

FEDERAL DIVERSITY JURISDICTION IN THE FIFTH CIRCUIT: MEETING
THE AMOUNT IN CONTROVERSY

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INTRODUCTION: DIVERSITY OF CITIZENSHIP SUBJECT-MATTER
JURISDICTION REQUIRES THAT THE AMOUNT IN CONTROVERSY BE
MET

For any party who wishes to litigate an action in federal court based on diversity of citizenship jurisdiction or for any party who wants to avoid litigation in federal court, understanding the jurisdictional amount in controversy requirement is absolutely vital. 28 U.S.C. § 1332 plainly states that the amount in controversy must exceed \$75,000. The statute, however, provides little guidance as to how a litigant can determine whether the jurisdictional amount is met.

This Comment will explore how the Fifth Circuit and its district courts have dealt with the amount in controversy requirement to find diversity jurisdiction under 28 U.S.C. § 1332 and point out differing views amongst the district courts where present. Specifically, the Comment will address general principals about the amount in controversy requirement, whether parties can add court costs, interest, counterclaims, attorneys' fees, and punitive damages to meet the jurisdictional amount, and aggregation rules in multi-plaintiff and class action suits. In cases concerning declaratory judgments, injunctions, motions to compel arbitration, and supplemental jurisdiction, this Comment will discuss alterations to the general rules, with a special emphasis on insurance cases. Lastly, this Comment will delve into removal and remand situations and concentrate on the most common questions that arise concerning burdens, timing, and what evidence is considered to decide whether the defendant knew the amount in controversy was met and timely removed.

I. GENERAL PRINCIPLES OF THE AMOUNT IN CONTROVERSY REQUIREMENT

Federal district courts have limited subject-matter jurisdiction.¹ The United States Constitution confers upon the federal judicial branch vast powers.² However, federal district courts have limited jurisdiction and may only adjudicate the matters for which Congress has created jurisdiction.³

The Judiciary Act of 1789 created the first grants of judicial power. In Section 11 of the Act, Congress created what we now call diversity jurisdiction—jurisdiction when citizens of different states sue each other. However, Congress only extended this jurisdiction if the “matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars.”⁴ Over the years, this required amount has increased. In 1887, the required amount needed to exceed \$2000;⁵ in 1911, \$3000;⁶ in 1958, \$10,000;⁷ in 1988, \$50,000;⁸ and in 1996, \$75,000.⁹ The United States Supreme Court explained the “congressional purpose in steadily increasing through the years the jurisdictional amount . . . was to check, to some degree, the rising caseload of the federal courts.”¹⁰

Today, the two biggest grants of federal district court jurisdiction are found in 28 U.S.C. § 1331 (federal-question jurisdiction) and 28 U.S.C. § 1332 (diversity of citizenship jurisdiction). If a party bases subject-matter jurisdiction on section 1332, then the requisite amount in controversy must also be met or the court does not have jurisdiction. Presently, for the court to have jurisdiction, section 1332 requires that the amount in controversy

¹ *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 289–90 (1938); *Anderson v. Dow Chem. Co.*, No. 06-30445, 2007 U.S. App. LEXIS 15467, at *2–4 (5th Cir. 2007) (holding that plaintiff’s fourth amended petition stating the amount in controversy was below \$75,000 did not divest the court of subject-matter jurisdiction); *Gebbia v. Wal-Mart Stores, Inc.*, 233 F.3d 880, 883 (5th Cir. 2000) (holding post-removal affidavit stipulating that damages are less than \$75,000 will not divest the court of jurisdiction; affidavit can only be used to determine the amount in controversy as it existed at the time suit was filed).

² U.S. CONST. art 3, § 2.

³ *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 552 (2005).

⁴ 1 Stat. 73, § 11 (1789).

⁵ 24 Stat. 552 (1887).

⁶ 36 Stat. 1087 (1911).

⁷ 72 Stat. 415 (1958).

⁸ 102 Stat. 4642 (1988).

⁹ 28 U.S.C. § 1332(a) (2000).

¹⁰ *Snyder v. Harris*, 394 U.S. 332, 339–40 (1969).

exceed \$75,000.¹¹ The party seeking to invoke the federal court's jurisdiction bears the burden of proving up jurisdictional facts, including the amount in controversy.¹²

Once Federal jurisdiction is obtained subsequent events that cause the amount in controversy to fall do not divest the court of jurisdiction. Jurisdictional facts are determined at the time the complaint is filed.¹³ Even if the plaintiff ultimately recovers less than the required jurisdictional amount, the court still maintains jurisdiction.¹⁴

If the Federal court finds by a legal certainty that the amount in controversy is not met, the court does not have jurisdiction. If it is legally certain from the face of the pleadings or legally certain from summary judgment type evidence that the plaintiff cannot recover the jurisdictional amount, then the court shall dismiss the suit for lack of jurisdiction.¹⁵ Generally, the amount a plaintiff claims in good faith will control to determine the amount in controversy.¹⁶ However, just because a plaintiff claims a certain amount, that does not mean the defendant or court cannot challenge the amount. In *Jones v. Unknown Employees of Kerrville Bus Line*, the plaintiff alleged \$1,000,000 in damages after the defendant bus company missed its scheduled pick-up time and did not pick-up the plaintiff to return home.¹⁷ Plaintiff sued for food costs, lodging, bus tickets, medical expenses resulting from the travel delay, and mental anguish.¹⁸ Plaintiff received food and shelter and presented no evidence of how the travel delay related to plaintiff's medical problems. Finding it legally certain that

¹¹28 U.S.C. § 1332(a) (2000). The statutory language is clear that the amount in controversy must *exceed* \$75,000; thus, an amount in controversy equal to \$75,000 exactly does not meet the jurisdictional requirement. See *Stonewall Ins. Co. v. Lopez*, 544 F.2d 198, 199 (5th Cir. 1976) (holding that the Fifth Circuit did not have jurisdiction when the insurance policy limit equaled \$10,000 exactly and the jurisdictional amount had to exceed \$10,000).

¹²*St. Paul Reinsurance Co. v. Greenberg*, 134 F.3d 1250, 1253 (5th Cir. 1998).

¹³*St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 289–90 (1938); *Gebbia v. Wal-Mart Stores, Inc.*, 233 F.3d 880, 883 (5th Cir. 2000).

¹⁴*Red Cab Co.*, 303 U.S. at 289.

¹⁵*Jones v. Unknown Employees of Kerrville Bus Line*, 281 Fed. App'x. 386, 387 (5th Cir. 2008) (citing *Red Cab*, 303 U.S. at 289).

¹⁶See *infra* Part IV.B.

¹⁷*Jones*, 281 Fed. App'x. at 387.

¹⁸*Id.* at 386.

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plaintiff could not meet the amount in controversy, the Fifth Circuit affirmed the district court's dismissal for lack of jurisdiction.¹⁹

II. ADDING TO REACH THE REQUIRED AMOUNT IN CONTROVERSY

To determine whether the amount in controversy is met, if the first step is to know what the amount actually is, then the next step is to know what you can and cannot add to reach that amount. In many cases, the jurisdictional amount will clearly be met. However, other times it is not so clear, and a thorough understanding of the adding rules will be necessary to conclude whether a federal court has jurisdiction.

A. Court Costs, Interest, and Most-Likely Counterclaims Are Not Added to Meet the Amount in Controversy

The plain language of 28 U.S.C. section 1332 states that court costs²⁰ and interest are not included when adding to reach the amount in controversy.²¹

Counterclaims generally may not be included to meet the amount in controversy, but there are limited exceptions. In *Horton v. Liberty Mutual Insurance Co.*, the Supreme Court affirmed the Fifth Circuit's decision permitting the amount in controversy to be met by adding the defendant's counterclaim.²² The plaintiff filed suit in federal court. The defendant counterclaimed, arguing for dismissal based upon lack of subject-matter jurisdiction.²³ The Fifth Circuit explained:

A further and additional reason why jurisdiction should not have been refused in this case is that it is the long established rule that where, as here, the jurisdictional amount is in question, and a counterclaim is brought in an

¹⁹ *Id.* at 386–87.

