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## Two Heads Are Better than One: Making a Case for the Either Party Viewpoint for Removal

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## Law Summary

# Two Heads Are Better Than One: Making a Case for the Either Party Viewpoint for Removal

### I. INTRODUCTION

To remove a claim to federal court on the basis of diversity jurisdiction, the defendant must show complete diversity in citizenship and must show that the value of the plaintiff's claim exceeds seventy-five thousand dollars.<sup>1</sup> In actions for removal, courts are finally recognizing the enormous inequity of looking only to what the plaintiff believes is the value of the claim. To assess the true and accurate value of the claim, courts should consider the amount the defendant stands to lose as well as the amount the plaintiff stands to gain. It makes little sense for the court to consider one party's viewpoint of the value of the case to the exclusion of the other party.

Litigation is a game of strategy. Courts that value the amount in controversy solely by the plaintiff's viewpoint encourage plaintiffs to engage in gamesmanship and forum shopping, which unfairly prejudices defendants. In light of the ambiguity of the removal statutes and the lack of clear precedent, the federal circuits have diverged in the debate over which viewpoints deserve consideration in removal actions. The three general approaches are to consider: (1) only the plaintiff's viewpoint, (2) the viewpoint of the party seeking federal jurisdiction, and (3) the viewpoint of either party. This Law Summary suggests that the amount in controversy should be determined according to the viewpoint of either party, where either the value to the plaintiff or the cost to the defendant can be used to establish the jurisdictional amount.

### II. LEGAL BACKGROUND

#### *A. Removal Statutes Do Not Favor a Particular Viewpoint*

The removal requirements set forth in 28 U.S.C. Section 1441 do not contain an explicit amount in controversy requirement.<sup>2</sup> Instead, the statute permits removal of any claim that could originally have been brought in federal

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1. See 28 U.S.C. §§ 1441, 1332 (2000).

2. *Id.* § 1441. In addition, procedures for removal are described in 28 U.S.C. Section 1446 (2000), and procedures after removal are explained in 28 U.S.C. Sections 1447-48 (2000).

court.<sup>3</sup> Federal jurisdiction extends primarily where there is diversity<sup>4</sup> of the parties or the claim involves a federal question.<sup>5</sup> In diversity cases, the amount in controversy for removal is determined by the record existing at the time the removal petition is filed with the district court.<sup>6</sup> That record can include a wide variety of evidence of the amount in controversy, including affidavits, documents, deposition testimony, answers to interrogatories, statements by counsel, stipulations, settlement offers and other correspondence between the parties.<sup>7</sup> Additionally, the court may conduct a limited evidentiary hearing.<sup>8</sup>

Generally, when a defendant files for removal, the court first looks to see if the plaintiff's state court complaint requests relief in excess of seventy-five thousand dollars, exclusive of costs and interest.<sup>9</sup> If so, the court will usually conclude that federal jurisdiction exists.<sup>10</sup> The much more controversial case arises where the plaintiff either fails to request a specific amount, or where the plaintiff requests equitable relief that has differing values or compliance costs to the parties. A plaintiff can usually plead an amount below seventy-five thousand dollars and later amend the complaint to increase the amount of damages claimed.<sup>11</sup> Because complaints are relatively easy to amend to increase the requested relief, a potential for abuse or manipulation by the plaintiff exists.<sup>12</sup>

3. *Id.* § 1441(a) (“[A]ny civil action . . . of which the district courts of the United States have original jurisdiction, may be removed . . .”).

4. *Id.* § 1441(b). The statute imposes the additional requirement of complete diversity. If the cause of action does not arise from either the Constitution or federal law, then it “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.” *Id.* The amount in controversy for diversity claims must exceed seventy-five thousand dollars. *See id.* § 1332.

5. Federal courts have jurisdiction over claims involving a federal question pursuant to 28 U.S.C. Section 1331 (2000).

6. *See* 14C CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3725, at 71-72 (3d ed. 1998).

7. *See McIntire v. Ford Motor Co.*, 142 F. Supp. 2d 911, 915 (S.D. Ohio 2001) (citing *Ohio Nat’l Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990)); *Radmer v. Aid Ass’n for Lutherans*, No. 99-0961-CV-W-9-4, 2000 WL 33910093, at \*2 (W.D. Mo. Apr. 27, 2000).

8. *Ohio Nat’l*, 922 F.2d at 325 (citing *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981); *Mortenson v. First Fed. Sav. & Loan Ass’n*, 549 F.2d 884, 891 (3d Cir. 1977)).

9. 14C WRIGHT ET AL., *supra* note 6, § 3725, at 68.

10. *Id.* § 3725, at 73.

11. *Id.* § 3725, at 85-87. If a plaintiff later amends the complaint to request more than seventy-five thousand dollars, the case becomes removable, and the defendant ordinarily has thirty days to file for removal. *Id.* § 3725, at 87.

12. 28 U.S.C. Section 1446 (2000) prohibits diversity-based removal of any action after one year. The one year time bar allows plaintiffs preferring state court to set a trap

The removal statutes do not specify how the court should determine the value of a claim when that value is not apparent from the face of the complaint. More specifically, the removal statutes do not specify whose viewpoint the court may consider in valuing the amount in controversy.

*B. Supreme Court Decisions Do Not Favor a Particular Viewpoint and the Circuit Courts Are Split*

The United States Supreme Court's decisions give very little insight into which viewpoints deserve consideration in valuing the amount in controversy. The decisions also fail to answer whether the viewpoint considered should depend on the type of relief requested.

The leading Supreme Court case, *Mississippi & Missouri Railroad Co. v. Ward*, says only that the value of the amount in controversy is the "value of the object."<sup>13</sup> *Ward* was a nuisance suit brought by a steamboat owner against the defendant, who built a bridge across a river.<sup>14</sup> It is unclear whether the "value of the object" referred to the value of the bridge, the value of the plaintiff's steamboat business, the cost of removing the bridge or the plaintiff's right to be free from the obstruction.<sup>15</sup>

Finding it difficult to derive any meaning from *Ward*, one might look for guidance to the Supreme Court's 1915 decision in *Glenwood Light & Water Co. v. Mutual Light, Heat & Power Co.*<sup>16</sup> In *Glenwood*, the plaintiff sought an injunction to prevent the defendant power company's construction of poles and wires, which interfered with the plaintiff's utility lines.<sup>17</sup> The Supreme Court reversed the trial court's dismissal for lack of subject matter jurisdiction and found that the plaintiff's right to be free from interference was worth an amount that exceeded the amount in controversy.<sup>18</sup>

Proponents of the plaintiff's viewpoint cite this case as implicitly ruling that only the plaintiff's viewpoint should be considered in determining the amount in controversy.<sup>19</sup> The actual language of the opinion applies the plaintiff's viewpoint but never rejects the use of the defendant's viewpoint.<sup>20</sup> Moreover,

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for inexperienced or careless defendants. Plaintiffs can plead lower damages, wait one year, then amend the complaint to increase the damage amount. See *infra* note 88 and accompanying text.

