b)(2)(B), 102 Stat. 4642, 4669 (1988) (codified as amended at 28 U.S.C. § 1446(b)). "The result [of the limit] is a modest curtailment in access to diversity jurisdiction." H.R. REP. NO. 100-889, at 72 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5982, 6032. Congress was concerned that settlement with a diversity-destroying defendant on the eve of trial would permit removal "late in the proceedings [that] may result in substantial delay and disruption." H.R. REP. NO. 100-889, at 72, *reprinted in* 1988 U.S.C.C.A.N. at 6033. A plaintiff may also creatively plead so as to potentially recover more than the jurisdictional amount and yet preclude a defendant from removing to federal court. *See* Jack E. Karns, *Removal to Federal Court and the Jurisdictional Amount in Controversy Pursuant to State Statutory Limitations on Pleading Damage Claims*, 29 CREIGHTON L. REV. 1091, 1096 (1996) (outlining scenario whereby plaintiff uses one-year limit to remain in state court yet ultimately asserts claim for more than jurisdictional amount). By originally pleading less than the jurisdictional amount and then waiting more than a year to amend the complaint to include a higher amount, a plaintiff could thwart a defendant who wishes to remove. *Id.*

34. *See* 28 U.S.C. § 1447(c) (Supp. II 1996) (stating that "[a] motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a)").

35. *Id.*

36. *See* 28 U.S.C. 1447(d) (1994) (stating that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise," except for civil rights cases removed pursuant to 28 U.S.C. § 1443). In *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), however, the United States Supreme Court permitted appellate review of a remand order when the district court judge remanded the case on grounds not found in § 1447(c). *See id.* at 349-52 (discussing lack of congressional intent to extend ban on appellate review of remand to remand based on grounds not specified in removal statute). In *Gravitt v. Southwestern Bell Telephone Co.*, 430 U.S. 723 (1977) (per curiam), the Supreme Court distinguished *Thermtron* and reaffirmed that § 1447(c) remands are not subject to appellate review. *Id.* at 723-24. The Seventh Circuit construed these two opinions to allow review of a district court's remand of a properly removed case based on a subsequent stipulation by the plaintiff that destroyed federal jurisdiction. *See In re* Shell Oil Co., 966 F.2d 1130, 1132 (7th Cir. 1992) (discussing propriety of appellate review of remanded case). However, if a

### *B. Using the Jurisdictional Amount to Choose a Forum*

Since the inception of removal jurisdiction in the Judiciary Act of 1789, its exercise in diversity cases has required a minimum amount in controversy.[37] Originally, the section of the Judiciary Act establishing removal jurisdiction specified a jurisdictional amount of $500.[38] Now, a defendant may remove any action to federal district court over which the court would have original jurisdiction.[39] Thus, in order for today's defendant to remove a diversity case, the amount in controversy must exceed $75,000 as provided by the federal statute granting original diversity jurisdiction to federal courts.[40]

Historically, the jurisdictional amount has provided plaintiffs a certain amount of forum control.[41] A plaintiff may prefer state court for procedural and tactical reasons, including a belief that a local jury will be partial to local residents.[42] Conversely, a defendant may prefer federal court for fear of biased local judges and juries.[43] Congress in 1789 recognized that fear when it created removal jurisdiction to protect nonresident defendants from locally-biased state courts.[44] Regardless of a defendant's fears or motivations, the

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remanding district judge believes a case lacked jurisdiction from the outset, § 1447(d) makes the remand unreviewable. *In re* Amoco Petroleum Additives Co., 964 F.2d 706, 708 (7th Cir. 1992). Thus, "[j]ust which remands are reviewable depends on the reasons the district court provides." *In re Shell Oil Co.*, 966 F.2d at 1132.

37. *See* Thomas E. Baker, *The History and Tradition of the Amount in Controversy Requirement: A Proposal to "Up the Ante" in Diversity Jurisdiction*, 102 F.R.D. 299, 302 ("As long as we have had federal courts, Congress has used the requirement of an amount in controversy to limit original and derivative access to the lower federal courts.").

38. *See* Act of Sept. 24, 1789, § 12, 1 Stat. 73, 79 (providing that defendant may remove from state court to federal court suit in which matter in dispute exceeds $500 and in-state plaintiff is suing nonresident defendant).

39. *See supra* Part II.A (providing overview of statutory basis for removal).

40. *See* 28 U.S.C. § 1332 (1994 & Supp. II 1996) (granting original jurisdiction to federal district courts for civil actions in which amount in controversy exceeds $75,000 and is between citizens of different states); *see also supra* notes 28-29 and accompanying text (explaining interaction of federal diversity jurisdiction statute, 28 U.S.C. § 1332, with removal statutes).

41. *See infra* notes 66-77 and accompanying text (discussing plaintiff's ability to choose state forum by pleading damages below federal jurisdictional amount).

42. *See* 1A MOORE & RINGLE, *supra* note 4, ¶ 0.158, at 199-200 & n.5 (observing possibility that state tribunal may not be impartial between its own citizens and nonresidents (citing Heniford v. American Motors Sales Corp., 471 F. Supp. 328, 335 (D.S.C. 1979))).

43. *See* Grassi v. Ciba-Geigy, Ltd., 894 F.2d 181, 185 (5th Cir. 1990) (discussing potential local bias against nonresident defendant in case in which plaintiffs attempted to avoid removal by assigning fractional interest in disputed property to nondiverse party).

44. *See* 14B WRIGHT ET AL., *supra* note 1, § 3721, at 289 ("[T]he right of removal probably was designed to protect nonresidents from the local prejudices of state courts."); *cf.* 1A MOORE & RINGLE, *supra* note 4, ¶ 0.157[13], at 193-94 (discussing reasons why defendant may forego or exercise right of removal).

amount of damages a plaintiff seeks in state court determines whether the defendant has the choice to remove to federal court.[45]

Two circuits of the United States courts of appeals, however, recently eroded the efficacy of pleading a specific amount below the jurisdictional minimum as a means of insuring a state court forum.[46] In *Burns v. Windsor Insurance Co.*,[47] the Eleventh Circuit considered the question of what burden a removing defendant must shoulder to establish jurisdiction despite a plaintiff's specific claim for less than the jurisdictional amount.[48] The *Burns* court determined that the defendant's burden must be a heavy one.[49] The court concluded that for the case to remain in federal court, the defendant must prove to a legal certainty that the plaintiff's claim exceeds the jurisdictional amount.[50] The Fifth Circuit considered the same question in *De Aguilar v. Boeing Co. (De Aguilar II)*[51] and rejected the "legal certainty" standard in favor of a more permissive one.[52] According to the *De Aguilar II* court, "the plaintiff's claim remains presumptively correct unless the defendant can show by a preponderance of the evidence that the amount in controversy is greater than the jurisdictional amount."[53]

### C. *A Recent Example of Removal Thwarted: The Traditional Approach*

*Hicks v. Universal Housing, Inc.*,[54] a case decided by the United States District Court for the Southern District of West Virginia, provides an example of how the statutory jurisdictional amount traditionally restricts access to federal courts in conformity with a plaintiff's preference.[55] In *Hicks*, the plaintiff originally filed a civil action seeking damages of $49,900 in the

45. *See infra* notes 67-69 and accompanying text (discussing bright line nature of federal jurisdictional amount).

46. *See infra* notes 47-53 and accompanying text (discussing different court of appeals approaches to removing defendant's burden when specific damages are jurisdictionally insufficient).

47. 31 F.3d 1092 (11th Cir. 1994).

48. *See* Burns v. Windsor Ins. Co., 31 F.3d 1092, 1095 (11th Cir. 1994) (considering what standard applies to defendant who seeks to remove case in which plaintiff pleads specific damages below jurisdictional amount).

49. *Id.*

50. *See id.* (explaining defendant's "legal certainty" burden of proof).

51. 47 F.3d 1404 (5th Cir. 1995).

52. *See De Aguilar II*, 47 F.3d 1404, 1411 (5th Cir. 1995) (rejecting defendant's burden of showing to legal certainty that plaintiff's claim exceeds jurisdictional amount as too onerous).

53. *Id.* at 1412.

54. 792 F. Supp. 482 (S.D. W. Va. 1992).

55. *See* Hicks v. Universal Hous., Inc., 792 F. Supp. 482, 485 (S.D. W. Va. 1992) (determining that defendant could not remove action for $49,900, $100 below jurisdictional amount at time).

Circuit Court of McDowell County, West Virginia.[56] The plaintiff, William Hicks, claimed that the defendant, Universal Housing, Inc., had faultily designed and constructed his mobile home and then damaged it during delivery.[57] The court observed that plaintiff's counsel candidly admitted to drafting the complaint in order to stay in state court.[58] The defendant timely removed to federal court and alleged that the true amount in controversy, exclusive of interests and costs, exceeded $50,000, then the jurisdictional amount.[59] The court found the conclusion "inescapable" that the plaintiff's case as originally filed – demanding $100 short of the threshold amount – was not removable.[60] The allegations of the plaintiff's complaint as they exist at the time the defendant files its petition for removal control the amount in controversy, the court stated.[61] Thus, the court determined that it had no jurisdiction and remanded the case to the McDowell County Circuit Court.[62] Otherwise, the court stated, the concept of jurisdiction would be changeable at the will of the court in order to fit circumstances.[63]

### *D. The Legacy of* St. Paul Mercury

The *Hicks* court relied on the "time-tested principles" of *St. Paul Mercury* and *Iowa Central Railway Co. v. Bacon*,[64] two United States Supreme Court opinions.[65] The Supreme Court's decision in *St. Paul Mercury*, now sixty years old, still provides the basis for discussion of the jurisdictional amount in removal cases.[66] The Court's assertion that a plaintiff may ensure a state court forum by pleading damages less than the jurisdictional amount and thereby bar removal is of particular relevance.[67] However, the Supreme Court actually established the bright line nature of the jurisdictional amount

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56. *Id.* at 483.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 484.

61. *Id.*

62. *Id.* at 485.

63. *Id.* at 484.

64. 236 U.S. 305 (1915).

65. *See* Hicks v. Universal Hous., Inc., 792 F. Supp. 482, 483-84 (S.D. W. Va. 1992) (citing *St. Paul Mercury* and *Iowa Central*).

66. *See De Aguilar II*, 47 F.3d 1404, 1408-09 (5th Cir. 1995) ("Most discussions of jurisdictional amount in removal cases begin with *St. Paul Mercury*.").

67. *See* St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 294 (1938) (stating that "[i]f [the plaintiff] does not desire to try his case in the federal court he may resort to the expedient of suing for less than the jurisdictional amount, and though he would be justly entitled to more, the defendant cannot remove").

twenty-three years before *St. Paul Mercury*.[68] In 1915, the Court in *Iowa Central* stated that if a complaint seeks less than the jurisdictional amount on its face, the case is not removable;[69] however, the *St. Paul Mercury* Court failed to cite *Iowa Central*.