²⁰ In *Garcia v. Koch Oil Co.*, the Fifth Circuit analogized the costs associated with performing an equitable accounting to determine restitution damages with court costs and held that costs to perform an equitable accounting could not be included to determine the amount in controversy. 351 F.3d 636, 641 (5th Cir. 2003).

²¹ 28 U.S.C. § 1332(a) (2008); *cf. infra* Part II.B (discussing interest, intended as a penalty, may be considered).

²² 367 U.S. 348, 353–54 (1961).

²³ *Liberty Mut. Ins. Co. v. Horton*, 275 F.2d 148, 150 (5th Cir. 1960), *aff'd*, 367 U.S. 348 (1961).

amount which, in itself or added to the amount claimed in the complaint, adds up to an amount in excess of the minimum jurisdictional amount, jurisdiction is established whatever may be the conclusion viewed from the plaintiff's complaint alone.²⁴

While the court explained that a defendant's counterclaim could be added to the plaintiff's claim to meet the amount in controversy, the Fifth Circuit has not decided a case in which the counterclaim did not exceed the amount in controversy on its own. In *Horton*, the defendant's \$14,035 counterclaim exceeded the \$10,000 jurisdictional amount.²⁵

In the removal context, most likely the value of defendants' compulsory counterclaims cannot be added to meet the amount in controversy. The Southern District of Mississippi recently addressed the effect of defendants' counterclaims in *Thrash v. New England Mutual Life Insurance Co.*²⁶ In *Thrash*, plaintiff demanded \$52,905 plus "attorney's fees and other damages allowable by law in an amount of not more than \$75,000."²⁷ Defendant counterclaimed for \$27,957.35, which would clearly cause the case to meet the amount in controversy, and removed the case to federal court.²⁸ The district court explained that the vast majority of districts across the Fifth Circuit and country do not permit defendants' counterclaims to be added with the plaintiff's claims when a defendant seeks to remove a case.²⁹ The court reasoned that defendants' "[c]ounterclaims are subsequent events that should not be considered in evaluating the amount in controversy under 28 U.S.C. § 1332."³⁰

However, it is not clear that district courts within the Fifth Circuit are unanimous in their treatment of defendants' counterclaims in removal

²⁴ *Id.* at 152.

²⁵ *Id.* at 150.

²⁶ See generally 534 F. Supp. 2d 691 (S.D. Miss. 2008).

²⁷ *Id.* at 693.

²⁸ *Id.*

²⁹ *Id.* at 696–97 (citing *Gulf-South Piling & Constr., Inc. v. Traylor Bros., Inc.*, No. 97-0861, 1997 U.S. Dist. LEXIS 8835, *2 (E.D. La. June 12, 1997)); see, e.g., *Meridian Aviation Serv. v. Sun Jet Int'l*, 886 F. Supp. 613, 615 (S.D. Tex. 1995); *Conference Am., Inc. v. Q.E.D. Int'l, Inc.*, 50 F. Supp. 2d 1239, 1242 (M.D. Ala. 1999); see also *McMahon v. Alternative Claims Serv., Inc.*, 521 F. Supp. 2d 656, 658 (N.D. Ohio 2007); *Kaplan v. Computer Scis. Corp.*, 148 F. Supp. 2d 318, 320–21 (S.D.N.Y. 2001).

³⁰ *Thrash*, 534 F. Supp. 2d at 697 (quoting *Moseley & Standerfer, P.C. v. Han*, No. 3: 98-CV-2171-L, 1999 U.S. Dist. LEXIS 7085, at *4 (N.D. Tex. May 11, 1999)).

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situations. In a removal case, the Southern District of Texas recently stated in dicta that “[c]ounterclaims raised by a defendant can generally be aggregated with a plaintiff’s claims to obtain the jurisdictional amount.”³¹ This statement is followed by a footnote stating: “The court assumes, *arguendo*, that the rule in *Horton* is applicable to removal actions. The court doubts, however, that the rule in *Horton* applies to removal actions as opposed to an action a plaintiff has filed in federal court directly, as was the case in *Horton*.”³²

B. Punitive and Penalty Damages May Be Added to Meet the Amount in Controversy

Punitive damages sought by plaintiffs can be added to meet the amount in controversy if, under the governing law, punitive damages are recoverable.³³ However, district courts across the Fifth Circuit have slightly different standards for inclusion of punitive damages. While some courts seem more lenient in finding the amount in controversy satisfied if there are claims for punitive damages (or penalty damages), other courts impose higher standards and refuse to assume the amount is met without further proof.³⁴

In *Dow Agrosciences L.L.C. v. Bates*, the Fifth Circuit stated in a footnote that “the mere availability of treble damages establishes that [plaintiffs’] claims satisfy the \$75,000 requirement.”³⁵ Some district courts adhere to a rationale that if punitive damages are sought, then the amount in controversy is necessarily met.³⁶

³¹ *Vanguard Mach. Int’l, L.L.C. v. Smith Publ’g, Inc.*, No. H-07-3490, 2008 U.S. Dist. LEXIS 10610, *10 (S.D. Tex. Feb. 13, 2008) (citing *Liberty Mut. Ins. Co. v. Horton*, 275 F.2d 148, 152 (5th Cir. 1960)).

³² *Id.* at *11.

³³ *Bell v. Preferred Life Assurance Soc’y*, 320 U.S. 238, 240 (1943).

³⁴ *See infra* Part II.D.

³⁵ 332 F.3d 323, 326 n.3 (5th Cir. 2003) (holding that even though the farmers did not originally seek DTPA treble damages, the damages were available and the farmers later sought the DTPA damages, bringing the case within the jurisdictional amount in controversy), *vacated*, 544 U.S. 431 (2005).

³⁶ *Sun Life Assurance Co. of Canada v. Fairley*, 485 F. Supp. 2d 731, 735 (S.D. Miss. 2007) (“[F]ederal courts in Mississippi have consistently held that a claim for an unspecified amount of punitive damages is deemed to exceed the federal jurisdictional minimum”); *Brasell v. Unumprovident Corp.*, No. 2:01CV202-D-B, 2001 WL 1530342, at *2 (N.D. Miss. Oct. 25, 2001) (“Here, in ascertaining whether the Plaintiff’s claim for punitive damages actually exceeds

However, the above cases must be compared to another line of cases within the circuit. In *Hot-Hed v. Safe House Habitats, Ltd.*, the Southern District of Texas held that plaintiff's mere request for punitive damages was not necessarily enough to make it facially apparent that the jurisdictional amount was met.³⁷ The *Hot-Hed* plaintiff did not allege a specific amount of damages; thus, the defendant had to either show that the jurisdictional amount was facially apparent or put forth summary judgment type evidence to prove the amount.³⁸ The defendant wanted to rely on plaintiff's claims for punitive damages arguing that generally a claim for punitive damages raises the amount in controversy above the jurisdictional amount.³⁹ The court criticized the defendant explaining that the removing-defendant needed to do more than just "point to a state law that *might* allow a plaintiff to recover damages above the requisite jurisdictional amount."⁴⁰

In addition to punitive damages and treble damages under the Deceptive Trade Practices Act, "interest" intended as a penalty may also be added to meet the amount in controversy since the interest is treated in the same manner as punitive damages.⁴¹ In *St. Paul Reinsurance Co. v. Greenberg*, the Fifth Circuit addressed Article 21.55 of the Texas Insurance Code which provides an 18 percent per annum interest penalty for noncompliance.⁴² The court explained: "It would be ludicrous, then, to

\$75,000, so as to meet the federal jurisdictional minimum, the court notes that punitive damages awards against insurance companies in Mississippi routinely exceed that amount"); *Myers v. Guardian Life Ins. Co. of Am., Inc.*, 5 F. Supp. 2d 423, 428 (N.D. Miss. 1998) (holding that "considering Mr. Myers' punitive damages claim alone" it is facially apparent that the amount in controversy exceeds the jurisdictional amount).