13. *Miss. & Mo. R.R. Co. v. Ward*, 67 U.S. (2 Black) 485, 492 (1862).

14. *Id.* at 491.

15. 14B WRIGHT ET AL., *supra* note 6, § 3703, at 114.

16. 239 U.S. 121 (1915).

17. *Id.* at 125.

18. *Id.*

19. 14B WRIGHT ET AL., *supra* note 6, § 3703, at 119-20.

20. *Id.*

it never addresses the real viewpoint controversy: when the defendant's value satisfies the jurisdictional amount but the plaintiff's value does not.<sup>21</sup> The only proposition that is clear from *Glenwood* is that when the plaintiff seeks to establish jurisdiction, the plaintiff's viewpoint is at least one viewpoint the court may consider.

Is the court limited to the plaintiff's perspective in removal actions, or may it consider the defendant's viewpoint in certain circumstances? In the absence of a Supreme Court decision, most federal circuits adopted one of the following viewpoints: (1) the plaintiff's viewpoint, (2) the viewpoint of the party seeking jurisdiction, or (3) either party's viewpoint. The Second,<sup>22</sup> Third,<sup>23</sup> Fifth,<sup>24</sup> Eighth<sup>25</sup> and Eleventh<sup>26</sup> Circuits appear to follow the plaintiff's viewpoint, which prohibits using the defendant's viewpoint as a basis for federal court jurisdiction. A few lower courts have applied the viewpoint of the party seeking jurisdiction.<sup>27</sup> Under that view, the court considers only the plaintiff's perspective to establish diversity jurisdiction and considers only the defendant's perspective for removal.<sup>28</sup> The First,<sup>29</sup> Seventh,<sup>30</sup> Ninth,<sup>31</sup> Tenth,<sup>32</sup> and possibly Fourth<sup>33</sup> Circuits apply the either party viewpoint, which allows the court to consider the value to

21. *Id.*

22. See *Kheel v. Port of N.Y. Auth.*, 457 F.2d 46, 49 (2d Cir. 1972).

23. See *In re Corestates Trust Fee Litig.*, 39 F.3d 61, 65 (3d Cir. 1994).

24. See *Alfonso v. Hillsboro County Aviation Auth.*, 308 F.2d 724, 727 (5th Cir. 1962).

25. See *infra* notes 34-58 and accompanying text. The Eighth Circuit's position is somewhat unclear but is most consistent with the plaintiff's viewpoint.

26. See *Ericsson GE Mobile Communications, Inc. v. Motorola Communications & Elecs., Inc.*, 120 F.3d 216, 219 (11th Cir. 1997).

27. For district courts following the party seeking jurisdiction viewpoint, see *Bergstrom v. Burlington Northern R.R. Co.*, 895 F. Supp. 257, 261 (D.N.D. 1995); *Solna, Inc. v. Am. Printing Equip., Inc.*, No. 89-0715-CV-W-5, 1989 WL 325976, at \*3 (W.D. Mo. Sept. 20, 1989); *Family Motor Inn, Inc. v. L-K Enters. Div., Consol. Foods Corp.*, 369 F. Supp. 766, 769 (E.D. Ky. 1973); and *Inman v. Milwhite Co.*, 261 F. Supp. 703, 708 (E.D. Ark. 1966).

28. 14B WRIGHT ET AL., *supra* note 6, § 3703, at 125.

29. See *Berman v. Narragansett Racing Ass'n*, 414 F.2d 311, 314 (1st Cir. 1969).

30. See *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 609 (7th Cir. 1997).

31. See *Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 405 (9th Cir. 1996).

32. See *Okla. Retail Grocers Ass'n v. Wal-Mart Stores, Inc.*, 605 F.2d 1155, 1159 (10th Cir. 1979); *Ronzio v. Denver & Rio Grande W. R.R. Co.*, 116 F.2d 604, 606 (10th Cir. 1940).

33. See *Hoffman v. Vulcan Materials Co.*, 19 F. Supp. 2d 475, 482 (M.D.N.C. 1998) (applying a "flexible approach" that is closely aligned with the either party viewpoint, if not identical).

either the plaintiff or the defendant. The Sixth and D.C. Circuits have not consistently applied any particular viewpoint.

The Eighth Circuit traditionally values the amount in controversy from the plaintiff's viewpoint,<sup>34</sup> but its decisions tease defendants with dicta and footnotes suggesting that it may consider the defendant's viewpoint under the right circumstances.<sup>35</sup> *Hatridge v. Aetna Casualty & Surety Co.*<sup>36</sup> was perhaps the Eighth Circuit's closest flirtation with considering the defendant's viewpoint. The *Hatridge* court voiced approval for the defendant's viewpoint, but safeguarded its decision by holding that Mr. and Mrs. Hatridge had a common, undivided interest, and the aggregate value of their claims exceeded the jurisdictional amount.<sup>37</sup> The court refused to sever Mrs. Hatridge's loss of consortium claim against Aetna from her husband's personal injury claim against Aetna.<sup>38</sup> The court also provided a few examples of when it would consider the plaintiff's viewpoint and factors that might warrant consideration of the defendant's viewpoint.<sup>39</sup> The court explained that when the plaintiff seeks only recovery of money, the plaintiff's viewpoint is ordinarily appropriate.<sup>40</sup> But it found a compelling case for using the defendant's viewpoint when the defendant

34. The Eighth Circuit allows compensatory damages, the value of injunctive relief, punitive damages and attorneys fees to go toward establishing the amount in controversy. See *Allison v. Sec. Benefit Life Ins. Co.*, 980 F.2d 1213, 1215 (8th Cir. 1992) (punitive damages); *Capitol Indem. Corp. v. Miles*, 978 F.2d 437, 438 (8th Cir. 1992) (attorneys fees); *Burns v. Mass. Mut. Life Ins. Co.*, 820 F.2d 246, 248 (8th Cir. 1987) (value of injunctive relief).