In *Iowa Central*, L.M. Bacon, administrator of the estate of Martin W. Lockhart, requested a judgment of $1990 – $10 below the $2000 jurisdictional amount at the time – in Iowa state court against Iowa Central Railway Company.[70] The wrongful death complaint also contained a statement alleging damages of $10,000.[71] Iowa Central unsuccessfully sought to remove the case to federal court.[72] After losing in state court and after the Iowa Supreme Court affirmed the judgment, Iowa Central appealed to the United States Supreme Court.[73] Iowa Central posed the federal question of "whether the state court had lost its jurisdiction by the attempted removal to the United States Circuit Court."[74] The *Iowa Central* Court confirmed that if "upon the face of the record . . . the suit does not appear to be removable," then the state court retains jurisdiction.[75] The Court concluded that because the plaintiff's prayer for recovery was for $1990, the federal district court did not have jurisdiction.[76]

The proposition that specifically pleaded damages below the jurisdictional amount bar the door to federal court reappeared for good in *St. Paul Mercury*.[77] Although courts and commentators often cite *St. Paul Mercury* for that proposition,[78] the "rule" only surfaced as dictum.[79] The question before

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68. *See infra* notes 69-76 and accompanying text (discussing *Iowa Central*).

69. *See* Iowa Cent. Ry. Co. v. Bacon, 236 U.S. 305, 310 (1915) (finding that state court did not lose jurisdiction of case because recovery sought by prayer for damages was below federal jurisdictional amount).

70. *Id.* at 308.

71. *Id.*

72. *Id.* at 309.

73. *Id.*

74. *Id.*

75. *Id.* at 310.

76. *Id.*

77. *See* St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 294 (1938) ("If [the plaintiff] does not desire to try his case in the federal court he may resort to the expedient of suing for less than the jurisdictional amount, and though he would be justly entitled to more, the defendant cannot remove.").

78. *See, e.g.*, Shaw v. Dow Brands, Inc., 994 F.2d 364, 366 (7th Cir. 1993) (citing *St. Paul Mercury* for proposition that plaintiff may evade federal court by seeking less than jurisdictional amount); Parnell v. State Farm Mut. Auto. Ins. Co., 173 F.R.D. 446, 447 (W.D. Ky. 1997) (same); Hicks v. Universal Hous., Inc., 792 F. Supp. 482, 484 (S.D. W. Va. 1992) (same); 1A MOORE & RINGLE, *supra* note 4, ¶0.158, at 203-04 & n.16 (same); 14C WRIGHT ET AL., *supra* note 1, § 3725, at 84-85 & n.20 (same).

79. *See St. Paul Mercury*, 303 U.S. at 294 (explaining that voluntary postremoval reduction of demand does not defeat federal jurisdiction).

the Court in *St. Paul Mercury* was whether a postremoval amendment could oust federal jurisdiction when at the time of removal the complaint demanded an amount sufficient for jurisdiction.[80] Red Cab Company originally sued St. Paul Mercury Indemnity Company in the Superior Court of Marion County, Indiana.[81] Red Cab alleged that St. Paul Mercury was liable for $4000 in damages for its failure to pay claims under a thirty-day insurance binder.[82]

St. Paul Mercury timely removed to federal district court after which Red Cab filed two amended complaints, the second of which contained an exhibit showing actual damages of $1,380.89.[83] Red Cab did not move to remand, however, and recovered $1,162.98 in a bench trial in the district court.[84] St. Paul Mercury appealed the decision to the United States Court of Appeals for the Seventh Circuit, which ruled that Red Cab's actual claim was below the jurisdictional amount of $3000 and that the district court had been without jurisdiction.[85] On appeal, the United States Supreme Court first ruled that for cases originally brought in federal court, the plaintiff's good faith demand controls jurisdiction, and "[i]t must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal."[86] The Court then concluded that dismissal would not have been justified if the plaintiff had brought the suit in federal court.[87] Observing that the defendant removed the case in question from state court, the Court further stated that principles governing remand strongly supported the suit remaining in federal court.[88]

The Court reasoned that in an original action the plaintiff has chosen a federal forum and a defendant may challenge the plaintiff's good faith in choosing that forum.[89] The Court then stated:

> 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.[90]

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80. *See id.* at 284 (stating question of case).

81. *Id.*

82. *Id.* at 284-85.

83. *Id.* at 285.

84. *Id.*

85. *Id.*

86. *Id.* at 288-89.

87. *Id.* at 290.

88. *Id.*

89. *Id.* The Court observed that in an original action in federal court, the plaintiff and defendant may have colluded to confer jurisdiction. *Id.* The Court also observed that in a removal situation a plaintiff's state court claim in excess of the jurisdictional minimum was not likely to have been made in a roundabout effort to reach federal court. *Id.* at 290-91.

90. *Id.*

Some commentators interpret this portion of the *St. Paul Mercury* decision as establishing differing standards for dismissal and removal: dismissal requires the appearance to a legal certainty that the plaintiff's claim is below the jurisdictional amount, but in a removal situation a court should strongly presume the validity of the plaintiff's claim.[91] Regardless, the Court in *St. Paul Mercury* confronted a removed action, and it found that in such a case, the plaintiff's complaint controls the status of the action.[92] Thus, subsequent events reducing the amount in controversy, whether at the instigation of the plaintiff or beyond the plaintiff's control, do not defeat federal jurisdiction.[93]

Modern federal courts generally interpret *St. Paul Mercury*'s "legal certainty" test as applying only to cases in which the plaintiff originally claims damages in excess of the jurisdictional amount, whether the plaintiff originally brings the case in federal court or in state court.[94] At least one federal district court has determined that the test applies only to motions to dismiss an original federal action and is inappropriate for a remand action regardless of the amount the plaintiff originally demands.[95] Thus, *St. Paul Mercury*

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91. *See, e.g.*, 16 MOORE ET AL., *supra* note 26, § 107.14[2][g][i], at 107–65 (stating that if amount in controversy is in doubt, Supreme Court in *St. Paul Mercury* drew "sharp distinction" between original jurisdiction and removal jurisdiction); 14C WRIGHT ET AL., *supra* note 1, § 3725, at 78 ("The judicial standard applied in removed cases to test the jurisdictional sufficiency of the amount in controversy when the plaintiff's complaint claims more than $75,000 is a simpler one, involving less strict scrutiny, than that applied to suits brought originally in federal court."); Quentin F. Urquhart Jr., *Amount in Controversy and Removal: Current Trends and Strategic Considerations*, 62 DEF. COUNS. J. 509, 515 (1995) (stating that "the Court in *St. Paul* set forth two completely distinct set of rules" for original actions and removed actions).

92. St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 291-92 (1938).

93. *Id.* at 293.

94. *See, e.g.*, Sanchez v. Monumental Life Ins. Co., 102 F.3d 398, 402 (9th Cir. 1996) (stating that *St. Paul Mercury* "legal certainty" test is only applicable when plaintiff pleads damages in excess of jurisdictional amount whether in state or federal court); Tapscott v. MS Dealer Serv. Corp., 77 F.3d 1353, 1356-57 (11th Cir. 1996) (rejecting "legal certainty" test in removal case in which plaintiff did not specify damages); Allen v. R&H Oil & Gas Co., 63 F.3d 1326, 1335 (5th Cir. 1995) (stating that "legal certainty" rule applies when plaintiff's demand exceeds jurisdictional amount, but plaintiff generally can bar defendant from removal by pleading less than jurisdictional amount); Gafford v. General Elec. Co., 997 F.2d 150, 160 (6th Cir. 1993) (stating that "legal certainty" test arose in case in which plaintiff's demand exceeded jurisdictional amount); Gaus v. Miles, Inc., 980 F.2d 564, 566-67 (9th Cir. 1992) (applying "preponderance of the evidence," not "legal certainty," standard when amount of plaintiff's damages was unclear); McCorkindale v. American Home Assurance Co., 909 F. Supp. 646, 651 (N.D. Iowa 1995) (stating that "legal certainty" rule applies only to cases in which plaintiff originally claims damages in excess of jurisdictional amount); Garza v. Bettcher Indus., Inc., 752 F. Supp. 753, 755 (E.D. Mich. 1990) (stating that *St. Paul Mercury*'s test "is limited in utility to cases in which the plaintiff himself has placed the requisite jurisdictional amount in controversy by requesting damages in excess of the jurisdictional amount").

95. *See* Landmark Corp. v. Apogee Coal Co., 945 F. Supp. 932, 935 n.2 (S.D. W. Va.

answers several removal questions while leaving others uncertain or unaddressed. First, the "legal certainty" test definitely applies to actions originally filed in federal court in which the plaintiff alleges damages in excess of the jurisdictional amount.[96] Second, after removal, a plaintiff may not reduce the original demand in order to return to state court.[97] However, the *St. Paul Mercury* decision leaves uncertain what standard applies when a plaintiff challenges jurisdiction after removal and the original complaint alleges damages exceeding the jurisdictional amount, although federal courts tend to extend the "legal certainty" test to such removal situations.[98] The *St. Paul Mercury* Court also did not address the question of what standard applies to a case in which the plaintiff does not specify damages and the defendant removes to federal court.[99] Finally, the Court did not address the question of

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1996) ("[T]he legal certainty test initially formulated by the United States Supreme Court in *Red Cab* is inappropriate for remand actions . . . .").

96. *See supra* notes 86-87 and accompanying text (discussing *St. Paul Mercury*'s test for dismissal).

97. *See supra* notes 80-93 and accompanying text (discussing central issue of *St. Paul Mercury* and its resolution that plaintiff's subsequent stipulation reducing demand has no effect on jurisdiction after removal).

98. *See* Gafford v. General Elec. Co., 997 F.2d 150, 157 (6th Cir. 1993) (finding general agreement among federal courts that "legal certainty" standard of *St. Paul Mercury* "should apply to cases removed to federal court from state court where the plaintiff's prayer for damages in the state suit exceeds the federal amount-in-controversy requirement"). *But see Landmark*, 945 F. Supp. at 935 ("[T]he 'legal certainty' test expressly applies only in instances in which a plaintiff invokes federal jurisdiction by filing a case in federal court."); Urquhart, *supra* note 91, at 515-16 (stating that although argument may be made for "legal certainty" test applying in remand situation, language of *St. Paul Mercury* indicates that plaintiff's allegation of jurisdictionally sufficient damages "fixes" right to remove and jurisdiction becomes essentially unchallengeable, thus "legal certainty" test should not apply to removed cases).

99. *See* Urquhart, *supra* note 91, at 516 (finding that *St. Paul Mercury* does not address all removal situations). Determining a defendant's right to remove a diversity case to federal court is especially problematic when a plaintiff does not specify the exact amount of damages sought and leaves the amount in controversy indeterminate. *See* Allen v. R&H Oil & Gas Co., 63 F.3d 1326, 1335-36 (5th Cir. 1995) (examining what constitutes acceptable proof to determine amount in controversy when plaintiff does not specify damages). Complaints with unspecified damages are increasingly common as "numerous states have enacted procedural rules prohibiting plaintiffs from stating damages in a complaint above a set amount." Karns, *supra* note 33, at 1092. United States courts of appeals have articulated the following three standards for a defendant to meet in showing that the jurisdictional amount truly is in controversy: (1) a defendant must show that it is legally certain that should the defendant lose the plaintiff will recover more than the jurisdictional amount, (2) a defendant must prove that the plaintiff's claim more likely than not meets the jurisdictional amount, or (3) a defendant must show by a preponderance of the evidence or to a reasonable probability that more than the jurisdictional amount is in controversy. *Id.* at 1093-94. Not only are the courts of appeals's decisions inconsistent, but district courts often misconstrue or misapply their circuit's standard. *Id.* at 1094, 1119. At least one commentator has favored the "preponderance of the evidence" standard when a defendant seeks to remove a case with unspecified damages. *See* Urquhart,

what standard should apply to a case in which a plaintiff specifies damages below the jurisdictional amount, yet a defendant still seeks to remove.[100] Of course, at the time, the Court's understanding that in such a case the defendant simply could not remove obviated the last question.[101]

### *E. The Effect of New Procedural Rules*

Now, however, a majority of states have counterparts to Federal Rule of Civil Procedure 54(c),[102] which, except in default cases, do not limit a plaintiff's recovery to the complaint's ad damnum, or damages, clause.[103] Rule

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*supra* note 91, at 516-17 (examining and approving of recent court of appeals cases adopting "preponderance of evidence" standard). Another commentator has suggested that modern courts should move beyond *St. Paul Mercury* and consider subsequent pleadings and stipulations in determining jurisdiction regardless of what standard governs removal jurisdiction. *See* Karns, *supra* note 33, at 1111-21 (examining recent court of appeals removal standards and concluding that courts should consider subsequent pleadings and stipulations when damages originally are unspecified because of state pleading rule).