³⁷No. H-06-1509, 2007 U.S. Dist. LEXIS 10274, at *5-7 (S.D. Tex. Feb. 12, 2007); *see also* *Rios v. Lear Corp. EEDS & Interiors*, No. EP-06-CA-146-DB, 2006 U.S. Dist. LEXIS 39233, at *7 (W.D. Tex. May 31, 2006) (holding plaintiff's mere request for punitive damages was not enough to necessarily bring the case within the jurisdictional amount).

³⁸*Hot-Hed*, 2007 U.S. Dist. LEXIS 10274, at *2.

³⁹*Id.* at *4.

⁴⁰*Id.* at *4-5 (citing *Powell v. Nat'l Action Fin. Servs., Inc.*, No. H-05-0806, 2005 U.S. Dist. LEXIS 43832, at *3-4 (S.D. Tex. Aug. 4, 2005)) (holding that the defendant must point to facts establishing the amount in controversy—not just point to the D.T.P.A. which permits treble damages in some situations).

⁴¹*St. Paul Reinsurance Co. v. Greenberg*, 134 F.3d 1250, 1255 (5th Cir. 1998); *Buras v. Birmingham Fire Ins. Co. of Pa.*, 327 F.2d 238, 238-39 (5th Cir. 1964) (holding that a statutory 6% interest rate for failure to timely pay an insurance claim was a penalty and could be added to meet the requisite amount in controversy).

⁴²134 F.3d 1250 (5th Cir. 1998).

include something as speculative as punitive damages—which all agree is properly includible—while excluding the automatic penalty provided in the insurance code.”⁴³ Thus, interest that is designed to punish is properly included when determining the amount in controversy.⁴⁴

No matter the source of penalty damages, a party seeking to invoke the court’s jurisdiction that needs punitive damages, treble damages, or “interest” to meet the amount in controversy, should err on the side of caution and fully explain the damages they are seeking and provide the rational for how those damages can be obtained.

C. Attorneys’ Fees May Be Added to Meet the Amount in Controversy

Attorneys’ fees may also be added to meet the jurisdictional amount if the applicable state law permits recovery of the fees in the particular suit.⁴⁵ There must be statutory authority for awarding the attorneys’ fees; a plaintiff’s mere request for attorneys’ fees when there is no statutory entitlement has no effect on the amount in controversy.⁴⁶ Moreover, the party relying on attorneys’ fees to meet the amount in controversy should do more than simply state that attorneys’ fees are available.⁴⁷ The party should also “present facts indicating the propriety of such penalties.”⁴⁸

D. Multi-party Cases and Class Actions

Generally, plaintiffs cannot aggregate their claims with other plaintiffs to meet the amount in controversy.⁴⁹ Likewise, a single plaintiff generally

⁴³ *Id.* at 1255.

⁴⁴ *Id.*

⁴⁵ *Mo. State Life Ins. v. Jones*, 290 U.S. 199, 202 (1933); *Foret v. S. Farm Bureau Life Ins. Co.*, 918 F.2d 534, 537 (5th Cir. 1990).

⁴⁶ *Madison v. Citicorp Inv. Servs.*, No. 5:06cv53-DCB-JMR, 2006 U.S. Dist. LEXIS 49368, at *7–8 (S.D. Miss. June 15, 2006).

⁴⁷ *London v. Allstate Ins. Co.*, No. 07-8653, 2008 U.S. Dist. LEXIS 4182, at *5 (E.D. La. Jan. 16, 2008).

⁴⁸ *Id.*; see also *Kelly v. Allstate Ins. Co.*, No. 07-9311, 2008 U.S. Dist. LEXIS 23390, at *4 (E.D. La. Mar. 24, 2008); *Gallery v. State Farm Fire & Cas. Co.*, No. 07-7441, 2008 U.S. Dist. LEXIS 17599, at *4 (E.D. La. Mar. 6, 2008); *Thompson v. Allstate Ins. Co.*, No. 06-10481, 2007 U.S. Dist. LEXIS 84316, at *3 (E.D. La. Mar. 8, 2007).

⁴⁹ However, when “two or more plaintiffs unite to enforce a single title or right in which they have a common and undivided interest,” the damages may be aggregated. *Snyder v. Harris*, 394 U.S. 332, 335 (1969).

cannot aggregate claims against multiple defendants.⁵⁰ However, if there is only one plaintiff and one defendant in a case, then the plaintiff may aggregate any number of related or unrelated claims against the single defendant.⁵¹ Additionally, the Fifth Circuit has stated: “Claims against two or more defendants can be aggregated for the purpose of attaining the jurisdictional amount, as a general proposition, if they are jointly liable to the plaintiff.”⁵²

Additional non-aggregation exceptions may arise in the class action setting when aggregating attorneys’ fees.⁵³ In a narrow line of cases, punitive damages may also be aggregated to meet the amount in controversy.⁵⁴

In the class action setting, so long as the class representative meets the amount in controversy, then all the other class members will be able to fall under the court’s jurisdiction.⁵⁵ Thus, the damages that can be attributed to the class representative are vital to determine whether the requisite amount in controversy is satisfied.⁵⁶

⁵⁰ *Jewell v. Grain Dealers Mut. Ins. Co.*, 290 F.2d 11, 13 (5th Cir. 1961) (“The general rule with respect to the aggregation of the claims of a plaintiff against two or more defendants is that ‘where a suit is brought against several defendants asserting claims against each of them which are separate and distinct, the test of jurisdiction is the amount of each claim, and not their aggregate.’”) (quoting *Cornell v. Mabe*, 206 F.2d 514, 516 (5th Cir. 1953)).

⁵¹ *Snyder*, 394 U.S. at 335.

⁵² *Jewell*, 290 F.2d at 13 (finding that joint liability did not exist between primary insurer and an excess insurer and therefore, claims against them could not be joined for determining jurisdiction) (citing *Walter v. Ne. R.R. Co.*, 147 U.S. 370 (1893)). However, following the Fifth Circuit’s lead, district courts have been reluctant to find joint liability and have thus refused to aggregate claims against multiple defendants. *See, e.g., Reliance Ins. Co. v. Airport Shuttle, Inc.*, No. 04-2383, 2004 U.S. Dist. LEXIS 25715, at *8 (E.D. La. Dec. 15, 2004); *Lathem v. State Farm Mut. Auto. Ins. Co.*, 339 F. Supp. 2d 767, 772–73 (S.D. Miss. 2004).

⁵³ *See infra* Part II.D.2.

⁵⁴ *See infra* Part II.D.1; *cf. ABS Ins., Ltd. v. Nat’l Union Fire Ins. Co.*, 51 F. Supp. 2d 762, 770 (E.D. Tex. 1999) (stating, after a lengthy analysis of punitive damage aggregation cases in the Fifth Circuit, “[t]hus, in a non-class-action context, aggregation of Texas punitive damage claims exists no more. . .”).

⁵⁵ *In re Abbott Labs.*, 51 F.3d 524, 529 (5th Cir. 1995) (citing 28 U.S.C. § 1367 (2000)); *see also Ahearn v. Fibreboard Corp.*, 162 F.R.D. 505, 523 (E.D. Tex. 1995).