35. See Brittain Shaw McInnis, Comment, *The \$75,000.01 Question: What Is the Value of Injunctive Relief?*, 6 GEO. MASON L. REV. 1013, 1047 n.52 (1998). McInnis views the Eighth Circuit as internally split, but this Law Summary offers an additional possibility. The Eighth Circuit may be willing to consider other viewpoints and is merely waiting for the perfect case to explain its position. In the meantime, perhaps it is not that the lower courts are split; the circuit as a whole might consider differing viewpoints in certain types of cases. For example, courts in the Eighth Circuit consistently refuse to consider the defendant's viewpoint in class actions. See *infra* notes 47-50 and accompanying text.

36. 415 F.2d 809 (8th Cir. 1969).

37. *Id.* at 815-16. After stating its approval of the defendant's viewpoint rule and explaining how defendant Aetna's liability would far exceed the amount in controversy despite the fact that Mrs. Hatridge requested less than the jurisdictional amount, the court retreated from the defendant's viewpoint. *Id.* It stated that "we do not feel free to place particular reliance, in our present decision, upon the cases, such as *Ronzio*, which utilize the defendant's standpoint approach. Instead, we rest our decision upon the nature of Mrs. Hatridge's claim and its inescapable dependency upon that of her husband." *Id.* at 816.

38. *Id.*

39. *Id.* at 814.

40. *Id.*

seeks removal and when the value to the defendant exceeds the value to the plaintiff.<sup>41</sup> By acknowledging the defendant's viewpoint, yet refusing to rest its holding on that point, the Eighth Circuit left the lower courts without a clear answer to the viewpoint debate.

In *Hedberg v. State Farm Mutual Automobile Insurance Co.*, the Eighth Circuit discussed how the viewpoint it was willing to consider depended on the type of relief requested.<sup>42</sup> Where the plaintiff seeks a money judgment, the amount in controversy is "the sum claimed by the plaintiff" as long as the plaintiff claims that amount in good faith.<sup>43</sup> For injunctive requests the amount in controversy is generally the value of "the right sought to be gained by the plaintiff," but the court stated that the "cost to the defendant has also been suggested as an alternative basis."<sup>44</sup> The court found ample evidence that the claim for injunctive relief satisfied the amount in controversy.<sup>45</sup> Although the court measured the value of the claim by the economic injury to the plaintiffs, its mention of the defendant's view suggests that the Eighth Circuit might be willing to consider the defendant's viewpoint in an appropriate case. *Hedberg*, like *Hatridge*, left no clear rule for the lower courts to follow.<sup>46</sup>

The Eighth Circuit's viewpoint analysis becomes more complex in the context of class actions where the claims of class members may not be aggregated to meet the jurisdictional amount.<sup>47</sup> The non-aggregation rule is

41. *Id.* at 815.

42. *Hedberg v. State Farm Mut. Auto. Ins. Co.*, 350 F.2d 924, 928-29 (8th Cir. 1965).

43. *Id.* *Hedberg* involved a request for an injunction to prevent a former employee from soliciting State Farm's present customers as well as a request for replevin of certain records and materials. *Id.*

44.

*Id.* at 928. In addition, the *Hatridge* court found Supreme Court authority for the either party viewpoint in *Smith v. Adams*, 130 U.S. 167, 175 (1889) ("It is conceded that the pecuniary value of the matter in dispute may be determined . . . in some cases . . . by the pecuniary result to one of the parties immediately from the judgment."). Several other Eighth Circuit cases suggest the possibility of valuing the amount in controversy from either viewpoint. See *Cowell v. City Water Supply Co.*, 121 F. 53, 57 (8th Cir. 1903) ("[I]t is the amount or value of that which the complainant claims to recover, or the sum or value of that which the defendant will lose if the complainant succeeds in his suit, that constitutes the jurisdictional sum or value of the matter in dispute, which tests the jurisdiction . . ."); see also *Hedberg*, 350 F.2d at 928; *Miller v. First Serv. Corp.*, 84 F.2d 680, 681 (8th Cir. 1965); *Elliott v. Empire Gas Co.*, 4 F.2d 493, 500-01 (8th Cir. 1925).

45. *Id.* at 929. The court ignored the replevin claim because the value of the documents was questionable. *Id.*

46. *Smith v. Am. States Preferred Ins. Co.*, 249 F.3d 812, 813 (8th Cir. 2001); *Hatridge v. Aetna Cas. & Sur. Co.*, 415 F.2d 809 (8th Cir. 1969).

47. See *infra* Part IV.C. The non-aggregation rule is discussed in *Zahn v.*

particularly difficult to reconcile with the defendant's viewpoint, and the Eighth Circuit seems fairly committed to the plaintiff's viewpoint for class actions. In *Massachusetts State Pharmaceutical Ass'n v. Federal Prescription Service, Inc.*, just one year after *Hatridge*, the Eighth Circuit refused to apply the defendant's viewpoint.<sup>48</sup> In *Federal Prescription Service*, the pharmacist plaintiffs could not maintain a class action because they failed to establish how much business they lost, either individually or as a class, due to the defendant's actions.<sup>49</sup> The court made a broad statement that the "amount in controversy is tested by the value of the suit's intended benefit to the plaintiff," and then it addressed the defendant's viewpoint in a footnote.<sup>50</sup> The court interpreted the non-aggregation rule to prevent application of the defendant's viewpoint to boost the value of the controversy in class actions to the jurisdictional amount.<sup>51</sup>

Litigation over the viewpoint used to measure the amount in controversy gained momentum only recently in federal courts in Missouri. Until the past decade, most of Missouri's case law on the issue dated back over half a century. In 1949, before either *Hatridge* or *Hedberg*, one Missouri district court applied the defendant's viewpoint and valued the amount in controversy according to the defendant's cost of establishing a trust fund.<sup>52</sup> The court in *Shipe v. Floral Hills* ultimately dismissed the case, not for failure to meet the amount in controversy, but for lack of diversity in citizenship.<sup>53</sup> The *Shipe* court measured the amount in controversy by the "pecuniary result[] to either party," and found that from the defendant's perspective, the amount exceeded the jurisdictional requirement.<sup>54</sup> Significantly, the court couched its language regarding the amount in controversy in terms of the cost to the defendant in establishing the fund.<sup>55</sup> Application of the defendant's viewpoint in *Shipe* is particularly noteworthy because the plaintiff

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*International Paper Co.*, 414 U.S. 291, 300 (1973), and *Snyder v. Harris*, 394 U.S. 332, 338 (1969).