One commentator has proposed a single standard—the party invoking federal jurisdiction must establish that it is not legally and not factually impossible for the plaintiff to recover more than the jurisdictional amount—to govern removal decisions for cases with either an "indeterminate complaint" or a "lowball complaint." *See* Alice M. Noble-Allgire, *Removal of Diversity Actions When the Amount in Controversy Cannot Be Determined from the Face of Plaintiff's Complaint: The Need for Judicial and Statutory Reform to Preserve Defendant's Equal Access to Federal Courts*, 62 MO. L. REV. 681, 699-728 (1997) (proposing judicial review of removed claims, whether indeterminate or lowball, under one form of reverse legal certainty standard). Alice M. Noble-Allgire has argued that the same removal standard that applies to indeterminate complaints should apply to complaints with specifically pleaded, jurisdictionally insufficient damages because many states' procedural rules permit recovery in excess of pleaded damages. *See id.* at 691-92. This Note, however, treats indeterminate and lowball complaints as presenting separate problems. It treats a plaintiff's ability to recover more than a specifically pleaded amount as a factor affecting a court's decision to allow a defendant to challenge a specific damage claim in the first place, not as a reason to equate indeterminate complaints with lowball complaints. *See infra* Part II.E; *see also infra* note 198 (discussing one federal court distinguishing between specific and indeterminate claims for damages).

100. *See* Burns v. Windsor Ins. Co., 31 F.3d 1092, 1096 n.6 (11th Cir. 1994) (finding that *St. Paul Mercury* is not applicable when defendant challenges plaintiff's specific jurisdictionally insufficient damages); Urquhart, *supra* note 91, at 517 (same).

101. *See supra* notes 67-69, 75-77 and accompanying text (discussing *St. Paul Mercury*'s assertion that plaintiff may ensure state court forum by pleading damages below jurisdictional amount).

102. FED. R. CIV. P. 54(c). Rule 54(c) states:

> A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings.

*Id.*

103. 14C WRIGHT ET AL., *supra* note 1, § 3725, at 96.

54(c) allows a trier of fact to grant relief to a party as it sees fit regardless of what the party demanded in its pleadings.[104] A specific claim for damages, however, must retain some usefulness. If courts view state counterparts to Rule 54(c) as putting an unlimited amount in controversy, then "the principle that a party may defeat removal by limiting the claim to less than the required amount would have no application in such states absent a binding stipulation on the matter."[105] Still, under state counterparts to Rule 54(c), a plaintiff may claim to seek less than the jurisdictional amount in order to stay in state court while actually seeking and potentially recovering damages in excess of the federal jurisdictional amount.[106]

This possibility of manipulation – the possibility that a plaintiff may deny a federal forum to a geographically diverse defendant yet may recover more than the jurisdictional amount – argues for reexamining *St. Paul Mercury*'s assumption that a jurisdictionally insufficient demand should always ensure a state forum.[107] However, at least one treatise author has contended that courts should follow the *St. Paul Mercury* decision and allow a plaintiff's good faith complaint to set the amount in controversy.[108] Otherwise, in states with rules similar to Rule 54(c), the state rules would effectively abolish the jurisdictional amount as a restriction on removal.[109] Nonetheless, federal courts are beginning to allow defendants to challenge plaintiffs' specific damage amounts because of a plaintiff's ability to recover more than pleaded.[110]

## *III. Removal Standards of the Fifth and Eleventh Circuits*

### *A.* Kliebert *Articulates the "Legal Certainty" Standard*

In *Kliebert v. Upjohn Co.*, the United States Court of Appeals for the Fifth Circuit considered the propriety of jurisdiction over a case removed from Louisiana state court in which the plaintiff sought specific damages less than

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104. FED. R. CIV. P. 54(c).

105. 14C WRIGHT ET AL., *supra* note 1, § 3725, at 96.

106. Gafford v. General Elec. Co., 997 F.2d 150, 157-58 (6th Cir. 1993).

107. *See De Aguilar II*, 47 F.3d 1404, 1410 (5th Cir. 1995) (arguing that potential plaintiff manipulation of damages to stay in state court calls for reexamination of *St. Paul Mercury*); Noble-Allgire, *supra* note 99, at 691-92 (stating that because of state versions of Rule 54(c), "the defendant's exposure may in fact be much greater than the federal jurisdictional cut-off").

108. *See* 14C WRIGHT ET AL., *supra* note 1, § 3725, at 98 ("The better practice is to treat the amount requested by the plaintiff in the state court as the amount in controversy.").

109. *See* 14C *id.* (discussing effect on removal of state rules tracking Federal Rule of Civil Procedure 54(c)).

110. *See De Aguilar II*, 47 F.3d at 1410 (observing that new pleading rules potentially permit "abusive manipulation by plaintiffs"); Burns v. Windsor Ins. Co., 31 F.3d 1092, 1096 n.6 (11th Cir. 1994) (declining to follow *St. Paul Mercury*'s "absolute standard" because that case was decided under different pleading rules).

the jurisdictional amount.[111] Applicable Louisiana law did not preclude plaintiffs from recovering judgments larger than originally sought in specifically pleaded ad damnums.[112] Although the Fifth Circuit subsequently agreed to rehear the case en banc,[113] after which the parties settled and dismissed the appeal,[114] an examination of the case forms the basis for further analysis of both the Fifth and Eleventh Circuits' opinions. In effect, *Kliebert* provides a bridge from the *St. Paul Mercury* decision to this Note's discussion of what burden a defendant should bear when attempting to remove a case to federal court that is facially unremovable because the plaintiff seeks specified damages below the jurisdictional amount.

In *Kliebert*, the plaintiff, Michael Anthony Kliebert, brought a products liability suit in Louisiana state court against five pharmaceutical companies that he alleged had manufactured and marketed certain tetracycline drugs.[115] Kliebert claimed that he had ingested the drugs as a child and that the drugs had discolored his permanent teeth.[116] He sought exactly $10,000 in damages, which was the federal jurisdictional amount of the time.[117]

The defendants removed the case to federal district court and contended that the plaintiff had not pleaded damages in good faith but had artfully concealed the actual amount in controversy in order to stay in state court.[118] Kliebert filed a motion to remand but later withdrew the motion.[119] The original federal district court judge had transferred Kliebert's case to a district court judge who previously had rejected remand motions in two similar actions that Kliebert's sister and her husband had instigated.[120] The district court granted the defendants' motions for summary judgment because Kliebert's childhood physician could not testify to having prescribed any particular tetracycline drug for Kliebert.[121] Kliebert timely appealed to the Fifth Circuit and argued that the district court did not have removal jurisdiction and that the court wrongly granted summary judgment for the defen-

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111. *See* Kliebert v. Upjohn Co., 915 F.2d 142, 144 (5th Cir. 1990) (considering challenge to removal jurisdiction), *vacated for reh'g en banc*, 923 F.2d 47 (5th Cir.), *appeal dism'd per stipulation of settlement*, 947 F.2d 736 (5th Cir. 1991).

112. *Id.* at 147.

113. Kliebert v. Upjohn Co., 923 F.2d 47, 47 (5th Cir.), *appeal dism'd per stipulation of settlement*, 947 F.2d 736 (5th Cir. 1991).

114. Kliebert v. Upjohn Co., 947 F.2d 736, 737 (5th Cir. 1991).

115. *Kliebert*, 915 F.2d at 144.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

dants.[122] The Fifth Circuit failed to reach Kliebert's second issue because it found that the district court lacked jurisdiction and remanded the case to state court.[123]

The *Kliebert* court began its consideration of removal jurisdiction by establishing that because the district court had entered judgment, the issue was not whether the case was properly removed, but whether the federal court would have had original jurisdiction had the plaintiff originally filed there.[124] The court then observed that the general federal rule is to determine the amount in controversy from the damages requested in the complaint, unless the plaintiff does not claim the amount in good faith.[125] The *Kliebert* court construed the *St. Paul Mercury* decision as concluding that a court must find lack of good faith if it appears to a legal certainty that the claim is below the jurisdictional amount.[126] Thus, the court found that to apply the *St. Paul Mercury* rule to cases in which the defendants removed a state court action originally seeking damages below the federal jurisdictional amount, the defendant has the burden of proving that the plaintiff underestimated the claim in bad faith.[127]

The *Kliebert* court then defined a removing defendant's burden.[128] The court observed that several district courts had adopted a "reverse legal certainty standard in cases with unspecified damages.[129] Under that standard, a removing defendant has the burden of proving that it does *not* appear to

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122. *Id.*

123. *Id.* at 147.

124. *Id.* at 145. The court stated:

> [W]here after removal a case is tried on the merits without objection and the federal court enters judgment, the issue in subsequent proceedings on appeal is not whether the case was properly removed, but whether the federal district court would have had original jurisdiction of the case had it been filed in that court.

*Id.* (quoting Grubbs v. General Elec. Credit Corp., 405 U.S. 699, 702 (1972)). The Ninth Circuit recently stated that courts should not read the *Grubbs* decision to say that the *St. Paul Mercury* "legal certainty" standard should apply in all removal cases. *See* Sanchez v. Monumental Life Ins. Co., 102 F.3d 398, 404 (9th Cir. 1996) (applying "preponderance of the evidence" standard to removing defendant in case with unspecified damages). Rather, once a district court rules on a case's merits because the plaintiff failed to properly contest removal, the plaintiff may not attack the removal *procedures* on appeal. *Id.* Still, the removing defendant bears the burden of establishing original federal jurisdiction if the plaintiff challenges subject matter jurisdiction on appeal. *Id.*

125. Kliebert v. Upjohn Co., 915 F.2d 142, 145 (5th Cir. 1990) (quoting Horton v. Liberty Mut. Ins. Co., 367 U.S. 348, 353 (1961)), *vacated for reh'g en banc*, 923 F.2d 47 (5th Cir.), *appeal dism'd per stipulation of settlement*, 947 F.2d 736 (5th Cir. 1991).

126. *Id.*

127. *Id.* at 146.