⁵⁶ 28 U.S.C. § 1332(d) (2008) (known as the Class Action Fairness Act) also provides for original jurisdiction if the total class action amount in controversy exceeds \$5 million. 28 U.S.C. § 1332(d) is an additional grounds for subject-matter jurisdiction and there is no need for individual members to meet the \$75,000 amount in controversy if the 1332(d) requirements are met. Indeed, the Court in *Exxon Mobil v. Allapattah Services, Inc.* explained that the

1. Aggregating Punitive Damages in Class Actions

Class action plaintiffs may be able to “aggregate” their punitive damages to meet the amount in controversy depending on the underlying substantive law.⁵⁷ In *Ard v. Transcontinental Gas Pipe Line Corp.*, the district court permitted the defendant to aggregate plaintiffs’ punitive damage claims to establish subject-matter jurisdiction.⁵⁸ On interlocutory appeal, the plaintiffs continued to argue that their punitive damages should not be aggregated and that the case should be remanded.⁵⁹ The *Ard* panel recognized that circuits are split on how to attribute punitive damages in class actions⁶⁰ and that even the Fifth Circuit has reached different decisions depending on the facts.⁶¹

For example, in *Lindsey v. Alabama Telephone Company*, the Fifth Circuit applied Alabama law and refused to attribute the \$1,000,000 sought in punitive damages to the class representative. The *Lindsey* defendants did not show the size of the class, so the court could not determine how much of the \$1,000,000 was attributable to each class member; the court found no subject-matter jurisdiction.⁶² However, applying Mississippi law in a multi-plaintiff case, the Fifth Circuit explained in *Allen v. R. & H. Oil & Gas Company*, the unique nature of punitive damages in Mississippi.⁶³ The

supplemental jurisdiction analysis it was performing had no bearing on jurisdiction under section 1332(d) as this was a separate means for jurisdiction that necessarily broke the non-aggregation rules in requiring a \$5 million amount in controversy. 545 U.S. 546, 570–71 (2005).

⁵⁷ See *Allen v. R & H Oil & Gas Co.*, 63 F.3d 1326, 1333–34 (5th Cir. 1995) (applying Mississippi law, aggregating punitive damages and attributing to class representative).

⁵⁸ 138 F.3d 596, 600 (5th Cir. 1998).

⁵⁹ *Id.*

⁶⁰ *Id.* at 600–01.

⁶¹ *Id.* at 601–02 (comparing *Lindsey v. Ala. Tel. Co.*, 576 F.2d 593, 593 (5th Cir. 1978) (holding under Alabama law punitive damages could not be aggregated) with *Allen v. R & H Oil & Gas Co.*, 63 F.3d 1326, 1335 (5th Cir. 1995) (holding under Mississippi law punitive damages can be aggregated and attributed to each individual plaintiff in their entirety)).

⁶² *Lindsey*, 576 F.2d at 595.

⁶³ *Allen*, 63 F.3d at 1333. *Allen* is not a class action case, but presumably the same logic would apply in a class action. See, e.g., *Carpenter v. Rocky Mountain Radar, Inc.*, No. 4:05CV01-M-B, 2007 U.S. Dist. LEXIS 12428, at *5–6 (N.D. Miss. Feb. 21, 2007) (following the logic of *Allen* and attributing the total amount of punitive damages sought to the class representative so that the amount in controversy is met); see also *Amos v. CitiFinancial Corp.*, 243 F. Supp. 2d 587, 590 (N.D. Miss. 2003) (refusing to be persuaded by Fifth Circuit cases that did not permit punitive damage aggregation, the court held that under Mississippi law, punitive damages were aggregated in a multi-plaintiff case).

court concluded: “because of the collective scope of punitive damages and their nature as individual claims under Mississippi law, we hold that under Mississippi law the amount of such an alleged award is counted against each plaintiff’s required jurisdictional amount.”⁶⁴

After evaluating the different, yet distinguishable results from *Lindsey* and *Allen*, the *Ard* court would not expand the punitive damages aggregation rule from *Allen*. The Fifth Circuit limited *Allen* to Mississippi law; applying Louisiana law, the Fifth Circuit declined to aggregate punitive damages and the case was dismissed for lack of jurisdiction.⁶⁵

2. Aggregating Attorneys’ Fees in Class Actions

In class actions, whether attorneys’ fees can be aggregated and attributed to the class representatives depends on the underlying state substantive law. Applying Texas law, the Fifth Circuit has held that attorneys’ fees cannot be aggregated under Texas law; the court explained that the standard approach is to distribute attorneys’ fees pro rata to all class members—both named and unnamed.⁶⁶ Likewise, *H. & D. Tire & Automotive-Hardware, Inc. v. Pitney Bowes Inc.* arose in Texas courts, but the court applied Connecticut substantive law. Applying Connecticut law, the Fifth Circuit refused to aggregate attorney’s fees.⁶⁷ The court explained that “[i]f the statute awards attorneys’ fees to the *named* plaintiffs in a class action, the fees are attributed solely to the class representatives.”⁶⁸ However, “[b]ecause the Connecticut statute does not specifically provide that attorneys’ fees are awarded to the class representatives, [the court declined] to attribute the attorneys’ fees solely to the named plaintiffs to determine whether the amount in controversy [was] sufficient.”⁶⁹

⁶⁴ *Allen*, 63 F.3d at 1335.

⁶⁵ *Ard*, 138 F.3d at 602; *see also* *H. & D. Tire & Automotive-Hardware, Inc. v. Pitney Bowes Inc.*, 227 F.3d 326, 329–30 (5th Cir. 2000) (holding that under Connecticut law, “a claim for punitive damages must be allocated pro rata among class members”).

⁶⁶ *Coghlan v. Wellcraft Marine Corp.*, 240 F.3d 449, 455 (5th Cir. 2001); *see also* *Trevino v. Credit Collection Servs.*, No. M-04-273, 2005 U.S. Dist. LEXIS 37422, at *4–5 (S.D. Tex. July 6, 2005).

⁶⁷ *Pitney Bowes*, 227 F.3d at 331.

⁶⁸ *Id.* at 330 (emphasis added).

⁶⁹ *Id.* at 331.

However, for class actions applying Louisiana law, if attorneys' fees are provided for by state law, then the attorneys' fees can be aggregated for purposes of determining jurisdiction.⁷⁰

III. AMOUNT IN CONTROVERSY IN UNIQUE SITUATIONS

The general rules for adding to reach the amount in controversy apply across the board in federal diversity cases. However, no cases are exactly alike and unique situations will arise that alter application of the general rules. The type of case (declaratory judgment for example), the facts of the case (insurance policy limits for example), and other statutory provisions, such as 28 U.S.C. § 1367, that may be relevant should always be considered.

A. *Declaratory Judgments, Injunctions, and Motions to Compel Arbitration*

Declaratory judgment and injunction cases present a situation where the financial relief being requested by the plaintiff, if any, should not necessarily be the controlling factor in determining the jurisdictional amount. In a declaratory judgment or injunction suit, the amount in controversy is the value of the right to be protected or the extent of which the injury can be prevented.⁷¹ For example, in *Leininger v. Leininger*, the ex-spouse plaintiff sought to nullify a \$105,000 alimony judgment and enjoin its enforcement.⁷² The court held "[t]he value of the right to be protected or the extent of the injury sought to be prevented was the amount of the judgment [\$105,000]," and thus the court properly had jurisdiction.⁷³ In cases where the plaintiff brings a declaratory judgment or injunction suit and also raises coercive claims, the "value of the right to be protected" can

⁷⁰Grant v. Chevron Phillips Chem. Co., 309 F.3d 864, 876 (5th Cir. 2002); Manguno v. Prudential Prop. & Cas. Ins. Co., 276 F.3d 720, 722 (5th Cir. 2002).

⁷¹St. Paul Reinsurance Co. Ltd. v. Greenberg, 134 F.3d 1250, 1252–53 (5th Cir. 1998); Hartford Ins. Group v. Lou-Con Inc., 293 F.3d 908, 911 (5th Cir. 2002); Leininger v. Leininger, 705 F.2d 727, 729 (5th Cir. 1983).

⁷²Leininger, 705 F.2d at 728.