48. *Mass. State Pharm. Ass'n v. Fed. Prescription Serv., Inc.*, 431 F.2d 130 (8th Cir. 1970).

49. *Id.* at 133.

50. *Id.* at 132.

51. *Id.* at 132 n.1.

52. *Shipe v. Floral Hills*, 86 F. Supp. 985, 987 (W.D. Mo. 1949).

53. *Id.* at 988.

54. *Id.* at 987.

55. *Id.* The court first discussed the plaintiff's contention that the "defendant agreed to establish an irrevocable 'Perpetual Care Trust Fund' and deposit . . . ten percent (10%) of [the defendant's profits]." *Id.* at 986. The opinion then states the amount in controversy as "the 'trust fund' defendant promised to establish." *Id.* at 987. The court applied the "pecuniary result to either party" standard and stated that if the plaintiff's contentions were true, the "pecuniary result to the defendant" would be fifty thousand dollars, well beyond the three thousand dollar amount in controversy required in 1949. *Id.*



requested monetary damages, as opposed to equitable relief, which is often difficult to translate into dollar value.<sup>56</sup> The court concluded that if the plaintiff's contentions were correct, the "pecuniary result to the defendant" would exceed the jurisdictional amount.<sup>57</sup> Although the value of the trust fund would likely be the same to both the defendant and the plaintiff, the language of the opinion reveals the court's willingness to consider the defendant's viewpoint, even when the relief requested is monetary damages, not an equitable remedy.<sup>58</sup>

Perhaps the Eighth Circuit's decisions are purposely unclear because of the lack of clarity in the Supreme Court opinions regarding the viewpoint controversy. Because the Eighth Circuit lacks a clear precedent to follow, it makes sense that the Eighth Circuit might purposely use hazy language as a precaution against later reversal. Although its opinions are most consistent with the plaintiff's viewpoint, the Eighth Circuit remains one of the few jurisdictions that has not formally declared whose viewpoint may be considered in removal actions.

### III. RECENT DEVELOPMENTS

#### A. Decisions by Missouri Federal Courts

Forced to make a decision about whose viewpoint can properly be considered in a removal action, the lower courts in the Eighth Circuit have reached varied and inconsistent conclusions. In Missouri, the courts have responded favorably to both the either party viewpoint and the party seeking jurisdiction viewpoint.

In 1989, in *Solna, Inc. v. American Printing Equipment, Inc.*,<sup>59</sup> the Western District applied the party seeking jurisdiction viewpoint in a request for a declaratory judgment. The *Solna* court noted the Eighth Circuit's statement in *Hatridge* that no "hard and fast rule governs" which viewpoint the court should consider to determine the amount in controversy.<sup>60</sup> Taking those words to mean that the court had discretion to choose which viewpoint to consider, the *Solna*

56. See *Burns v. Windsor Ins. Co.*, 31 F.3d 1092 (11th Cir. 1994); *Crenshaw v. Great Cent. Ins. Co.*, 482 F.2d 1255 (8th Cir. 1973); *Davenport v. Procter & Gamble Mfg. Co.*, 241 F.2d 511 (2d Cir. 1957).

57. *Shipe*, 86 F. Supp. at 987.

58. The monetary value of this contract claim was arguably easier to determine than other remedies, such as injunctive relief or specific performance of the contract. If the court is willing to consider the defendant's view for a claim where there is no real need to diverge from the plaintiff's view, there seems little reason why the district court would not consider the defendant's viewpoint when the plaintiff requests equitable remedies.

59. No. 89-0715-CV-W-5, 1989 WL 325976, at \*3 (W.D. Mo. Sept. 20, 1989).

60. *Id.*

court allowed the value to the defendant to push the plaintiff's claim over the threshold jurisdictional amount.<sup>61</sup> The court reasoned that if it only considered the plaintiff's viewpoint, the plaintiff would be allowed to set forth its own theory of the amount of damages, which would essentially bind the parties and the court.<sup>62</sup> By giving the plaintiff the power to set the jurisdictional amount, the plaintiff could manipulate and tweak the value to remain just below the jurisdictional amount.<sup>63</sup> The court found that result undesirable and declined to extend so much power and control to the plaintiff.<sup>64</sup> Instead, the court applied the party seeking jurisdiction viewpoint in an effort to avoid gamesmanship and manipulation by the plaintiff.<sup>65</sup> Since it is the defendant who seeks to establish federal jurisdiction in removal actions, the court determined the jurisdictional amount from the defendant's viewpoint.<sup>66</sup>

A more recent decision implicitly affirms the Western District's willingness to consider the defendant's perspective, but applies *Solna*'s reasoning in a new context: requests for injunctive relief.<sup>67</sup> In *Radmer v. Aid Ass'n for Lutherans*, the court stated that although the defendant could not aggregate the class action plaintiffs' damages, federal jurisdiction would have been proper if the defendant's cost of compliance with each plaintiff's claim exceeded the jurisdictional amount.<sup>68</sup> The court explained the non-aggregation rule by saying that the "costs to a defendant of complying with court-ordered injunctive relief may not be viewed as a whole; rather, a defendant 'is deemed to face multiple claims for injunctive relief, each of which must be separately evaluated.'"<sup>69</sup> In effect, the court said it would allow the defendant's viewpoint to determine the amount in controversy, but the value to the defendant must be apportioned among the plaintiffs. The decision reveals two significant elements of the court's viewpoint approach: (1) the non-aggregation rule for class action plaintiffs applies even in cases where the court considers the defendant's viewpoint and (2) the defendant's cost of compliance with injunctive relief can be used to satisfy the amount in controversy for removal.

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61. *Id.*

62. *Id.* at \*3-4.

63. *Id.*

64. *Id.*

65. *See id.*

66. 14B WRIGHT ET AL., *supra* note 6, § 3703, at 125.

67. *Radmer v. Aid Ass'n for Lutherans*, No. 99-0961-CV-W-9-4, 2000 WL 33910093 (W.D. Mo. Apr. 27, 2000).

68. *Id.* at \*3 (citing *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 610 (7th Cir. 1997)).