128. *Id.*

129. *See id.* (examining district court cases adopting "reverse legal certainty" standard).

a legal certainty that the claim is for less than the jurisdictional amount.[130] In essence, the defendant must show that there is *a probability* that the amount in controversy exceeds the jurisdictional minimum.[131] The court concluded that a defendant's showing that the plaintiff possibly would recover more than the jurisdictional amount is insufficient to establish the plaintiff's bad faith.[132] The court held that to establish a plaintiff's bad faith understatement of his claim, a defendant must show that a successful plaintiff would recover at least the jurisdictional minimum.[133] Under that standard, a trial court must look to the pleadings, or possibly summary judgment-type evidence, and conclude that it would have to grant a new trial if a jury awarded less than the jurisdictional amount.[134] In other words, a removing defendant must show to a *legal certainty* that the plaintiff's claim *exceeds* the jurisdictional amount.[135]

The *Kliebert* court observed that under its "legal certainty" standard, the *St. Paul Mercury* decision still applies to cases arising in states that confine a plaintiff's judgment to the ad damnum clause.[136] Consequently, in those states, a plaintiff could ensure a state court forum with a jurisdictionally insufficient claim.[137] Louisiana did not so limit judgments, and the court looked beyond Kliebert's complaint to ascertain the amount in controversy.[138] The defendants cited other tetracycline cases in which judgments ranged from $65,000 to $110,000.[139] However, the court observed that tetracycline discoloration varied.[140] The court determined that the defendants had not produced

130. *Id.*

131. *See id.* (examining district court cases simplifying "reverse legal certainty" standard to "a probability" standard). A plaintiff's claim is not legally certain to be less than the jurisdictional amount if there is a probability that the claim exceeds the jurisdictional amount. *See* Corwin Jeep Sales & Serv., Inc. v. American Motors Sales Corp., 670 F. Supp. 591, 595 (M.D. Pa. 1986) (citing Cunningham v. Ford Motor Co., 413 F. Supp. 1101, 1103 (D.S.C. 1976)).

132. Kliebert v. Upjohn Co., 915 F.2d 142, 146 (5th Cir. 1990), *vacated for reh'g en banc*, 923 F.2d 47 (5th Cir.), *appeal dism'd per stipulation of settlement*, 947 F.2d 736 (5th Cir. 1991).

133. *Id.*

134. *See id.* ("Under this standard, the trial court must be able to conclude from the pleadings or, at the most, summary judgment-type evidence, that if a jury awarded less than $10,000, the court would be required to grant a new trial.").

135. *Id.* at 147; *see* Burns v. Windsor Ins. Co., 31 F.3d 1092, 1095-96 (11th Cir. 1994) (characterizing *Kliebert* standard as "legal certainty" standard).

136. *Kliebert*, 915 F.2d at 146-47.

137. *Id.* at 147.

138. *Id.*

139. *Id.*

140. *Id.*

evidence of the severity of discoloration of Kliebert's teeth in comparison to the discoloration in the cited cases and thus could not establish that the amount in controversy here was between $65,000 and $110,000.[141] Thus, the defendants failed to carry their "legal certainty" burden.[142]

Circuit Judge E. Grady Jolly wrote a vigorous dissent in *Kliebert* in which he argued that the new "legal certainty" standard allows plaintiffs unscrupulously to manipulate jurisdiction.[143] He first asserted that the same standard of review should apply to the plaintiff's claim regardless of which party seeks a federal forum.[144] He further observed that a plaintiff filing originally in federal court could, under *St. Paul Mercury*, maintain jurisdiction by showing that the claim probably exceeds the federal jurisdictional amount.[145] The equivalent burden for a defendant seeking removal to federal court, he argued, would be one rejected by the majority: the defendant must show only that a probability exists that the claim exceeds the jurisdictional amount.[146] The dissent downplayed the importance that the majority gave to the plaintiff's choice of forum.[147] The dissent said:

> Although there may be valid reasons for a plaintiff choosing a state forum, which are independent of the amount of the claim, such valid reasons (e.g., allowable discovery, evidentiary questions, and jury or judge characteristics) cannot constitute good faith as to the allegation of jurisdictional amount when the jurisdictional question, and hence the specific good faith question, focuses only on whether the *amount* alleged forecloses jurisdiction; in other words, the question of bad faith for the purposes of jurisdiction is whether the amount of the claim alleged in the state court complaint is "colored" to avoid federal jurisdiction, for whatever reason.[148]

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141. *Id.*

142. *Id.*

143. *Id.* at 148 (Jolly, J., dissenting).

144. *See id.* at 147 (Jolly, J., dissenting) ("No matter which party brings it into court, the controversy remains the same; it involves the same amount of money and is to be adjudicated and determined under the same rules." (quoting Horton v. Liberty Mut. Ins. Co., 367 U.S. 348, 354 (1961))).

145. *Id.* (Jolly, J., dissenting). If a defendant cannot show to a legal certainty that the amount in controversy is jurisdictionally insufficient, then a plaintiff has avoided dismissal because a probability exists that the claim is jurisdictionally sufficient. *See* Jeffries v. Silvercup Bakers, Inc., 434 F.2d 310, 311-12 (7th Cir. 1970) (concluding that plaintiff must show only "a probability" of recovering more than jurisdictional amount in order to stay in federal court).

146. Kliebert v. Upjohn Co., 915 F.2d 142, 147-48 (5th Cir. 1990) (Jolly, J., dissenting), *vacated for reh'g en banc*, 923 F.2d 47 (5th Cir.), *appeal dism'd per stipulation of settlement*, 947 F.2d 736 (5th Cir. 1991); *see* Noble-Allgire, *supra* note 99, at 728 (making same argument).

147. *Kliebert*, 915 F.2d at 148 (Jolly, J., dissenting).

148. *Id.* (Jolly, J., dissenting).

The dissent sought to place plaintiffs and defendants on equal footing concerning choice of forum and in effect proposed giving choice of forum no role in jurisdictional analysis.[149]

Neither the *Kliebert* majority nor the dissent was prepared to find the *St. Paul Mercury* decision inapplicable when a plaintiff challenges jurisdiction after a defendant removes from a state court system that does not limit damages to those pleaded.[150] Rather, both recognized that a plaintiff's complaint would not control the question of jurisdiction if made in bad faith.[151] Their disagreement arose over the severity of a removing defendant's burden when the defendant attempts to show that a plaintiff has filed a bad faith complaint in order to stay in state court.[152]

### *B.* Burns *Adopts* Kliebert*'s "Legal Certainty" Standard*

Four years later, in *Burns v. Windsor Insurance Co.*, the Eleventh Circuit utilized the "legal certainty" approach that the Fifth Circuit recognized but never established as precedent because it vacated the *Kliebert* opinion and then dismissed the appeal.[153] *Burns* began in Alabama state court where Jacqueline Burns sued Windsor Insurance Company for fraud, breach of contract, bad faith failure to pay an insurance claim, and negligence arising from a coverage dispute.[154] Burns sought no more than $45,000 damages, $5000 below the jurisdictional amount at the time.[155] Windsor removed based on diversity, and Burns sought remand.[156] Windsor claimed that Burns was trying to manipulate jurisdiction.[157] The district court denied Burns's

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149. *See id.* at 149 (Jolly, J., dissenting) ("I would think, that choice of forum should not play even an indirect determining role in the jurisdictional analysis.").

150. *See supra* notes 125-27, 144-45 and accompanying text (discussing *Kliebert* majority's and dissent's uses of reasoning from *St. Paul Mercury*).

151. *See supra* notes 125-26, 147-48 and accompanying text (discussing *Kliebert* majority's and dissent's considerations of bad faith complaints).

152. *See supra* notes 143-49 and accompanying text (discussing *Kliebert* dissent's point of disagreement with majority).

153. *See* Burns v. Windsor Ins. Co., 31 F.3d 1092, 1095-96 & n.7 (11th Cir. 1994) (finding *Kliebert* court's reasoning "instructive" although case has no precedential value).

154. *Id.* at 1093-94.

155. *Id.* at 1094.

156. *Id.*

157. *Id.* Windsor worried that because 28 U.S.C. § 1446(b) absolutely limits to one year the time during which a defendant can remove, Burns could wait a year and amend her complaint to seek damages above the jurisdictional amount. *Id.* at 1094 n.4. In that case, Windsor could not remove. *Id.* The court, however, dismissed Windsor's argument in a footnote. *Id.* The court stated that congressional action, not judicial action, should remedy the potential for manipulation. *Id.*

motion to remand when Burns refused to agree never to seek more than $49,999.[158] After the court entered summary judgment for Windsor, Burns appealed.[159]

The Eleventh Circuit began its opinion by finding that the case differed from the typical diversity case in which the plaintiff originally seeks damages above the jurisdictional amount in federal court.[160] The court also found that the case was not a typical removal case in which the plaintiff begins in state court seeking more than the jurisdictional amount.[161] The court then recognized that a plaintiff still controls the claim.[162] In this case, the face of the plaintiff's complaint demanding only $45,000 did not confer jurisdiction on the district court.[163] However, the court did not end its inquiry with that determination.

The Eleventh Circuit rejected the conclusion of both *Iowa Central* and *St. Paul Mercury* that a defendant, as a matter of law, cannot remove a case in which a plaintiff seeks less than the jurisdictional amount.[164] The court then attempted to define the burden that a defendant must meet to prove jurisdiction in the face of a plaintiff's jurisdictionally insufficient claim.[165] The court relied on the ethical obligations of counsel in stating that a plaintiff's specific claim in a pleading signed by a lawyer deserves a presumption of truth.[166] Therefore, the defendant's burden must be heavy, and further, a strict standard comports with case law and Congress's policy of limiting diversity jurisdiction.[167] The court concluded that to avoid a remand a defendant must prove to a legal certainty that plaintiff's counsel has falsely or incompetently valued the claim.[168] Thus, the "defendant must prove to a legal certainty that plaintiff's claim must exceed [the jurisdictional amount]."[169]

While the Eleventh Circuit agreed with much of *Kliebert*'s reasoning, it stressed that the "legal certainty" standard is objective.[170] The subjective

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158. *Id.* at 1094.

159. *Id.* at 1094 n.3.

160. *Id.* at 1094.

161. *Id.*

162. *Id.* at 1095.

163. *Id.*

164. *Id.* at 1096 n.6.

165. *See id.* at 1095 ("[T]he critical question is to what extent must defendant prove jurisdiction exists despite plaintiff's express claim to less than the minimum jurisdictional sum.").

166. *Id.*

167. *Id.* at 1095-96.

168. *Id.* at 1095.

169. *Id.*

170. *Id.* at 1096.

intent of the plaintiff or plaintiff's counsel is irrelevant.[171] However, the court declined to follow *Kliebert* to the extent that the earlier decision holds that the defendant must always prove the plaintiff's bad faith to prevail.[172] The *Kliebert* court had adhered to the *St. Paul Mercury* decision by allowing a plaintiff's good faith demand to control jurisdiction but allowing a defendant to maintain federal jurisdiction by showing bad faith pleading.[173] The *Burns* court took a further step. By declining to follow *St. Paul Mercury*, the court, in essence, found that modern procedural rules which do not limit damages superseded *St. Paul Mercury*.[174] Thus, a defendant may freely challenge the jurisdiction-limiting aspect of a plaintiff's specific demand for damages, but a defendant must bear the heavy "legal certainty" burden.[175] The court found that the rule proposed by Windsor – a "reverse legal certainty" rule that would allow federal jurisdiction if the plaintiff could possibly recover more than the jurisdictional amount – would unacceptably expand removal jurisdiction based on diversity.[176]

The *Burns* court went on to find that Windsor had not met its heavy burden.[177] Windsor had made only conclusory allegations and offered no proof that Burns had grossly undervalued her claim.[178] The court of appeals vacated the district court's decision and remanded the case to Alabama state court.[179] The Eleventh Circuit had allowed Windsor to challenge Burns's specific damages, and Windsor failed to show to a legal certainty that the damages were jurisdictionally sufficient.[180] One year later, the Fifth Circuit rejected the reasoning of the Eleventh Circuit in *Burns* as well as that of its earlier opinion in *Kliebert* and adopted the lighter "preponderance of the evidence" burden for a removing defendant.[181]

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171. *Id.*

172. *Id.* at 1096 n.10.