⁷³Id. at 729; see also Petrohawk Energy Corp. v. Raceland Raw Sugar Corp., No. 07-1437, 2007 U.S. Dist. LEXIS 41307, at *3–4 (E.D. La. May 24, 2007) (holding that plaintiffs who brought suit to prevent eviction from their oil and gas lease met the requisite jurisdictional amount).

be added with the damages sought by plaintiff to meet the amount in controversy.⁷⁴

When a party brings suit to compel arbitration, the value of the suit is the underlying claim at issue. In *Webb v. Investacorp, Inc.*, the plaintiffs challenged the district court's order compelling arbitration; plaintiffs argued that right to be protected in this case was "their right to have their dispute with [defendant] adjudicated in a court rather than an arbitration proceeding—a right that [plaintiffs] claim cannot be valued in monetary terms."⁷⁵ The Fifth Circuit rejected plaintiff's argument and held the "amount in controversy in a motion to compel arbitration is the amount of the potential award in the underlying arbitration proceeding."⁷⁶

B. Insurance Policy Cases

Cases concerning insurance-policy coverage present common fact patterns and holdings that are insurance-specific. In *St. Paul Reinsurance Company Ltd. v. Greenberg*, the Fifth Circuit held when insurer's bring declaratory judgment proceedings regarding policy-coverage, the value of the right to be protected is the "plaintiff's potential liability under that

⁷⁴ See *Berggreen v. Sallie Mae, Inc.*, No. 07-467-DLD, 2008 U.S. Dist. LEXIS 38322, at *9–11 (M.D. La. May 12, 2008) (Plaintiff brought declaratory judgment suit against ex-husband and Sallie Mae because of Sallie Mae's continued efforts to collect outstanding debt from plaintiff that plaintiff claimed belonged solely to husband. The student loans in dispute totaled \$51,614. In addition to this "value of the right to be protected," plaintiff sued for actual damages for intentional infliction of emotional distress, damages for violation of unfair collection activities, attorneys' fees, and mental anguish damages. The court held that the "value of the right to be protected" coupled with the damages sought met the amount in controversy.); see also, *Miller v. Chase Home Fin., LLC*, No. 08-0575, 2008 U.S. Dist. LEXIS 58694, at *4–5 (W.D. La. July 25, 2008) (The plaintiff wanted a declaratory judgment that \$38,000 in insurance proceeds would be applied to the principal on their mortgage. Additionally, the plaintiff sued for \$61,400 in various damages. The court combined these amounts to meet the \$75,000 jurisdictional amount.); *Pilgrim's Pride Corp. v. Frisco Food Servs., Inc.* No. 2:06-CV-512, 2007 U.S. Dist. LEXIS 10032, at *11 (E.D. Tex. Feb. 13, 2007) (holding that even when the value of plaintiff's declaratory judgment relief was added with plaintiff's claim for attorneys' fees, the amount in controversy was still not met).

⁷⁵ 89 F.3d 252, 255–56 (5th Cir. 1996).

⁷⁶ *Id.* at 56; see also *Bernhard Mech. Contractors, Inc. v. Am. Arbitration Ass'n*, No. 07-1919, 2008 U.S. Dist. LEXIS 33504, at *4–5 (W.D. La. Feb. 20, 2008) (rejecting plaintiff's argument that because only injunctive relief is sought, the amount in controversy is not met and holding that the jurisdiction is met by considering the underlying arbitration claim).

policy.”⁷⁷ If a plaintiff seeks in excess of insurance policy limits, then the insurance policy serves as a cap on recovery and potentially a cap on the amount in controversy.⁷⁸ The insurance policy limit makes it possible to be legally certain that a party cannot meet the amount in controversy if the limit is below the jurisdictional amount.⁷⁹ However, “items in addition to the policy limits, such as potential attorney’s fees, penalties, statutory damages, and punitive damages, may be considered when the insurer could be liable for these sums under state law.”⁸⁰

On the other hand, if a plaintiff is seeking less than the insurance policy limits, then a defendant seeking removal cannot rely on the policy limit to remove the case; rather the amount the plaintiff seeks in good faith will control for the jurisdiction determination.⁸¹ A Louisiana district court recently summarized the law clearly for claims based on insurance policies: “[I]t is the value of the claim, not the value of the underlying policy, that determines the amount in controversy, unless the value of the claim exceeds the value of the policy.”⁸²

C. Supplemental Jurisdiction Cases

The exercise of supplemental jurisdiction is codified at 28 U.S.C. section 1367. Section 1367(a) states:

[I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so

⁷⁷ 134 F.3d 1250, 1253 (5th Cir. 1998) (quoting *Allstate Ins. Co. v. Hilbun*, 692 F. Supp. 698, 700 (S.D. Miss. 1988)).

⁷⁸ *Payne v. State Farm Mut. Auto. Ins. Co.*, 266 F.2d 63, 65 (5th Cir. 1959); *see also* *Blansett v. Am. Employers Ins. Co.*, 652 F.2d 535, 535–36 (5th Cir. 1981).

⁷⁹ *Payne*, 266 F.2d at 65 (holding that even though the child’s damages may have been in excess of \$10,000, the insurance policy had a \$10,000 cap making it legally certain that recovery could not meet the jurisdictional amount).

⁸⁰ *Landrum v. Geico Gen. Ins. Co.*, No. 06-0845, 2007 U.S. Dist. LEXIS 22000, at *4–5 (W.D. La. Feb. 16, 2007) (citing *St. Paul Reinsurance Co. Ltd. v. Greenberg*, 134 F.3d 1250, 1253 (5th Cir. 1998); *Scottsdale Ins. Co. v. Domangue*, No. 99-2688, 1999 U.S. Dist. LEXIS 17774 (E.D. La. Nov. 12, 1999)).

⁸¹ *Hartford Ins. Group v. Lou-Con Inc.*, 293 F.3d 908, 911 (5th Cir. 2002); *Nola Restoration I, L.L.C. v. U.S.F. Ins. Co.*, No. 07-8760, 2008 U.S. Dist. LEXIS 9947, at *7 (E.D. La. Feb. 8, 2008).

⁸² *Nola Restoration I*, 2008 U.S. Dist. LEXIS 9947, at *7 (quoting *Southall v. St. Paul Travelers Ins. Co.*, No. 06-3848, 2006 U.S. Dist. LEXIS 61911 (E.D. La. Aug. 16, 2006)).

related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.⁸³

1367(b) goes on to explain the exceptions to this rule if jurisdiction is predicated on diversity of citizenship jurisdiction only. If original jurisdiction is based on 28 U.S.C. section 1332, a court cannot exercise supplemental jurisdiction over “claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure.”⁸⁴ Additionally, courts cannot exercise supplemental jurisdiction over a claim by a Rule 19 or Rule 24 plaintiff.⁸⁵

The United States Supreme Court interpreted 28 U.S.C. section 1367 in *Exxon Mobil Corp. v. Allapattah Services, Inc.*⁸⁶ In *Exxon Mobil*, a consolidated case, two sets of plaintiffs sued a single defendant.⁸⁷ In each case, at least one plaintiff could meet the requisite jurisdictional amount, but other plaintiffs, individually, could not reach the amount on their own. The Court explained the question before it was “whether a diversity case in which the claims of some plaintiffs satisfy the amount-in-controversy requirement, but the claims of other plaintiffs do not, presents a ‘civil action of which the district courts have original jurisdiction.’”⁸⁸ The Court answered “yes” and explained:

⁸³ 28 U.S.C. § 1367(a) (2000).

⁸⁴ *Id.* § 1367(b).

⁸⁵ *Id.*

⁸⁶ 545 U.S. 546 (2005).

⁸⁷ It is vital that each set of plaintiffs only sued one defendant. If there were multiple defendants, joined under Rule 20, the plain language of section 1367(b) would have denied supplemental jurisdiction. However, the Court clearly explained that nothing in section 1367(b) prevented jurisdiction of plaintiffs joined under Rule 20 or Rule 23. *Id.* at 560; *cf.* *Guidry & Begnaud Devs., L.L.C. v. Houlihan Smith & Co.*, No. 07-2192, 2008 U.S. Dist. LEXIS 56039, at *11 (W.D. La. May 8, 2008) (holding that the court had supplemental jurisdiction over plaintiff’s claim against second defendant because the court had original jurisdiction (diversity of citizenship) over the first defendant and the claims against the second defendant were related). The author doubts that *Guidry* is a permissive exercise of supplemental jurisdiction because it appears that the two defendants are Rule 20 parties and 28 U.S.C. section 1367(b) carves out jurisdiction in this case.