69. *Id.* (quoting *Brand Name*, 123 F.3d at 610). The *Brand Name* court allowed the defendant's costs of compliance to satisfy the jurisdictional amount, stating, "The test, we repeat, is the cost to each defendant of an injunction running in favor of one plaintiff." *Id.*

Unfortunately, the *Radmer* court never distinguished whether it was applying the party seeking jurisdiction viewpoint or the either party viewpoint. The court would have considered the defendant's viewpoint (the defendant was seeking jurisdiction) but does not say whether it would also consider the plaintiff's viewpoint (the either party viewpoint). What can be read from the *Radmer* decision is that, under appropriate circumstances, the defendant's viewpoint deserves consideration.

The *Radmer* and *Solna* decisions, together, leave two questions unanswered. First, does the Western District now follow the party seeking jurisdiction viewpoint or the either party viewpoint? Second, will the Western District consider the defendant's viewpoint where the requested relief is not injunctive or declaratory?

### *B. Congressional Action to Expand Federal Jurisdiction Over Class Actions*

For the past four years, Congress has responded to the viewpoint controversy by proposing legislation to change the removal standard for class actions.<sup>70</sup> Although class actions encompass only a segment of the overall viewpoint debate, the purposes and policies fueling the legislation coincide with the policies at issue in the broader context.

With a few minor exceptions, the proposed legislation would permit removal of any class action with an aggregate value that exceeds five million dollars and involves more than one hundred class members.<sup>71</sup> Both the Senate and House bills have almost identical provisions for removal. Instead of complete diversity, federal jurisdiction would require only that one plaintiff and one defendant be citizens of different states.<sup>72</sup> The Senate explained the need for federal court jurisdiction over class actions in the Findings and Purposes section of the bill:

(4) Abuses in class actions undermine the national judicial system . . . and the concept of diversity jurisdiction as intended by the framers of the United States Constitution, in that State and local courts are—

70. See Class Action Fairness Act of 2004, S. 2062, 108th Cong. §§ 4-5 (2004); Class Action Fairness Act of 2003, S. 274, 108th Cong. §§ 4-5 (2003); Class Action Fairness Act of 2003, H.R. 1115, 108th Cong. §§ 4-5 (2003); Class Action Fairness Act of 2002, H.R. 2341, 107th Cong. §§ 4-5 (2001); Class Action Fairness Act of 2001, S. 1712, 107th Cong. §§ 4-5 (2001).

71. See S. 2062 § 4(a); S. 274 § 4(a); H.R. 1115 § 4(a); S. 1712 § 4(a); H.R. 2341 § 4(a). Originally, the threshold was two million dollars, but the Act was amended to five million dollars. See Bill Tracking H.R. 1115, 108th Cong. (2003); 149 CONG. REC. H5296 (June 12, 2003).

72. See S. 2062 § 4(a); S. 274 § 4(a); H.R. 1115 § 4(a); S. 1712 § 4(a); H.R. 2341 § 4(a).

- (A) keeping cases of national importance out of Federal court;
- (B) sometimes acting in ways that demonstrate bias against out-of-State defendants; and
- (C) making judgments that impose their view of the law on other States and bind the rights of the residents of those States.<sup>73</sup>

The House agreed that federal jurisdiction over class actions was necessary to prevent abuses of the system by plaintiffs who now avoid litigating in federal courts through the use of “artful pleading.”<sup>74</sup> The bill notes that local courts may give less consideration to the merits of the case, may exhibit bias against out-of-state defendants and may impose their own view of other states’ laws on the parties.<sup>75</sup> The House approved the Act on June 12, 2003.<sup>76</sup>

The American Bar Association (“ABA”) responded to Congress’s initiative by forming its own class action task force to investigate.<sup>77</sup> After gathering information about the pros and cons of the proposed legislation, the task force urged Congress to consider several factors before widely expanding federal jurisdiction over class actions.<sup>78</sup> The ABA thought the need to expand federal jurisdiction hinged upon “the total amount of money involved in the dispute, the existence of overlapping classes or cases, the number of plaintiffs in the alleged class and the percentage of those plaintiffs who claim as their home the state in which the suit is pending.”<sup>79</sup> The ABA scheduled the task force to continue its investigation through August 2003.<sup>80</sup> After considering the task force results, the ABA plans to propose a resolution for its own delegates to vote to determine the ABA’s official position.<sup>81</sup>

73. S. 2062 § 2(a)(4).

74. H.R. 1115 § 2(a)(4).

75. *Id.* § 2(a)(5).

76. Bill Tracking H.R. 1115, 108th Cong. (2003); 149 CONG. REC. H5306 (June 12, 2003); Bill Tracking S. 2062, 108th Cong. (2004). In the House, 253 representatives voted for passage, and 170 voted against passage. The Senate introduced the bill on February 4, 2003. Bill Tracking S. 274, 108th Cong. (2003). The Senate filed a report on the bill, but did not vote on the bill in 2003. *Id.*; 149 CONG. REC. S10,616 (July 31, 2003); S. REP. NO. 108-123 (July 31, 2003). It was introduced in the Senate again on February 10, 2004. Bill Tracking S. 2062, 108th Cong. (2004).

77. The ABA appointed the task force in the Fall of 2001 and current President Alfred P. Carlton, Jr. extended the term of the task force through August 2003. Patricia Manson, *Lawyers Fret over Shifting Class Actions to Federal Court*, 149 CHI. DAILY LAW BULL., Feb. 7, 2003.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* The task force was generally supportive of expanding federal jurisdiction over interstate class actions claims, but cautioned the legislature against stripping state courts of their ability to hear claims where the state interest outweighed the federal

These recent cases and congressional actions reflect the controversial and timely nature of the viewpoint debate. That debate is likely to continue until either the Supreme Court takes a definite stance or until Congress passes legislation.

#### IV. DISCUSSION

##### *A. A Necessary Distinction: Equitable Versus Legal Remedies*

Equitable remedies are inherently more difficult to value than monetary damages. Injunctive relief is often requested in two situations: (1) when monetary damages fail to adequately compensate the plaintiff, or (2) when the amount of money required to return the plaintiff to her rightful position is too speculative or difficult to convert to a monetary amount.<sup>82</sup> The court's initial determination that money is an inadequate substitute for the harm done or that the harm cannot be converted to a dollar figure makes it inherently more difficult for the court to place a dollar value on the controversy for jurisdictional purposes.<sup>83</sup>

One reason that it is so much harder to value injunctive relief in monetary terms is because the value can be different for each party involved. One proponent of the either party viewpoint suggests that this disjunction in value is most extreme in cases where an injunction would force the defendant to substantially alter its business practices, to forego valuable opportunities, or to comply with burdensome administrative tasks.<sup>84</sup> In these situations, the benefit to the individual plaintiff might be relatively minor, but the costs of compliance to the defendant might be incredibly large. It is easy to contemplate a scenario where the parties' individual estimates of the value of the injunctive relief might fall on either side of the seventy-five thousand dollar threshold. How should the court choose the side of the threshold on which the case rightfully belongs?