173. *See infra* notes 125-27 and accompanying text (discussing *Kliebert* court's incorporation of reasoning of *St. Paul Mercury* decision).

174. *See* Burns v. Windsor Ins. Co., 31 F.3d 1092, 1096 n.6 (11th Cir. 1994) (declining to follow *St. Paul Mercury* and *Iowa Central* "because these cases were decided when different rules about pleading damages (in general, much more strict) and about jurisdiction were in effect").

175. *Id.* at 1095.

176. *Id.* at 1096-97.

177. *Id.* at 1097.

178. *Id.*

179. *Id.*

180. *Id.*

181. *See infra* Part III.C (discussing *De Aguilar II*, 47 F.3d 1404 (5th Cir. 1995)).

### *C.* De Aguilar II *Adopts the "Preponderance of the Evidence" Standard*

In *De Aguilar v. Boeing Co. (De Aguilar II)*, the Fifth Circuit again confronted the question raised in *Kliebert*: What burden should a removing defendant meet to show that the requisite amount truly is in controversy when the plaintiff specifically pleads damages below the federal jurisdictional amount?[182] This time though, the court found that an equitable standard would require a defendant to show by a preponderance of the evidence that the amount in controversy actually exceeds the jurisdictional amount.[183] The Fifth Circuit stated that its past decisions had favored parties seeking federal jurisdiction.[184] The court then found that the "preponderance of the evidence" standard seemed more congruent with that philosophy than did the stricter standard of *Kliebert*.[185]

The tortuous procedural path of the case ultimately decided in *De Aguilar II* began on March 31, 1986, when a Mexicana Airlines jet crashed near Mexico City killing everyone on board.[186] Relatives and personal representatives of the estates of the victims unsuccessfully sought a United States forum for lawsuits at several venues in Illinois, Texas, and Washington.[187] In one of those cases, the United States District Court for the Eastern District of Texas dismissed the plaintiffs' claims on forum non conveniens grounds.[188] The plaintiffs appealed to the Fifth Circuit arguing that the district court should have applied state law and that under Texas common law the doctrine of forum non conveniens did not apply to their wrongful death action.[189] In *De Aguilar v. Boeing Co. (De Aguilar I)*,[190] the Fifth Circuit affirmed the district

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182. *See De Aguilar II*, 47 F.3d 1404, 1408 (5th Cir. 1995) (regarding plaintiff's claim as one for specific, jurisdictionally insufficient amount and seeking to determine defendant's burden for establishing federal jurisdiction).

183. *Id.* at 1412.

184. *Id.* at 1411 (citing Kliebert v. Upjohn Co., 915 F.2d 142, 145 (5th Cir. 1990) (Jolly, J., dissenting), *vacated for reh'g en banc*, 923 F.2d 47 (5th Cir.), *appeal dism'd per stipulation of settlement*, 947 F.2d 736 (5th Cir. 1991)).

185. *Id.* at 1411-12.

186. *Id.* at 1406.

187. *See id.* at 1406-07 & n.1 (listing earlier cases in which parties voluntarily dismissed actions or courts dismissed actions on basis of foreign sovereign immunity or forum non conveniens).

188. *See* De Aguilar v. Boeing Co., 806 F. Supp. 139, 145 (E.D. Tex. 1992) (applying federal law of forum non conveniens and dismissing plaintiffs' claims), *aff'd*, 11 F.3d 55 (5th Cir. 1995).

189. *See* De Aguilar v. Boeing Co., 11 F.3d 55, 56 (5th Cir. 1993) [hereinafter *De Aguilar I*] (discussing plaintiffs' basis for appeal to court of appeals).

190. 11 F.3d 55 (5th Cir. 1993).

court's application of federal forum non conveniens law to a motion to dismiss a diversity action to a foreign forum.[191]

Undeterred, several heirs of the decedents again filed suit in Texas state court and, in contravention of Texas procedural rules, specified damages below the federal jurisdictional amount in an effort to prevent removal.[192] The defendants, including Boeing, Delta Airlines, B.F. Goodrich, and Goodyear Tire and Rubber, again removed to federal court in the Eastern District of Texas arguing that the plaintiffs did not have the authority to limit damages.[193] When the plaintiffs moved to remand, they provided the district court with an affidavit from one of their attorneys swearing that she had explicit authority from each of the named plaintiffs to limit damages.[194] The district court denied the motion to remand and granted the defendants' subsequent motion to dismiss on forum non conveniens grounds.[195] On appeal, the Fifth Circuit observed that in *De Aguilar I* it had affirmed the district court's dismissal on forum non conveniens grounds.[196] Therefore, if the court were to find federal jurisdiction in *De Aguilar II*, the forum non conveniens dismissal would be the law of the case.[197]

The *De Aguilar II* court began its jurisdictional inquiry by determining that it would regard the plaintiffs' complaint as one for a specific amount of damages below the jurisdictional amount although the plaintiffs simply had said that they were seeking less than $50,000.[198] The court then examined *St.*

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191. *See De Aguilar I*, 11 F.3d 55, 58 (5th Cir. 1993) (confirming that federal, not Texas, law applied in resolving forum non conveniens issue). In *De Aguilar I*, the Fifth Circuit established that when a plaintiff does not specify damages, the removing defendant must prove the jurisdictional amount by a preponderance of the evidence. *Id.* Relatives and representatives of estates of victims of a 1986 Mexicana Airlines crash brought a wrongful death action in Texas state court against the airplane manufacturer, among others. *Id.* at 56-57. The defendants removed to federal district court, and the court dismissed the action on forum non conveniens grounds. *Id.* at 57. On appeal to the Fifth Circuit, the court found that the complaint, although for unspecified damages, on its face sought damages exceeding the jurisdictional amount because it sought damages for wrongful death. *Id.* Further, the court found that the defendants easily had met their burden of proof by showing that the plaintiffs had sought up to $5 million in other venues. *Id.* at 58. The court of appeals also found that the district court did not err in applying federal law of forum non conveniens and agreed with the district court that Mexico would be a more convenient forum. *Id.* at 58-59. Consequently, the district court had jurisdiction over the case and its disposition was proper. *Id.* at 59.

192. *De Aguilar II*, 47 F.3d 1404, 1407 (5th Cir. 1995).

193. *Id.*

194. *Id.* at 1408.

195. *Id.*

196. *Id.* at 1408 n.3.

197. *Id.*

198. *See id.* at 1408. ("As a functional matter, plaintiffs are attempting to avoid federal jurisdiction."). The court stated that by treating the plaintiffs' complaint as demanding a

*Paul Mercury* and found that its legal certainty test only applied to typical diversity and typical removal situations.[199] *De Aguilar II* was not a typical case because the plaintiffs, "in a bold effort to avoid federal court," pleaded jurisdictionally insufficient damages.[200] The court still found *St. Paul Mercury* instructional, however, and concluded that a plaintiff's bad faith pleading will not control jurisdiction.[201] The court further observed that state procedural rules that do not limit damage awards to the amount pleaded in the ad damnum open the door for plaintiffs to manipulate pleadings to stay in state court yet ultimately recover more than the jurisdictional amount.[202] The court stated that "[s]uch manipulation is surely characterized as bad faith."[203] To avoid plaintiff manipulation, the *De Aguilar II* court held that if a defendant can show that the amount in controversy actually is jurisdictionally sufficient, then to justify remand, a plaintiff must show to a legal certainty that recovery is limited to requested damages.[204]

The *De Aguilar II* court then attempted to define a removing defendant's particular burden.[205] The court examined the *Kliebert* "legal certainty" standard and determined that the standard was too strict.[206] Additionally, the court found the "some possibility" and "reverse legal certainty" standards to be too permissive.[207] The court stated that *to some extent* the plaintiff is still the master of the complaint.[208] Accordingly, the court adopted an intermediate approach.[209] "[T]he plaintiff's claim remains presumptively correct unless the defendant can show by a preponderance of the evidence that the amount in controversy is greater than the jurisdictional amount."[210] The court stated that

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specific amount, the court rendered inapposite prior decisions in which plaintiffs did not specify damages. *Id.* at 1048 & n.4. At the time, the federal jurisdictional amount for diversity cases was $50,000. *Id.* at 1406.

199. *Id.* at 1409.

200. *Id.* at 1409-10.

201. *Id.* at 1410.

202. *See id.* ("The majority of states now . . . have followed the example of FED.R.CIV.P. 54(c) and do not limit damage awards to the amount specified in the *ad damnum* clause of the state pleading."). The court also observed that Texas and many other states had enacted rules which prohibit plaintiffs from pleading specific amounts in cases in which damages are unliquidated. *Id.*

203. *Id.*

204. *Id.* at 1411.

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.* at 1411-12.

209. *Id.* at 1412.

210. *Id.*

a defendant, however, must do more than point out that state law might allow the plaintiff to manipulate the complaint.[211]

The Fifth Circuit explained that once a defendant has removed a case by meeting its preponderance of the evidence burden, the case becomes analogous to *St. Paul Mercury*.[212] Consequently, the federal court will retain jurisdiction unless the plaintiff can show to a legal certainty that the jurisdictional amount is not in controversy.[213] The court speculated that a plaintiff's state complaint might cite state law limiting damages to the pleaded amount and prohibiting amendments increasing the ad damnum.[214] In states without these statutes, the plaintiff must file a binding stipulation or affidavit with the complaint.[215] The court stated that stipulations after removal do not affect jurisdiction according to *St. Paul Mercury*.[216]

The *De Aguilar II* court observed that the *De Aguilar I* court already had determined that the amount in controversy exceeded the federal jurisdictional amount.[217] The court also found that Texas law, not Mexico law, should apply to the case, and, therefore, the plaintiffs had not shown that they could legally limit their respective damages to below $50,000.[218] Consequently, the district court had jurisdiction, and the Fifth Circuit affirmed the lower court's dismissal of the case.[219]

By finding federal jurisdiction in *De Aguilar II*, the Fifth Circuit cleanly disposed of the case because its prior dismissal on forum non conveniens grounds in *De Aguilar I* controlled the case as long as that federal decision could apply.[220] Whether the Fifth Circuit favored federal jurisdiction because of the unique procedural history of the case is a matter of speculation. However, the court clearly adopted a lighter burden for a removing defendant than

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211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *See id.* at 1413-15 (discussing plaintiffs' claim that Mexican law should apply allowing plaintiffs legally to limit their respective claims to below jurisdictional amount as lawful heirs of decedents). The plaintiffs sought a Texas state forum because forum non conveniens would not apply, but they wanted to apply Mexican law in getting there. *Id.* at 1413. The Fifth Circuit concluded that Texas law should apply and that under Texas law, the plaintiffs had not alleged the necessary elements to be considered legal heirs. *Id.* at 1414-15. Without proving that they were legal heirs, the plaintiffs had no authority to limit their damages. *Id.* at 1415.