⁸⁸ *Exxon Mobil*, 545 U.S. at 558 (quoting 28 U.S.C. § 1367(a) (2000)).

When the well-pleaded complaint contains at least one claim that satisfies the amount-in-controversy requirement, and there are no other relevant jurisdictional defects, the district court, beyond all question, has original jurisdiction over that claim. The presence of other claims in the complaint, over which the district court may lack original jurisdiction, is of no moment. If the court has original jurisdiction over a single claim in the complaint, it has original jurisdiction over a “civil action” within the meaning of § 1367(a), even if the civil action over which it has jurisdiction comprises fewer claims than were included in the complaint. Once the court determines it has original jurisdiction over the civil action, it can turn to the question whether it has a constitutional and statutory basis for exercising supplemental jurisdiction over the other claims in the action.⁸⁹

Thus, the Court held so long as one named plaintiff satisfies the amount in controversy, section 1367(a) authorizes the exercise of supplemental jurisdiction over the claims of additional plaintiffs in the same Article III case or controversy, even if those claims do not meet the amount in controversy (subject to the exceptions in section 1367(b)).⁹⁰

IV. WHEN AND HOW TO REMOVE AND REMAND

Many amount in controversy questions arise when plaintiffs originally file suit in state court, and then the defendant seeks to remove the suit to federal court. Since 1988, the Fifth Circuit Court of Appeals has dealt with more diversity of jurisdiction removal cases than any other circuit.⁹¹ Thus, the court is well versed in the subject.

⁸⁹ *Id.* at 559.

⁹⁰ *Id.* at 549.

⁹¹ Michael W. Lewis, *Comedy or Tragedy: The Tale of Diversity Jurisdiction Removal and the One-Year Bar* 24 (2008), available at http://works.bepress.com/context/michael_lewis/article/1001/type/native/viewcontent/.

A. *Generally, Removal Within 30 Days of Learning That the Amount In Controversy is Met*

28 U.S.C. section 1446(b) plainly states that the notice of removal “shall be filed within thirty days after the receipt by the defendant . . . of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based.”⁹² However, in Texas and Louisiana pleading the amount in controversy in a state suit is generally not required due to the rules and statutes in each state. Section 1446(b) goes on to explain:

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 removable⁹³

The thirty-day rule appears to be very straight-forward, but in practice this straight-forward rule is not so easy to apply. In addition to the thirty day rule, there is an overarching one year limit. No case may be removed from state court more than one year after the state suit commenced.⁹⁴

However, the one year limitation to remove is not without exception in the Fifth Circuit. In *Tedford v. Warner-Lambert Co.*, the Fifth Circuit became the first and only circuit court to permit an equitable exception to the one year rule.⁹⁵ The court held: “[w]here a plaintiff has attempted to manipulate the statutory rules for determining federal removal jurisdiction, thereby preventing the defendant from exercising its rights, equity may require that the one-year limit in section 1446(b) be extended.”⁹⁶

⁹² See, e.g., TEX. R. CIV. P. 47(b); TEX. R. CIV. P. 56; LA. CODE CIV. PROC. ANN. art. 893(A)(1). For suits arising in Louisiana state courts, however, plaintiffs may generally plead that the amount in controversy is below the federal jurisdictional amount. Louisiana plaintiffs are prohibited from pleading an amount in controversy, but plaintiffs may generally plead that the amount in controversy does or does not meet the jurisdictional amount. LA. CODE CIV. PROC. ANN. art. 893(A)(1).

⁹³ 28 U.S.C. § 1446(b) (2008).

⁹⁴ *Id.*

⁹⁵ 327 F.3d 423 (5th Cir. 2003); see also Lewis, *supra* note 91.

⁹⁶ *Tedford*, 327 F.3d at 428–29.

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B. When Plaintiff Alleges an Amount in Controversy in Good Faith, That Amount Controls, but If Plaintiff Alleges an Amount in Controversy in a Post-Removal Affidavit, That Affidavit May Not Have Any Effect.

The sum claimed by the plaintiff generally controls, so long as it was made in good faith.⁹⁷ A strong presumption arises that the amount the plaintiff claims is made in good faith; this is especially true when a plaintiff brings suit in state court.⁹⁸ It is highly unlikely that a plaintiff would ever plead an inflated amount in controversy in state court with hopes that the defendant would remove to federal court; if a plaintiff wants to be in federal court and meets the amount in controversy, it will be much easier for the plaintiff to file in federal court.

Some plaintiffs will also allege an amount in controversy just below the jurisdictional amount or stipulate to damages below the jurisdictional amount in an attempt to avoid federal jurisdiction.⁹⁹ In *Troiani v. Allstate Insurance Company*, a Texas plaintiff sought to defeat the possibility of removal by pleading, in violation of Texas Rule of Civil Procedure 47,¹⁰⁰ that its causes of action were for damages “not in excess of \$70,000.”¹⁰¹ The court explained:

When a plaintiff specifically limits his recovery in an attempt to avoid federal jurisdiction, his claim will not control if made in bad faith. A plaintiff’s claim will be characterized as made in bad faith if it was made “with the knowledge that the claim is actually worth more, but also with the knowledge that [the plaintiff] may be able to evade federal jurisdiction by virtue of the pleading.”¹⁰²

The court explained that in this case, plaintiff’s claims “clearly exceeded” the jurisdictional amount, plaintiff knew this, and thus, plaintiff

⁹⁷ *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288 (1938).

⁹⁸ *Id.* at 290–91.

⁹⁹ *See Allen v. R. & H. Oil & Gas Co.*, 63 F.3d 1326, 1335 (5th Cir. 1995).

¹⁰⁰ “An original pleading . . . shall contain . . . in all claims for unliquidated damages only the statement that the damages sought are within the jurisdictional limits of the court.” TEX. R. CIV. P. 47.

¹⁰¹ No. B-06-67, 2006 U.S. Dist. LEXIS 45037, at *8–11 (S.D. Tex. July 3, 2006).

¹⁰² *Id.* at *13 (quoting *De Aguilar v. Boeing Co.*, 47 F.3d 1404, 1409–10 (5th Cir. 1995)).

made a “transparent attempt to evade federal jurisdiction.”¹⁰³ Thus, the court gave no consideration to plaintiff’s pleading stating the amount in controversy will not exceed \$70,000.¹⁰⁴

Post-removal affidavits and stipulations have varying degrees of persuasion depending on the circumstances. The Fifth Circuit has explained that post-removal affidavits and stipulations are only considered to the extent the amount in controversy, at the time of removal, is ambiguous.¹⁰⁵ If there is no ambiguity about the amount in controversy at the time of removal, then post-removal affidavits and stipulations should have no effect.¹⁰⁶ Even in Louisiana where plaintiffs can plead in their original petition that the amount-in-controversy is not met in the beginning, a later stipulation to damages may have no effect.¹⁰⁷ However, in *Trevino v. Credit Collection Services*, plaintiffs filed a class action suit, and defendant removed the case to the Southern District of Texas. The court considered the post-removal stipulation that recovery will not exceed \$75,000 and remanded the case.¹⁰⁸

While post-removal stipulations rarely have an effect, a failure to stipulate to damages post-removal may be some evidence that the removing defendant has met his preponderance burden.¹⁰⁹ The Eastern District of Louisiana explained that the “failure to stipulate is only one factor to consider in determining whether a defendant has met its burden and it alone will not defeat a plaintiff’s motion to remand.”¹¹⁰

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Gebbia v. Wal-Mart Stores, Inc.*, 233 F.3d 880, 883 (5th Cir. 2000).