A court might apply one viewpoint when a plaintiff requests equitable relief and another viewpoint when a plaintiff requests monetary relief. This may be an appropriate distinction to make. Where a plaintiff requests one thousand dollars in monetary damages, it makes sense for the court to presume the amount in controversy is the same for each party: the plaintiff stands to gain one

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interest. *Id.*

82. For a discussion of the historical evolution of legal and equitable remedies, see JOHN J. COUND ET AL., CIVIL PROCEDURE 490 (6th ed. 1993) ("[T]he availability of specific relief through the injunction or specific performance when compensatory relief through a judgment for damages would be inadequate was the chief basis for drawing common-law causes into equity. As a result equity now dominates many areas of controversy originally governed by the common law, because damages are an impotent remedy in such cases; a good example is nuisance.").

83. See McInnis, *supra* note 35, at 1014-15.

84. *Id.* at 1015.

thousand dollars and the defendant stands to lose one thousand dollars. However, with injunctive relief, it is much more appropriate to look beyond the plaintiff's viewpoint because the value of that injunction is not the same for both parties. As a result, practitioners must scrutinize court decisions to deduce the scope of their jurisdiction's particular viewpoint.

### *B. Comparing and Contrasting the Three Viewpoints*

#### 1. Is the Plaintiff the Master of the Forum or Merely Forum Shopping?

The policy rationale for valuing the claim from the plaintiff's viewpoint rests on the historical and traditional notion that the plaintiff is the master of the forum.<sup>85</sup> Being master of the forum entitles the plaintiff to select the court system in which she chooses to bring the claim.<sup>86</sup> Although the removal statute offers protection to defendants, it also embraces the master of the forum doctrine by imposing conditions on the defendant's ability to remove.

Some of those limitations are quite severe. Section 1441 requires defendants to file for removal within sixty days of the case becoming removable.<sup>87</sup> The statute cuts off removal after one year, regardless of the plaintiff's amendments to the complaint or parties that may drop from the case.<sup>88</sup> This limitation permits some manipulation of rules to defeat removal. The plaintiff can initially undervalue the claim or add defendants to defeat diversity of citizenship and then later amend the complaint to increase the stakes or to drop a defendant.<sup>89</sup> As long as the plaintiff waits until after the one-year cutoff to amend, the defendant will be powerless to remove the case even if there is diversity of citizenship and an amount in controversy that exceeds the jurisdictional amount.<sup>90</sup> In addition, the Supreme Court strictly construes removal statutes against removal and in favor of remand.<sup>91</sup> Erecting a high hurdle for removal not only reduces the number of claims that defendants can

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85. *De Aguilar v. Boeing Co.*, 47 F.3d 1404, 1411-12 (5th Cir. 1995) (requiring the defendant to show the threshold jurisdictional amount is a "legal certainty" in order to overcome the presumption that the plaintiff's alleged damage figure is accurate).

86. 14C WRIGHT ET AL., *supra* note 6, § 3725, at 95.

87. 28 U.S.C. § 1441(3) (2000).

88. *See id.* § 1446.

89. *Id.* (Commentary on 1988 Revision to 28 U.S.C. § 1446, at 3-4).

90. *See* 14C WRIGHT ET AL., *supra* note 6, § 3725, at 86-87.

91. *See Shamrock Oil & Gas v. Sheets*, 313 U.S. 100, 108-09 (1941) ("[T]he policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation."); *Eastas v. Blue Bell Creameries*, 97 F.3d 100, 106 (5th Cir. 1996) (removal statutes should be strictly construed against removal and in favor of remand).

successfully remove, it also discourages defendants from taking the time and effort to even attempt to remove claims.

Cases of large value to only the defendant cannot be removed under the plaintiff's viewpoint, which defeats Congress's goal of providing federal jurisdiction to claims of large value.<sup>92</sup> As a result, defendants have less protection against the possibility of local bias.<sup>93</sup> Historically, federal diversity jurisdiction served the purpose of "secur[ing] a tribunal presumed to be more impartial than a court of the state in which one of the litigants resides."<sup>94</sup> Diversity jurisdiction was created to protect out-of-state defendants from the potential favoritism toward local residents by both the juries<sup>95</sup> and state legislatures.<sup>96</sup>

Application of the plaintiff's viewpoint keeps large claims out of federal court when they properly belong there. By ignoring the defendant's stake in the litigation, the plaintiff's viewpoint encourages the plaintiff to play procedural games to avoid removal and gives defendants little protection against forum shopping.

## 2. Reaching a Fair and Efficient Decision

Two important considerations in choosing a particular viewpoint are (1) fairness to the parties and (2) efficient administration of claims. The viewpoint choice should hinge on fairness to both parties and on reducing the possibility of

92. See *BEM I, L.L.C. v. Anthropologie, Inc.*, 301 F.3d 548, 553 (7th Cir. 2002); *In re Ford Motor Co./Citibank (S.D.), N.A.*, 264 F.3d 952, 961 (9th Cir. 2001); *Hatridge v. Aetna Cas. & Sur. Co.*, 415 F.2d 809, 815 (8th Cir. 1969).

93. See *supra* note 73 and accompanying text.

94. *Barrow Steamship Co. v. Kane*, 170 U.S. 100, 111 (1898); see also *Pease v. Peck*, 59 U.S. (18 How.) 595, 599 (1855) ("The theory upon which jurisdiction is conferred on the courts of the United States, in controversies between citizens of different States, has its foundation in the supposition that, possibly, the state tribunal might not be impartial between their own citizens and foreigners."); *Davis v. Carl Cannon Chevrolet-Olds, Inc.*, 182 F.3d 792, 797 (11th Cir. 1999) ("An important historical justification for diversity jurisdiction is the reassurance of fairness and competence that a federal court can supply to an out-of-state defendant facing suit in state court."); *In re Prudential Ins. Co. Sales Practices Litig.*, 148 F.3d 283, 305 (3d Cir. 1998).

95. See Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369, 424-25 (1992) (practitioners believe federal courts have a higher quality jury pool than state courts); McInnis, *supra* note 35, at 1028 (arguing that larger jury venire and higher per diem might explain higher quality of federal jurors).