219. *Id.*

220. *See supra* notes 196-97 and accompanying text (discussing disposition of case in *De Aguilar II* if court found federal jurisdiction).

did the Eleventh Circuit,[221] and the Fifth Circuit appears to have drawn that lighter standard from cases that materially differed from *De Aguilar II*.[222]

Early in its *De Aguilar II* opinion, the Fifth Circuit stated that it would treat the plaintiffs' claim as one for a specific amount of damages below the jurisdictional amount.[223] Thus, the court rendered inapposite earlier decisions in cases in which plaintiffs claimed unspecified damages.[224] However, when the court established a burden for a defendant seeking to remove an action with specific, jurisdictionally insufficient damages, the court looked to *De Aguilar I* – a case in which the plaintiffs did not specify damages – for the "preponderance of the evidence" burden.[225] The court in *De Aguilar I* had adopted the standard that the Ninth Circuit and the United States District Court for the Eastern District of Michigan articulated in cases dealing with unspecified damages.[226] Those courts in turn had looked to a 1936 United States Supreme Court case – again, one with unspecified damages – for the "preponderance of the evidence" standard.[227] Consequently, the *De Aguilar II* court, after distinguishing its case from decisions concerning unspecified damages, rendered that distinction meaningless.[228] Should a defendant wish to remove a case filed in state court within the Fifth Circuit, the burden to establish the requisite amount in controversy is the same whether the plaintiff claims unspecified damages or claims a specific amount below the jurisdictional amount.[229]

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221. *See De Aguilar II*, 47 F.3d 1404, 1411 (5th Cir. 1995) (finding "legal certainty" burden too strict).

222. *See infra* notes 223-29 and accompanying text (discussing *De Aguilar II*'s derivation of "preponderance of the evidence" standard).

223. *De Aguilar II*, 47 F.3d at 1408.

224. *Id.* at 1408 & n.4.

225. *Id.* at 1411.

226. *See De Aguilar I*, 11 F.3d 55, 58 (5th Cir. 1993) (adopting "preponderance of the evidence" standard of *Gaus v. Miles, Inc.*, 980 F.2d 564, 567 (9th Cir. 1992), and *Garza v. Bettcher Industries, Inc.*, 752 F. Supp. 753, 763 (E.D. Mich. 1990), in case with unspecified damages).

227. *See* Gaus v. Miles, Inc., 980 F.2d 564, 567 (9th Cir. 1992) (adopting standard of *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936), in case with unspecified damages); Garza v. Bettcher Indus., Inc., 752 F. Supp. 753, 763 (E.D. Mich. 1990) (same).

228. *See supra* notes 223-27 and accompanying text (discussing *De Aguilar II* court's use of standard from inapposite cases).

229. *Compare De Aguilar I*, 11 F.3d at 58 (stating that "preponderance of the evidence" burden applies in cases with unspecified damages) *with De Aguilar II*, 47 F.3d 1404, 1411 (5th Cir. 1995) (stating that same test applies when plaintiff pleads specific amount of damages). In 1995, the Fifth Circuit in *Allen v. R&H Oil & Gas Co.*, 63 F.3d 1326 (5th Cir. 1995), returned to the question of the burden of proof for a removing defendant when a plaintiff does not specify damages. *Id.* at 1335. Although the court insisted that the "plaintiff remains the

## *IV. Choosing the Proper Standard*

### *A. The "Reverse Legal Certainty" Standard and Expanding Federal Jurisdiction*

Between the *Kliebert* dissent and the majority opinions of *De Aguilar II* and *Burns*, three distinct burdens for removing defendants to establish the amount in controversy – "reverse legal certainty," "preponderance of the evidence," and "legal certainty" – found advocates. The *Kliebert* dissent argued that the "reverse legal certainty" standard, the most lenient of the three, is appropriate because it imposes the same burden on a removing defendant as the *St. Paul Mercury* "legal certainty" burden places on a plaintiff who originally files in federal court.[230] The *Burns* court rejected this rationale and stated that a plaintiff's choice of forum deserves more deference than a defendant's right to remove.[231] On that point the *De Aguilar II* court agreed with the *Burns* opinion.[232] The *De Aguilar II* court found that a test which merely requires a removing defendant to show that a plaintiff *could* recover more than the jurisdictional amount is too permissive.[233] Both the Sixth Circuit[234] and the Ninth Circuit[235] have agreed that adoption of the "reverse legal certainty" or "some possibility" standard, even in cases with unspecified damages, will unreasonably expand federal diversity jurisdiction. If the "reverse legal certainty" standard is inapplicable when damages are indeterminate on the

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master of his complaint," the court stated that *De Aguilar II*'s "preponderance of the evidence" standard applies when a plaintiff specifies damages. *Id.* at 1335 & n.14. The court, citing *De Aguilar I*, then reaffirmed its adoption of the "preponderance of the evidence" standard when a plaintiff does not specify damages. *Id.* at 1335.

230. *See supra* notes 143-46 and accompanying text (discussing *Kliebert* dissent's argument for equality of burdens on removing defendants and plaintiffs filing in federal court); *see also* Noble-Allgire, *supra* note 99, at 728 (arguing that removing defendants and plaintiffs filing in federal court should bear same burden of showing that it is not legally and factually impossible for plaintiff to recover more than jurisdictional amount).

231. *See* Burns v. Windsor Ins. Co., 31 F.3d 1092, 1095 (11th Cir. 1994) ("Defendant's right to remove and plaintiff's right to choose his forum are not on equal footing; for example, unlike the rules applied when plaintiff has filed suit in federal court with a claim that, on its face, satisfies the jurisdictional amount, removal statutes are construed narrowly . . . .").

232. *See De Aguilar II*, 47 F.3d at 1411 (citing *Burns* for proposition that "reverse legal certainty" test is unduly light burden for removing defendant).

233. *Id.*; *see* 14C WRIGHT ET AL., *supra* note 1, § 3725, at 91-92 ("The most lenient burden . . . requires the defendant merely to show that it does *not* appear to a legal certainty that the amount in controversy falls below the applicable jurisdictional amount." (footnote omitted)).

234. *See* Gafford v. General Elec. Co., 997 F.2d 150, 158-59 (6th Cir. 1993) (discussing standards for removal in light of limited nature of federal jurisdiction).

235. *See* Sanchez v. Monumental Life Ins. Co., 102 F.3d 398, 403 (9th Cir. 1996) (stating that "reverse legal certainty" test "may result in an unwarranted expansion of federal diversity jurisdiction").

face of the complaint, the standard should apply *a fortiori* when a plaintiff specifies damages. A plaintiff seeking specific damages below the jurisdictional amount in state court not only evinces a desire for a state forum, but the plaintiff's claim is presumptively correct unless made in bad faith.[236] A defendant who can show that a prevailing plaintiff possibly could recover more than the jurisdictional amount still falls far short of showing that the plaintiff has manipulated the complaint in a bad faith attempt to remain in state court and yet ultimately recover more than the jurisdictional amount.

### *B. The "Preponderance of the Evidence" Standard and Unspecified Damages*

Although the "reverse legal certainty" standard may be too permissive even when damages are unspecified, several courts of appeals agree that in these cases the defendant's burden should be lighter than if the plaintiff pleads specific jurisdictionally insufficient damages.[237] Courts adopting the "preponderance of the evidence" burden for defendants removing cases with unspecified damages generally acknowledge that the standard strikes the proper balance between a plaintiff's right to choose the forum and the defendant's

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236. *See* St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 288 (1938) (stating that sum claimed by plaintiff controls jurisdiction if made in good faith). In *Kliebert*, the court allowed the removing defendants to challenge the plaintiff's good faith in making his damages claim rather than preventing the defendants' removal as a matter of law. *See supra* notes 125-27 and accompanying text (examining how *Kliebert* decision adapted *St. Paul Mercury* decision to allow defendants to challenge plaintiff's jurisdictionally insufficient claim). In *Burns*, the court agreed that a jurisdictionally insufficient claim does not bar removal as a matter of law because rules governing pleading and recovery are now less strict than when the Supreme Court decided *Iowa Central* and *St. Paul Mercury*. *See Burns*, 31 F.3d at 1096 n.6 (explaining court's unwillingness strictly to adhere to *Iowa Central* and *St. Paul Mercury* decisions). "But, these cases do support the fundamental principle that plaintiff is the master of his own claim." *Id.* The *Burns* court, however, went further than the *Kliebert* court and allowed a removing defendant to challenge not only a plaintiff's good faith but also the claim itself, albeit with a heavy burden of proof. *Id.* at 1096 & n.10. The *De Aguilar II* court more closely adhered to the rationale of *Kliebert* on this point and determined that a plaintiff's manipulating the complaint to stay in state court but recovering more than the jurisdictional amount "is surely characterized as bad faith." *De Aguilar II*, 47 F.3d 1404, 1410 (5th Cir. 1995). Consequently, the *De Aguilar II* court allowed the removing defendants the opportunity to show that the amount in controversy actually exceeded the jurisdictional amount. *Id.* at 1411.

237. *See Sanchez*, 102 F.3d at 403 (determining that "preponderance of the evidence" burden strikes proper balance between interests of plaintiffs and defendants when plaintiff does not specify damages); Tapscott v. MS Dealer Serv. Corp., 77 F.3d 1353, 1356-57 (11th Cir. 1996) ("Where a plaintiff has made an unspecified demand for damages, a lower burden of proof is warranted because there is simply no estimate of damages to which a court may defer."); *Gafford*, 997 F.2d at 160 (stating that in cases in which plaintiff does not specify damages, plaintiff's claim cannot determine amount in controversy and strict "legal certainty" test should not apply).

right to remove.[238] Not coincidentally, commentators have praised *De Aguilar II*'s adoption of the "preponderance of the evidence" standard as finding an equitable balance between these competing interests.[239] Further, federal district courts have cited *De Aguilar II* when applying the "preponderance of the evidence" standard to cases with unspecified damages.[240]

However, the *De Aguilar II* court adopted the "preponderance of the evidence" standard for cases with *specific* jurisdictionally insufficient damages.[241] The *De Aguilar II* court found its rationale for adopting the "preponderance of the evidence" standard in prior Fifth Circuit opinions which concluded that the standard for establishing jurisdiction should favor the party seeking the federal forum.[242] Further, the court cited a Fifth Circuit opinion which stated that plaintiffs should not be able to destroy the jurisdictional choice that Congress gave defendants through the removal statute.[243]

By favoring removing defendants with a less strict standard, the Fifth Circuit ignored the widely held beliefs that courts should construe the removal statute narrowly and that courts should resolve doubts about jurisdiction in favor of remand.[244] The United States Supreme Court in *Shamrock Oil & Gas*

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238. *See Tapscott*, 77 F.3d at 1357 ("The proper balance between a plaintiff's right to choose his forum and a defendant's right to remove, without unnecessarily expanding federal diversity jurisdiction, is struck by a 'preponderance of the evidence' standard."); *Gafford*, 997 F.2d at 160 ("We believe that the mean between the extremes unsettles to the least extent the balance struck between the defendant's right to remove and the federal interest in limiting diversity jurisdiction.").

239. *See* Lawrence W. Moore, S.J., *Federal Jurisdiction and Procedure*, 41 LOY. L. REV. 469, 481 (1995) (stating that *De Aguilar II*'s standard "seems a sensible and durable equilibrium point on which to balance the parties' interests"); Urquhart, *supra* note 91, at 519 (stating that standard of *De Aguilar II* is more equitable than *Burns*'s standard).