¹⁰⁶ *Id.*

¹⁰⁷ *Jones v. CMM of Ind., LLC*, No. 05-4039, 2006 U.S. Dist. LEXIS 1156, at *10 (E.D. La. Jan. 17, 2006) (holding plaintiff’s post-removal stipulation that damages did not exceed the amount in controversy had no effect).

¹⁰⁸ *Trevino v. Credit Collection Servs.*, No. M-04-273, 2005 U.S. Dist. LEXIS 37422, at *4, 6 (S.D. Tex. July 6, 2005).

¹⁰⁹ *See infra* Part IV.C.

¹¹⁰ *Carbajal v. CasKids Oil Operating Co.*, No. 05-5966, 2006 U.S. Dist. LEXIS 21065, at *10 (E.D. La. Apr. 18, 2006); *see also* *Broadway v. Wal-Mart Stores, Inc.*, No. 00-1893, 2000 U.S. Dist. LEXIS 15632, at *5–6 (E.D. La. Oct. 18, 2000); *Reid v. Delta Gas, Inc.*, 837 F. Supp. 751, 752 (M.D. La. 1993).

C. When Plaintiff Does Not Allege an Amount in Controversy, the Defendant Must Prove by a Preponderance of the Evidence That the Amount in Controversy is Met

When defendant removes a case to federal court, the burden of invoking the court's jurisdiction rests on the defendant, even if the plaintiff did not allege an amount in controversy.¹¹¹ To carry its burden, the defendant cannot merely make a conclusory statement that the amount in controversy is met.¹¹² In *Simon v. Wal-Mart Stores*, the defendant removed the case to federal court without providing any facts to support jurisdiction. The *Simon* plaintiffs did not challenge the removal.¹¹³ Nevertheless, the Fifth Circuit held that the district court was without jurisdiction because plaintiff's complaint did not make it facially apparent that the amount in controversy was met and defendant did not introduce any evidence to support the amount in controversy.¹¹⁴

When the plaintiff does not allege an amount in controversy in good faith, the removing-defendant must prove by a preponderance of the evidence that the jurisdictional amount is met.¹¹⁵ First, the court should determine whether it is facially apparent that the claims exceed the jurisdictional amount.¹¹⁶ Secondly, the defendant may present summary-judgment type evidence of facts demonstrating the jurisdictional amount.¹¹⁷

No clear rules govern what is "facially apparent." What is facially apparent will be determined case by case; neither the Fifth Circuit's nor its district courts' decisions can be easily predicted.¹¹⁸ Courts have

¹¹¹ *St. Paul Reinsurance Co. v. Greenberg*, 134 F.3d 1250, 1253 (5th Cir. 1998).

¹¹² *Simon v. Wal-Mart Stores, Inc.*, 193 F.3d 848, 850 (5th Cir. 1999).

¹¹³ *Id.*

¹¹⁴ *Id.* at 851–52.

¹¹⁵ *Allen v. R & H Oil & Gas Co.*, 63 F.3d 1326, 1335 (5th Cir. 1995).

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ See generally *Felton v. Greyhound Lines, Inc.*, 324 F.3d 771 (5th Cir. 2003) (holding the amount in controversy was met and removal was proper where elderly lady fell and broke hip while boarding a Greyhound Bus, and had \$40,000 in medical bills and would have pain and suffering damages as well); *White v. FCI USA, Inc.*, 319 F.3d 672 (5th Cir. 2003) (holding that the amount in controversy was met and removal was proper in a wrongful termination case when plaintiff prayed for punitive damages, attorney's fees, pre-judgment interest, court costs, and compensatory damages for lost pay, lost fringe benefits, front pay, loss of wage earning capacity, harm to plaintiff's credit and credit reputation, mental anguish, and emotional distress (both past and future)); *Gebbia v. Wal-Mart Stores, Inc.*, 233 F.3d 880 (5th Cir. 2000) (holding that the

consistently held that ambiguities regarding the propriety of removal should be decided in favor of remand;¹¹⁹ thus, defendants should practice with caution and not expect a court to find the amount in controversy facially apparent.

D. Defendant Must Timely Remove When it May Be First Ascertained That the Amount in Controversy is Met

Assuming the amount in controversy is not facially apparent from the original pleadings, then the defendant must remove “within thirty days after receipt by the defendant . . . of a copy of an amended pleading, motion, order or *other paper* from which it may first be ascertained that the case [is removable]”¹²⁰ To utilize removal under this subsection, it is important to understand the meaning of “other paper.”

1. ‘Other Paper’ Must Be Received After Suit is Filed and Cannot Be the Voluntary Act of Defendant

“Other paper” must be received after suit is filed. The Fifth Circuit has held that any communications between the plaintiff and defendant before the plaintiff actually files suit are not other paper.¹²¹ Therefore, the Fifth Circuit decided that a demand letter and medical bills sent to a defendant before suit was not other paper for purposes of invoking 28 U.S.C. section

amount in controversy was met in a Wal-Mart slip and fall case when plaintiff alleged injuries to her wrist, knee, and back and alleged damages for medical expenses, physical pain and suffering, mental anguish and suffering, loss of enjoyment of life, lost wages and earning capacity, and permanent disability and disfigurement); *Lockett v. Delta Airlines, Inc.*, 171 F.3d 295 (5th Cir. 1999) (holding that the amount in controversy was met and removal was proper when Delta Airlines lost plaintiff’s luggage, which included plaintiff’s medication, and plaintiff had to be hospitalized for 6 days); *cf. Simon*, 193 F.3d at 848 (remanding case because amount in controversy not met facially apparent where Wal-Mart shopper was mugged in the parking lot and ended up being drug the distance of several parking spaces to the front of the store and suffered a severely injured shoulder, soft-tissue injuries throughout her body, bruises, and abrasions); *Nola Restoration I, L.L.C. v. USF Ins. Co.*, No. 07-8760, 2008 U.S. Dist. LEXIS 9947 (E.D. La. Feb. 8, 2008) (remanding case where plaintiffs were Hurricane Katrina victims and asserted substantial wind damage and loss of use and loss of rent against insurance company).

¹¹⁹*Manguno v. Prudential Prop. & Cas. Ins. Co.*, 276 F.3d 720, 723 (5th Cir. 2002) (“Any ambiguities are construed against removal because the removal statute should be strictly construed in favor of remand.”).

¹²⁰28 U.S.C. § 1446(b) (2008) (emphasis added).

¹²¹*Chapman v. Powermatic, Inc.*, 969 F.2d 160, 164 (5th Cir. 1992).

1446(b).¹²² The court explained: “The plain language . . . of section 1446(b) requires that if an ‘other paper’ is to start the thirty-day time period, [the] defendant must receive the ‘other paper’ after receiving the initial pleading.”¹²³

A voluntary act by the defendant or the defendant’s subjective knowledge is not enough to constitute “other paper” for purposes of removal.¹²⁴ In *S.W.S. Erectors, Inc. v. Infax, Inc.*, the defendant signed an “affidavit, which summarized a [phone] conversation with plaintiff’s attorney [in which defendant admitted] that the amount in controversy exceeded \$100,000.”¹²⁵ The defendant did not remove the case after memorializing the phone conversation in an affidavit. The Fifth Circuit held that even though the defendant may have had subjective knowledge of the amount in controversy and even though the defendant signed an affidavit stating the amount in controversy, these acts by the defendant did not start the thirty day removal clock.¹²⁶ Other paper requires a “voluntary act by the plaintiff”—not the defendant.¹²⁷

2. A Broad Range of Documents Received After Suit is Filed Constitute ‘Other Paper’

In contrast to a pre-complaint demand letter, a post-complaint demand letter is sufficient to comprise “other paper.”¹²⁸ The Fifth Circuit considers a post-complaint demand letter a voluntary act of the plaintiff that provides the defendant knowledge of the changed circumstances.¹²⁹ This demonstrates that it is not always necessary for the “other paper” to be filed with the court before the court will consider the “other paper.”¹³⁰ Additionally, many discovery responses are considered “other paper.”