96. McInnis, *supra* note 35, at 1024. See generally CHARLES A. WRIGHT, *THE LAW OF FEDERAL COURTS* § 23 (2d ed. 1970); John P. Frank, *For Maintaining Diversity Jurisdiction*, 73 YALE L.J. 7, 9-12 (1963-64); Henry Friendly, *The Historical Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 495 (1927-28).

bias. Because consideration of only the plaintiff's viewpoint decreases the number of claims the defendant can remove from state court to federal court, potential bias against defendants in state courts becomes significant. With respect to the numerous class action filings against insurance companies in Southern Illinois state courts, one study found:

The willingness of certain Illinois state courts to serve as free-roving insurance commissioners and issue edicts that affect the way insurance companies can do business in forty-nine other states may explain why twenty-six class action lawsuits have been filed in Madison County against insurance companies in the last few years.<sup>97</sup>

Explaining how the rules encouraged forum shopping by plaintiffs and produced inequitable results, the study said that "'one Madison County judge could be single-handedly responsible for dramatically increasing the price of automobile insurance . . . and adversely affecting the . . . automobile parts industry.'"<sup>98</sup> The study raised additional questions about whether a state judge would actually enforce the interests of the public at large where the claim affected nationwide interests.<sup>99</sup> Elected state court judges as opposed to federal judges who have life tenure<sup>100</sup> may be more at risk of subconsciously or intentionally favoring their own constituents' views over those of outsiders.<sup>101</sup> Considering that one of the purposes of diversity jurisdiction is to reduce bias against the defendant, using the plaintiff's viewpoint seems particularly flawed.

The risk of bias is especially troublesome to large corporate defendants. Large corporations often engage in business in all fifty states and risk suit anywhere in the country. Attorneys who represent multiple plaintiffs might be encouraged by defendants' lack of removal power to shop for the forum with the most favorable local rules or the judge with the most generous track record.

97. Brief of Amicus Curiae State Farm Mut. Auto. Ins. Co., *Ford Motor Co. v. McCauley*, 537 U.S. 1 (2002) (No. 01-896), *cert. dismissed as improvidently granted*, available at 2002 WL 976473, at \*13 (quoting John H. Beisner & Jessica Davidson Miller, *They're Making a Federal Case Out of It . . . in State Court*, 25 HARV. J.L. & PUB. POL'Y 143, 151 (2002)).

98. *Id.* at \*24-25 (quoting Beisner & Miller, *supra* note 97, at 151).

99. "The ability of one locally elected judge to exercise that much power raises serious federalism questions." *Id.* (quoting Beisner & Miller, *supra* note 97, at 151).

100. Article III, Section 1 of the U.S. Constitution provides that "Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

101. See Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1120-21 (1977) (finding that elected state judges are more affected by majoritarian pressure than the life tenured federal judges).



Upsetting the balance of power between the federal and state governments and the balance of power from state to state is a closely related concern. Application of the plaintiff's viewpoint raises the policy question of whether a state court should decide claims where the outcome could affect the practices and policies of companies engaging in interstate commerce. This federalism concern arises particularly in cases where the plaintiff requests injunctive relief that would alter the national policy of a large corporation or affect the commercial activities of residents of several states. In an amicus brief filed in *Ford Motor Co. v. McCauley*, State Farm argued that the plaintiff's viewpoint rule keeps large claims with far-reaching effects from being litigated in federal court, where they properly belong:

When a single state court judge, elected by the voters of a single county, adjudicates the claims of a nationwide class of policyholders, there is a serious risk that the resulting judgment may impinge upon the prerogative of other states to regulate the business of insurance within their own borders.<sup>102</sup>

In addition to federalism concerns, the unfamiliar procedural rules of the state court system may unfairly prejudice the defendant.<sup>103</sup> At the very least, the defendant's lack of familiarity with the local rules and procedures in various state courts could drive up research costs for the defendant. The difference in local court rules and procedures also creates the potential for resident-friendly rules and may encourage plaintiffs to attempt to set procedural traps for defendants.<sup>104</sup> The mere *potential* for bias has a chilling effect on interstate commerce.<sup>105</sup> Businesses may limit their business operations to avoid states where the owners suspect or perceive procedural unfairness.<sup>106</sup>

In contrast, the federal courts may provide a better, more efficient adjudication than state courts. Federal judges can consolidate federal cases for

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102. Brief of Amicus Curiae at \*2, *McCauley* (No. 01-896).

103. But defendants could obtain local counsel or at least require their attorneys to refer to the local rules of the court. In addition, the plaintiffs' attorney may be less familiar with federal procedure and may be disadvantaged if removal is granted.

104. See generally Miller, *supra* note 95, at 400-23 (empirical study shows that perceptions of local bias in state courts still exist); McInnis, *supra* note 35, at 1014-15.

105. See William L. Marbury, *Why Should We Limit Federal Diversity Jurisdiction?*, 46 A.B.A. J. 379, 380 (1960) (access to federal courts through diversity jurisdiction encourages business); Adrienne J. Marsh, *Diversity Jurisdiction: Scapegoat of Overcrowded Federal Courts*, 48 BROOK. L. REV. 197, 209-10 (1982) (if diversity jurisdiction were abolished, it would "chill entrepreneurial interstate investment").

106. See Brief of Amicus Curiae at \*4, *McCauley* (No. 01-896); Marsh, *supra* note 105, at 210-12.

pre-trial proceedings, unlike their state counterparts.<sup>107</sup> Several commentators suggest that federal courts are more accustomed to large cases and have more resources to devote to complex litigation.<sup>108</sup> Proponents of strict removal limitations attempt to justify their view by pointing to the overloaded and backlogged federal court dockets.<sup>109</sup> That justification is not convincing because state courts are similarly backlogged and the federal court system often has more resources and flexibility to deal with a loaded docket.<sup>110</sup>

Allowing federal judges to exercise jurisdiction serves the dual purpose of assuring nonresidents the freedom from “susceptibility to local bias” as well as protecting the federal system by placing the decision in the hands of a federal official.<sup>111</sup>

### 3. Consistency With Statutory Language, Case Law, and Congressional Intent

The either party viewpoint is consistent with the language of the federal statute outlining the requirements for diversity jurisdiction. Section 1332 does not expressly or implicitly require relief to be measured from the viewpoint of any particular party.<sup>112</sup> Because of this, the broad interpretation allowing consideration of either party’s viewpoint is probably most consistent with the plain language of the statute.<sup>113</sup>

The either party viewpoint is also in accord with the Supreme Court’s broad, general test for determining the amount in controversy. In *Hunt v. Washington Apple Commission*, the Supreme Court stated that “the amount in controversy is measured by the value of the object of the litigation,”<sup>114</sup> and in *Thomas v. Gaskill*

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107. Manson, *supra* note 77. While a few states do allow state court judges to consolidate cases within the state for pretrial proceedings, no state judge can consolidate claims brought in different states. *Id.* (citing Memorandum from Judge David F. Levi, to the Civil Rules Advisory Committee of the A.B.A.).