240. *See, e.g.*, Ace Pest Control Co. v. Kmart Corp., 979 F. Supp. 443, 445 (E.D. La. 1997) (citing *De Aguilar II* and adopting its "preponderance of the evidence" standard for case with unspecified damages); Mercante v. Preston Trucking Co., No. CIV.A. 96-5904, 1997 WL 230826, at *2 (E.D. Pa. May 1, 1997) (same); Duhon v. Conoco, Inc., 937 F. Supp. 1216, 1221 (W.D. La. 1996) (same); *In re* Norplant Contraceptive Prods. Liab. Litig., 918 F. Supp. 178, 180 (E.D. Tex. 1996) (same).

241. *See supra* note 198 and accompanying text (discussing *De Aguilar II* court's treatment of case as one for specific damages).

242. *See De Aguilar II*, 47 F.3d 1404, 1411 (5th Cir. 1995) ("As the dissenting judge indicated in *Kliebert*, the strict test adopted by the *Kliebert* majority 'seems to conflict with our past decisions that have stated that the standard for determining jurisdictional amount should favor "those parties seeking to invoke the jurisdiction of a federal district court."'").

243. *See id.* ("This court has spoken adamantly of 'preventing the plaintiff from being able to destroy the jurisdictional choice that Congress intended to afford a defendant in the removal statute.'" (quoting Boelens v. Redman Homes, Inc., 759 F.2d 504, 507 (5th Cir. 1985))).

244. *See* Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994) (stating that federal courts are courts of limited jurisdiction, thus presumption is that causes lie outside

*Corp. v. Sheets*[245] insisted that congressional intent called for a strict construction of the removal statute.[246] The *Shamrock* Court also emphasized that a strong concern for the "rightful independence of state governments" should guide federal courts when they consider jurisdiction questions.[247] Several federal district courts have advanced an additional rationale for preferring remand: the unfairness of exposing a plaintiff to the possibility of obtaining a final judgment in federal court only to have an appeals court determine that the district court lacked jurisdiction to decide the case on its merits.[248]

Many federal courts of appeals have followed the reasoning of the *Shamrock* decision and have preferred remand over removal.[249] For courts to con-

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jurisdiction until proved otherwise); Turner v. Bank of North-America, 4 U.S. (4 Dall.) 8, 11 (1799) (same); CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS 237 (4th ed. 1983) ("A great many cases might be cited for the proposition that if federal jurisdiction is doubtful the case should be remanded."); 14C WRIGHT ET AL., *supra* note 1, § 3739, at 446 n.28 (collecting cases).

245. 313 U.S. 100 (1941).

246. *See* Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 108 (1941) (stating that successive acts of Congress regulating federal jurisdiction indicate intent for strict construction of removal statute). In *Shamrock*, the Court considered whether a diverse plaintiff facing a jurisdictionally sufficient counterclaim could remove that state action to federal court. *Id.* at 103. The Court concluded that the plaintiff could not remove. *Id.* at 108-09. The plaintiff argued that removal was proper because the counterclaim in essence made it a defendant for the purposes of the removal statute. *Id.* at 104. However, the Court focused on the meaning of the statute rather than on a party's self-characterization. *Id.* The Court concluded that Congress intended a narrow interpretation of the removal statute. *Id.* at 107-08. Thus, a plaintiff facing a counterclaim was not a "defendant" within the meaning of the removal statute. *Id.* at 108. The Court affirmed the court of appeals's remand of the case to state court. *Id.* at 109.

247. *Id.* at 108-09 (quoting Healy v. Ratta, 292 U.S. 263, 270 (1934)); *see* Healy v. Ratta, 292 U.S. 263, 270 (1934) ("Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined."); *see also* Progressive Specialty Ins. Co. v. Nobles, 928 F. Supp. 1096, 1099 (M.D. Ala. 1996) (discussing *Shamrock* court as relying heavily on federalism concerns to construe strictly removal statutes); Auto Ins. Agency, Inc. v. Interstate Agency, Inc., 525 F. Supp. 1104, 1106 (D.S.C. 1981) (stating that courts must construe strictly federal removal statutes to keep federal judiciary within jurisdictional bounds); Town of Freedom, Okla. v. Muskogee Bridge Co., 466 F. Supp. 75, 77-78 (W.D. Okla. 1978) (stating that removal statutes represent "encroachments by the federal courts into the various states' sovereignties").

248. *See* Limbach Co. v. Renaissance Ctr. Partnership, 457 F. Supp. 347, 349 (W.D. Pa. 1978) (preferring remand because of potential unfairness to plaintiff); Rosack v. Volvo of Am. Corp., 421 F. Supp. 933, 937 (N.D. Cal. 1976) ("[A]ny doubt should be resolved in favor of remand to spare the parties proceedings which might later be nullified should jurisdiction be found to be lacking."). *But see* Boatmen's Bank v. Fritzlen, 135 F. 650, 654 (8th Cir. 1905) (arguing that federal courts should resolve doubts in favor of retaining jurisdiction because dismissal or remand orders are not subject to review).

249. *See, e.g.*, Mulcahey v. Columbia Organic Chems. Co., 29 F.3d 148, 151 (4th Cir. 1994) (citing *Shamrock* for proposition that "[b]ecause removal jurisdiction raises significant

strue the removal statute strictly, as called for in *Shamrock*, they must construe strictly the statutes granting original jurisdiction to federal courts because only cases qualifying for original federal jurisdiction may be removed from state courts.[250] Accordingly, courts that strictly construe the federal diversity jurisdiction statute must strictly construe its amount in controversy requirement,[251] and such strict construction is consistent with Congress's use of the jurisdictional amount in diversity cases to limit access to federal courts.[252]

### *C. Congressional Intent and the "Legal Certainty" Standard*

Throughout the more than 200-year history of original and derivative jurisdiction of lower federal courts, Congress has wielded the amount in controversy requirement to limit access to those courts.[253] At various times, three rationales – judicial federalism, cost efficiency, and caseload constraints – have dominated debates over the existence and amount of the jurisdictional limit.[254] All three rationales support restricting diversity jurisdiction[255] and, thus, removal jurisdiction based on diversity.[256] As Congress consistently has

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federalism concerns, [courts] must strictly construe removal jurisdiction"); *In re* Business Men's Assurance Co. of Am., 992 F.2d 181, 183 (8th Cir. 1993) ("The district court was required to resolve all doubts about federal jurisdiction in favor of remand."); Boggs v. Lewis, 863 F.2d 662, 663 (9th Cir. 1988) ("This court strictly construes the removal statute against removal jurisdiction."); Steel Valley Auth. v. Union Switch & Signal Div., 809 F.2d 1006, 1010 (3d Cir. 1987) ("It is settled that the removal statutes are to be strictly construed against removal and all doubts should be resolved in favor of remand." (footnote omitted)), *cert. dismissed*, 484 U.S. 1021 (1988).

250. *See supra* notes 28-29 and accompanying text (discussing interaction of removal statutes with statutes granting original jurisdiction to federal courts).

251. *See supra* note 29 and accompanying text (discussing operation of two prongs of federal diversity jurisdiction statute).

252. *See* St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 288 (1938) (determining that courts have rigorously enforced intent of Congress drastically to restrict federal jurisdiction in diversity cases).

253. *See* Baker, *supra* note 37, at 302 (discussing long history of congressional use of amount in controversy requirement).

254. *See generally id.* at 302-18 (discussing policy rationales and debates concerning federal amount in controversy requirement); Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483 (1928) (same).

255. *See* JUDICIAL CONFERENCE OF THE UNITED STATES, LONG RANGE PLAN FOR THE FEDERAL COURTS 9-16, 21-23, 29-39 (1995) [hereinafter LONG RANGE PLAN] (advocating restriction, if not abolition, of diversity jurisdiction based on concerns of judicial federalism and overburdened federal courts); *see also* Baker, *supra* note 37, at 305-06 (determining that Congress and federal courts historically have restricted access to federal courts to preserve autonomy of state courts and, to lesser extent, because of cost efficiency and caseload constraints).

256. *See supra* notes 28-29 and accompanying text (discussing how removal jurisdiction over diversity case requires same elements as original diversity action).

raised the amount in controversy requirement,[257] it has also consistently reaffirmed its belief in the jurisdictional amount as a tool to effect jurisdictional goals.[258] For example, Congress attempts to set the amount in controversy requirement at a level that will extend federal jurisdiction to "substantial" controversies.[259] In 1958, the Senate Judiciary Committee stated that "[t]he jurisdictional amount should not be so high as to convert the Federal courts into courts of big business nor so low as to fritter away their time in the trial of petty controversies."[260] In 1988, when Congress raised the jurisdictional amount for diversity cases from $10,000 to $50,000, the House of Representatives cited the goals of reducing federal caseload and reflecting inflation to justify the increase.[261] In debating the 1996 increase to $75,000, the Senate claimed to be balancing the interests of the federal judiciary in reducing its increasing caseload with the interests of litigants using the federal courts.[262] While Congress currently is unwilling to abolish diversity jurisdiction,[263] it

257. Congress reduced the amount in controversy requirement only once, from $500 to $400, in 1801. *See* Baker, *supra* note 37, at 305 (discussing short-lived "Law of the Midnight Judges" Act of 1801).

258. *See supra* notes 254-257 and accompanying text (discussing congressional intent upon raising amount in controversy requirement).

259. *See* S. REP. NO. 85-1830, at 3 (1958), *reprinted in* 1958 U.S.C.C.A.N. 3099, 3101 (discussing proper level for jurisdictional amount).

260. *Id.*

261. *See* H.R. REP. NO. 100-889, at 45 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5982, 6005 (discussing rationale for increasing jurisdictional amount). The House Report states that proponents of diversity reform expected that increasing the jurisdictional amount from $10,000 to $50,000 should decrease the federal diversity caseload by up to 40%. H.R. REP. NO. 100-889, at 45, *reprinted in* 1988 U.S.C.C.A.N. at 6006.

262. *See* S. REP. NO. 104-366, at 29 (1996), *reprinted in* 1996 U.S.C.C.A.N. 4202, 4209 (discussing raising jurisdictional amount). The Senate Judiciary Committee stated that "[t]he adjustment of the jurisdictional amount [from $50,000 to $75,000] provides claims with *substantial amounts* at issue access to a Federal forum, if diversity of citizenship among parties exists." S. REP. NO. 104-366, at 29-30, *reprinted in* 1996 U.S.C.C.A.N. at 4209 (emphasis added).