¹²² *Id.* at 163–64.

¹²³ *Id.* at 164.

¹²⁴ *S.W.S. Erectors, Inc. v. Infax, Inc.*, 72 F.3d 489, 494 (5th Cir. 1996).

¹²⁵ *Id.* at 493.

¹²⁶ *Id.* at 494.

¹²⁷ *Id.*

¹²⁸ *Addo v. Globe Life & Accident Ins. Co.*, 230 F.3d 759, 762 (5th Cir. 2000).

¹²⁹ *Id.*

¹³⁰ *Id.* at 761.

Examples include plaintiff's responses in deposition transcripts,¹³¹ interrogatories,¹³² and requests for disclosure.¹³³

3. The Evidence Must Be Unequivocally Clear and Certain To Start the Thirty-Day Clock.

In *Bosky v. Kroger Texas, LP*, a case where defendant did not timely remove, the Fifth Circuit explained that when confronted with "other paper" and other section 1446(b) grounds for removal, a higher, unequivocally-clear-and-certain, standard applies.¹³⁴

The *Chapman* measure of the "affirmatively reveals on its face" standard does not apply to the second paragraph of section 1446(b), but rather the information supporting removal in a copy of an amended pleading, motion, order or other paper must be "unequivocally clear and certain" to start the time limit running for a notice of removal under the second paragraph of section 1446(b). This clearer threshold promotes judicial economy. It should reduce "protective" removals by defendants faced with an equivocal record. It should also discourage removals before their factual basis can be proven by a preponderance of the evidence through a simple and short statement of the facts. In short, a bright-line rule should create a fairer environment for plaintiffs and defendants.¹³⁵

The "unequivocal clear and certain" described in *Bosky* is applied when the court is determining whether the defendant timely removed—whether the thirty day clock should start under section 1446(b)—not whether removal was permissive.¹³⁶ For example, in *Harden v. Field Memorial Community Hospital*, the plaintiff argued that the case should be remanded because the defendant failed to timely remove.¹³⁷ Plaintiff contended that

¹³¹ *S.W.S. Erectors*, 72 F.3d at 494.

¹³² *Chapman v. Powermatic, Inc.*, 969 F.2d 160, 164 (5th Cir. 1992).

¹³³ *Rios v. Lear Corp. EEDS & Interiors*, No. EP-06-CA-146-DB, 2006 U.S. Dist. LEXIS 39233, at *8 (S.D. Tex. May 31, 2006).

¹³⁴ 288 F.3d 208, 211 (5th Cir. 2002).

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ 265 Fed. App'x. 405, 408 (5th Cir. 2008).

the thirty day removal clock started when plaintiff filed an amended petition because through the amended petition is ascertainable that the amount in controversy was met. The amended petition described the plaintiff's injuries as "a fractured nose, fractured jaw, lacerations to her face and gums, broken dentures, and contusions to her face and other body parts of her body."¹³⁸ Applying *Bosky*, the Fifth Circuit held that it was not "unequivocally clear and certain" that the damages exceeded \$75,000 based on this amended petition; thus, defendant's removal, more than thirty days after receiving the amended petition, was not untimely.¹³⁹

E. Defendant May Attempt Removal More Than One Time, But Not on the Same Grounds

Even after a case is remanded, defendant may still attempt to remove the case again, so long as defendant asserts different factual grounds.¹⁴⁰ In *S.W.S. Erectors, Inc. v. Infax, Inc.*, the defendant first removed the case based on defendant's own affidavit and asserted jurisdiction under 28 U.S.C. section 1332; the case was remanded.¹⁴¹ Then, the defendant removed the case a second time—this time based on plaintiff's deposition testimony—and again asserted jurisdiction under 28 U.S.C. section 1332.¹⁴² The district court sustained jurisdiction on the second removal and the Fifth Circuit affirmed. The court explained: "The prohibition against removal 'on the same ground' does not concern the theory on which federal jurisdiction exists (i.e., federal question or diversity jurisdiction), but rather the pleading or event that made the case removable."¹⁴³

F. To Remand, Plaintiff Must Prove by a Legal Certainty that the Amount in Controversy is Not Met

Once the removing defendant has met its burden to show by a preponderance of the evidence that the amount in controversy is met, the plaintiff may only have the case remanded by proving to a legal certainty

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *S.W.S. Erectors, Inc. v. Infax, Inc.*, 72 F.3d 489, 492 (5th Cir. 1996).

¹⁴¹ *Id.* at 493.

¹⁴² *Id.* at 494.

¹⁴³ *Id.* at 492.

that the jurisdictional amount is not met.¹⁴⁴ If plaintiff seeks remand based on a lack of subject-matter jurisdiction, since federal district courts have limited jurisdiction, plaintiff may move to remand at any time.¹⁴⁵

If plaintiff can prove the removing-defendant lacked an “objectively reasonable basis for seeking removal” then plaintiff may be entitled to attorneys’ fees.¹⁴⁶ Conversely, if there is an objectively reasonable basis for removal, attorneys’ fees are not available.¹⁴⁷ If fees are ordered, they are limited to the plaintiff’s costs of opposing removal, seeking remand, and any other expenses incurred because of improper removal, but not “ordinary litigation expenses that would have been incurred had the action remained in state court”¹⁴⁸

CONCLUSION

Since 1789, when Congress first granted federal courts diversity jurisdiction, there has always been a dollar requirement. The requirement that started at \$500 has now increased to over \$75,000. The United States Supreme Court, Fifth Circuit, and district courts have countless opinions interpreting “where the matter in controversy exceeds the sum or value of \$ 75,000.” Because it is implausible to think Congress will ever do away with the jurisdictional amount in diversity jurisdiction, lawyers need a thorough understanding of how to reach the requirement.

To reach \$75,000.01, you cannot add court costs or non-penalty interest. Penalty interest, however, is treated like punitive damages, and may be added to other damages. Likewise, when attorneys fees are authorized by statute, attorneys’ fees may be included.

In a two-party case, with one plaintiff and one defendant all of the plaintiff’s claims may be aggregated. Conversely, in a multi-party case you

¹⁴⁴De Aguilar v. Boeing Co., 47 F.3d 1404, 1412 (5th Cir. 1995).

¹⁴⁵28 U.S.C. § 1447(c) (2008).

¹⁴⁶28 U.S.C. § 1447(c) (2008); see *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 140 (2005); see also *Yount v. Lafayette Ins. Co.*, No. 06-31297, 2007 U.S. App. LEXIS 16332, at *2 (5th Cir. July 9, 2007).

¹⁴⁷28 U.S.C. § 1447(c) (2008); see *Martin*, 546 U.S. at 140; see also *Yount*, 2007 U.S. App. LEXIS 16332, at *2.

¹⁴⁸*Hines v. Plane Paint, Inc.* 430 F. Supp. 2d 598, 602 (S.D. Miss. 2005) (quoting *Avitts v. Amoco Prod. Co.*, 111 F.3d 30, 32 (5th Cir. 1997)) (holding removal based on diversity jurisdiction lacked objectively reasonable basis as there was no complete diversity and no improper joinder).

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cannot aggregate separate plaintiffs' claims to reach the jurisdictional amount. However, all of the general rules have to be applied in light of other statutory provisions. If supplemental jurisdiction can be obtained under 28 U.S.C. section 1367, then it is not necessary for multiple plaintiffs or all class members to individually meet the amount in controversy.

After determining which amounts can be added and who's claims can be aggregated, removing defendants need to consider the facts of the case. Defendants who want to remove a case to federal court have thirty days after ascertaining that the amount in controversy is met to remove the case. To argue for removal or remand, litigants need to analogize and differentiate their case with the many Fifth Circuit and district court cases that turn on facts.

The burden of proving the amount in controversy always rests on the party seeking to invoke the court's jurisdiction. At the same time, the party seeking to avoid the court's jurisdiction must fully understand the contours of the amount in controversy requirement to argue against federal jurisdiction.