263. Some commentators argue for abolishing diversity jurisdiction altogether. *See* LONG RANGE PLAN, *supra* note 255, at 31 (stating that Judicial Conference opposes diversity jurisdiction). Since 1977, the Judicial Conference of the United States has advocated this step. *Id.* Among others calling for the abolition of diversity jurisdiction is the Study Committee of the Sub-Committee on Diversity Jurisdiction of the New York County Lawyers' Association. *See* Sub-Committee on Diversity Jurisdiction, New York County Lawyers' Association, *Report of the New York County Lawyers' Association Committee on the Federal Courts on the Recommendation of the Federal Courts Study Committee to Abolish Diversity Jurisdiction*, 158 F.R.D. 185, 189-93 (1990) (discussing abolition of diversity jurisdiction). As early as 1928, Henry J. Friendly, in an oft-cited article on the history of diversity jurisdiction, questioned whether diversity jurisdiction should yield to increasing federal question litigation. Friendly, *supra* note 254, at 510. Friendly downplayed the fear of local hostility to nonresident defendants and stated that diversity cases "intrinsically belong[ ] to the state courts." *Id.*

clearly and consistently expresses the idea that diversity cases involving less than the jurisdictional amount belong in state courts.[264]

Additionally, Congress has statutorily restrained plaintiffs from manufacturing diversity jurisdiction,[265] but it has made no meaningful effort to ban the practice of defeating jurisdiction by pleading jurisdictionally insufficient damages.[266] Some commentators, moreover, argue that there is no policy against defeating federal diversity jurisdiction.[267] A plaintiff's manufacturing federal jurisdiction is qualitatively different from manipulation designed to defeat it.[268] By manufacturing diversity jurisdiction, a plaintiff calls on an overburdened federal court to adjudicate a case that, except for the jurisdiction-invoking device, would be outside the court's statutory competence.[269] In contrast, when a plaintiff defeats federal jurisdiction, "a case depending on state law merely remains in the state court."[270] Consequently, a plaintiff's effort to defeat federal jurisdiction by pleading insufficient damages implicates no statutory restriction and raises fewer policy concerns than an attempt to manufacture jurisdiction.

When the *Burns* court insisted on the heavy "legal certainty" burden, it adhered to congressional intent and policy behind the jurisdictional amount as a bright line between federal and state jurisdiction.[271] By requiring a removing defendant to prove to a legal certainty that a plaintiff's facially

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264. *See supra* notes 258-62 and accompanying text (discussing congressional intent for jurisdictional amount to limit access to federal courts).

265. *See* 28 U.S.C. § 1359 (1994) (denying district courts jurisdiction over actions in which plaintiff has improperly or collusively assigned claim to create federal jurisdiction).

266. *See* AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 160-61 (1969) [hereinafter ALI STUDY] (observing that "[t]he avoidance of federal diversity jurisdiction has never been the subject of statutory ban"). In 1988, however, Congress did attempt to curtail the practice of plaintiffs naming fictitious defendants to destroy diversity and avoid removal jurisdiction. *See* 28 U.S.C. § 1441(a) (1994) ("For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.").

267. ALI STUDY, *supra* note 266, at 160.

268. *Id.*

269. *Id.*

270. *Id.* However, the ALI observed that the harder a plaintiff tries to defeat federal jurisdiction, the more likely the plaintiff is motivated by a desire to place the defendant at a substantial disadvantage. *Id.* Still, plaintiffs properly should be able to avoid federal jurisdiction. *See* Boyer v. Snap-On Tools Corp., 913 F.2d 108, 110-13 (3d Cir. 1990) (stating that concern about plaintiff putting defendant at disadvantage "cannot defeat plaintiff's right to retain as defendants those parties properly joined, even if the consequence is that defendants must litigate in state court").

271. *See* Burns v. Windsor Ins. Co., 31 F.3d 1092, 1095-96 (11th Cir. 1994) (stating that "legal certainty" standard "is consistent with case law and Congress's policy of limiting federal diversity jurisdiction").

insufficient claim is actually jurisdictionally sufficient, the court recognized that a plaintiff's specific claim deserves considerable deference.[272] Further, the *Burns* court based its adoption of the "legal certainty" standard on lawyers' duties of diligence and candor.[273] Rather than combat bad faith plaintiff manipulation of the amount in controversy with a lighter burden on removing defendants, the court imposed a heavy burden on defendants and relied on the duties of the plaintiff's lawyer as an officer of the court to ensure truthful pleading.[274] Likewise, the House Judiciary Committee in 1988 stated that federal courts should apply the sanctions available for attorneys who sign bad faith complaints under Rule 11 of the Federal Rules of Civil Procedure[275] when reviewing jurisdictional allegations.[276] At least one federal district court

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272. *See id.* at 1095 (determining that plaintiff's specific claim in pleading that lawyer signed deserves deference and presumption of truth).

273. *See id.* (discussing court's reliance on lawyers' duties).

274. *Id.*

275. FED. R. CIV. P. 11. In pertinent part, Rule 11 states:

> (a) Signature. Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. . . .
> (b) Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, –
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> . . . .
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
> (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; . . . .
> (c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

*Id.* The *Burns* court cited the Alabama counterpart to Rule 11 of the Federal Rules of Civil Procedure in stating that an attorney's duty of candor goes beyond any duty that consicence or ethical codes impose. *Burns*, 31 F.3d at 1095 n.5.

276. *See* H.R. REP. NO. 100-889, at 45 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5982, 6006 (discussing availability of Rule 11 sanctions to punish bad faith allegations affecting federal jurisdiction). Further, Congress appears willing to tolerate some plaintiff manipulation of pleadings to remain in state court. *Burns*, 31 F.3d at 1097 n.12. The Commentary to the 1988 Revisions of 28 U.S.C. § 1446(b) shows that Congress knew that an absolute one-year window for removal might allow plaintiffs to temporarily join nondiverse defendants to defeat removal. *Id.* "Congress has recognized and accepted that, in some circumstances, plaintiff can and will intentionally avoid federal jurisdiction." *Id.*

has agreed that Rule 11 sanctions, not judicial tinkering with statutory jurisdictional requirements, should be used to prevent bad faith plaintiff manipulation of the removal statutes.[277] In sum, the *Burns* "legal certainty" standard not only comports with congressional use of the jurisdictional amount as a bright line determinant of federal jurisdiction, but the court's reliance on judicial sanctions is also consistent with congressional understanding.[278]

Finally, the "legal certainty" standard, while a high bar, is not an insurmountable hurdle for defendants.[279] In *Jackson v. American Bankers Insurance Co.*,[280] the United States District Court for the Southern District of Alabama held that the defendant had met the burden of proving to a legal certainty that the amount in controversy exceeded the jurisdictional amount.[281] Printella B. Jackson sued two credit card issuers and several insurance companies in Alabama state court over the defendants' alleged failure to pay on disability policies covering her credit card debt.[282] The plaintiff's ad damnum clause requested no more than $70,000 plus court costs, $5000 short of the federal jurisdictional amount.[283] The defendants removed, and the plaintiff moved for remand.[284] The district court applied the *Burns* "legal certainty" standard and concluded that the defendants had met the heavy burden based on affidavits from a Yale law professor and from an Alabama attorney who had published an article on large punitive damage awards in Alabama.[285]

The affidavit of George L. Priest, John M. Olin Professor of Law and Economics at the Yale Law School, summarized his research which found that

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277. *See* Robinson v. Quality Ins. Co., 633 F. Supp. 572, 577 (S.D. Ala. 1986) (discussing proper judicial response to potential plaintiff manipulation of removal jurisdiction). The *Robinson* court emphatically stated that should the plaintiff, which the court allowed to remain in state court because of a jurisdictionally insufficient claim, again appear before the federal court seeking damages in excess of the jurisdictional amount, "this Court will be hard pressed to keep from applying sanctions to the plaintiff for having filed a frivolous pleading, namely the amendment to the present complaint." *Id.*

278. *But see* Noble-Allgire, *supra* note 99, at 725-28 (arguing that "there is no persuasive reason why the courts should apply a stricter standard to the defendant's estimate of damages in a removal case than the court would apply to the plaintiff's estimate of damages in a complaint filed directly in federal court").

279. *See infra* notes 280-91 and accompanying text (discussing case in which defendant successfully met "legal certainty" burden and removed to federal court).

280. 976 F. Supp. 1450 (S.D. Ala. 1997).

281. *See* Jackson v. American Bankers Ins. Co., 976 F. Supp. 1450, 1453 (S.D. Ala. 1997) (holding that defendants met burden of proof under *Burns* in showing that amount in controversy was sufficient for federal jurisdiction).

282. *Id.* at 1450.

283. *Id.* at 1451.

284. *Id.*

285. *Id.* at 1451-53.

out-of-state insurers suffered punitive damage verdicts in Alabama courts averaging well over $1 million.[286] The court also relied on the affidavit of Forrest S. Latta, an Alabama attorney who had studied damage verdicts in the state.[287] Latta opined that the amount in controversy in the *Jackson* case was "well in excess of $75,000."[288] However, the court disregarded defendants' exhibit of copies of thirteen complaints filed by the plaintiff's law firm in similar cases against nondiverse defendants in which the plaintiffs did not limit the damages sought to below $75,000.[289] The court, following *Burns*, stated that the subjective intent of the plaintiff's counsel was not at issue; the court must make an objective determination of the actual amount in controversy.[290] Even without the evidence of the subjective intent of the plaintiff's counsel, the court concluded that the defendants had met the heavy burden of the *Burns* standard.[291] Thus, *Jackson* illustrates that the *Burns* standard may restrict federal jurisdiction but is not an absolute bar to federal courts.

### *V. Conclusion*

Removal jurisdiction for diversity cases exists to provide nonresident defendants with a federal forum,[292] but the amount in controversy requirement limits access to federal courts to substantial cases.[293] The jurisdictional amount provides a mechanism for a plaintiff to ensure a state court forum by pleading jurisdictionally insufficient damages.[294] However, in many states, a plaintiff's specific claim for damages does not limit the plaintiff's recovery to that amount.[295] Further, a statutory one-year window for removal opens the door for a plaintiff to manipulate pleadings to remain in state court and yet ultimately recover more than the federal jurisdictional amount.[296] The poten-

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286. *Id.* at 1452.

287. *Id.* at 1453.

288. *Id.* (quoting Latta Aff. ¶ 21).

289. *Id.*

290. *Id.*

291. *Id.* at 1453, 1455.

292. *See supra* note 44 and accompanying text (stating purpose of removal jurisdiction).

293. *See supra* notes 253-64 and accompanying text (examining congressional intent animating amount in controversy requirement).

294. *See supra* notes 67-69, 77-101 and accompanying text (analyzing rule of *St. Paul Mercury* and its application).

295. *See supra* notes 102-06 and accompanying text (discussing state counterparts to Federal Rule of Civil Procedure 54(c), which does not limit recovery to amount prayed for in complaint).

296. *See supra* notes 33, 276 and accompanying text (discussing potential for plaintiff manipulation because of one-year limit on removal in 28 U.S.C. § 1446(b)).

tial for manipulation by plaintiffs has led some federal courts to allow a removing defendant to challenge a plaintiff's specifically pleaded damage claim.[297]

If, as those courts have found, specific jurisdictionally insufficient damages no longer foreclose removal, the defendant's burden to prove the jurisdictional amount at least should be a heavy one.[298] Congress intends that the jurisdictional amount restrict access to federal courts.[299] As the most onerous of the proposed burdens, the "legal certainty" standard of *Burns* performs this access-limiting function better than the "preponderance of the evidence" standard of *De Aguilar II* or the "reverse legal certainty" standard proposed by the *Kliebert* dissent. Thus, federal courts should hold a removing defendant to the higher standard when allowing that defendant to challenge a plaintiff's specifically pleaded and jurisdictionally insufficient damage claim.

297. *See supra* notes 107-110, 202-04 and accompanying text (discussing courts' willingness to allow challenge to specifically pleaded damages).

298. *See supra* notes 165-68, 271-79 and accompanying text (arguing for heavy burden on removing defendant).

299. *See supra* notes 253-64 and accompanying text (discussing Congressional intent for jurisdictional amount).