108. See Miller, *supra* note 95, at 407-20 (empirical study finding that practitioners view federal courts as more just and less biased than state courts). Admittedly, it is sometimes the federal judges who sing their own praises. See RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 139-41 (1985).

109. See 14C WRIGHT ET AL., *supra* note 6, § 3725, at 96.

110. Federal courts have clerks, while many state courts do not. Beisner & Miller, *supra* note 97, at 151. Federal courts have more flexibility than state courts to send cases to other courts or to join similar claims. *Id.* Federal courts are arguably more accustomed to dealing with large and complex claims than state courts. *Id.*

111. Brief of Amicus Curiae State Farm Mut. Auto. Ins. Co., Ford Motor Co. v. McCauley, 537 U.S. 1 (2002) (No. 01-896), *cert. dismissed as improvidently granted*, available at 2002 WL 976473, at \*21.

112. *Id.* at \*7.

113. See *id.*

114. *Hunt v. Wash. Apple Comm’n*, 432 U.S. 333, 347 (1977).

that generally, the value is measured by the "pecuniary consequence to those involved in the litigation."<sup>115</sup> The Supreme Court's refusal to either adopt or prohibit a particular viewpoint suggests that the broad and flexible approach of the either party viewpoint is most appropriate. In addition, the either party viewpoint comes the closest to reconciling the scattered case law, in which lower courts have considered the plaintiff's viewpoint in some cases and the defendant's viewpoint in other cases. The either party viewpoint also coincides with recent Senate and House bills that would expand federal court jurisdiction to almost any case where the pooled value of the plaintiff's claims exceeds five million dollars and there are more than one hundred class members.<sup>116</sup>

In contrast, application of the party seeking jurisdiction viewpoint is less consistent with the principles behind removal. Although none of the circuits have adopted the party seeking jurisdiction viewpoint, several decisions at least pay lip service to the view, and some lower courts decisions appear to rest on the viewpoint.<sup>117</sup>

At first glance it seems logical that the amount in controversy should be measured from the viewpoint of the party saddled with the burden of establishing jurisdiction.<sup>118</sup> The court typically rules on removal long before the parties have a chance to conduct thorough discovery, so the court should accept the value from the defendant's view because that is the evidence most accessible to the defendant.<sup>119</sup> Allowing the defendant to use his own view of the cost of the claim may reflect a more accurate value of the claim because the defendant will not have to speculate as to the possible benefit to the plaintiff.<sup>120</sup> However, if a case filed in federal court by the plaintiff is remanded for failure to establish the amount in controversy (judged by the plaintiff's viewpoint), the defendant could in some cases immediately remove it, using the value to the defendant.<sup>121</sup>

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115. *Thomas v. Gaskill*, 315 U.S. 442, 447 (1942).

116. *See supra* note 71 and accompanying text.

117. For courts following the party seeking jurisdiction viewpoint, see *Bergstrom v. Burlington N. R.R. Co.*, 895 F. Supp. 257, 262 (D.N.D. 1995); *Solna, Inc. v. Am. Printing Equip., Inc.*, No. 89-0715-CV-W-5, 1989 WL 325976 (W.D. Mo. Sept. 20, 1989); *Family Motor Inn, Inc. v. L-K Enters. Div., Consol. Foods Corp.*, 369 F. Supp. 766 (D. Ky. 1973); *Inman v. Milwhite Co.*, 261 F. Supp. 703 (E.D. Ark. 1966).

118. In *Bergstrom v. Burlington Northern Railroad Co.*, the court noted: "When the burden rests upon the plaintiff to prove jurisdiction, plaintiff is allowed to proceed if it appears the amount claimed is made in good faith. The same should be true for the defendant's allegations of its costs to satisfy a requested equitable relief." *Bergstrom*, 895 F. Supp. at 259 (citations omitted).

119. *See id.* at 262.

120. *See id.*

121. *See* 15 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* ¶ 102.109[5] (3d ed. 1995 & Supp. 1997).

This result is troubling because the ability to remove a case depends on whether it could have initially been filed in federal court by the plaintiff. The removal statute refers back to the diversity statute.<sup>122</sup> One would expect that cross-referencing to produce a uniform result: the removal statute allows removal of any case that could originally have been brought in federal court. But under the party seeking jurisdiction viewpoint, a defendant might be able to remove a case to federal court that the plaintiff could not have initially filed there.

The plaintiff's viewpoint is also troublesome because it excludes high-value claims from adjudication in federal court. Even if the plaintiff is acting in good faith, the value of the case may exceed seventy-five thousand dollars for the defendant yet still be excluded from federal court.<sup>123</sup> While the purpose of an amount in controversy limitation is to keep trivial claims out of federal court,<sup>124</sup> the plaintiff's viewpoint also keeps out cases where large sums of the defendant's money are involved. The plaintiff's viewpoint fails to accurately assess the actual amount of money at stake in many cases. The plaintiff's viewpoint "ignores the real, substantial costs that are at issue" and "exaggerates the possibilities for manipulation of the amount in controversy."<sup>125</sup>

### *C. Problems Unique to Class Actions: The Non-Aggregation Rule*

The non-aggregation rule presents a potential conflict with the either party viewpoint or the party seeking jurisdiction viewpoint, but it is a conflict that is easily resolved. The non-aggregation rule states that the claims of class members may not be aggregated to meet the minimum jurisdictional amount.<sup>126</sup> A narrow exception to the non-aggregation rule is where a class of plaintiffs seeks to enforce a common and undivided right.<sup>127</sup> Federal court interpretations of a common and undivided right vary,<sup>128</sup> particularly when the plaintiffs seek

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122. See 28 U.S.C. § 1441 (2000).

123. A court's refusal to consider the cost of compliance to the defendant results in an "artificially low amount in controversy." Brief of Amicus Curiae State Farm Mut. Auto. Ins. Co., *Ford Motor Co. v. McCauley*, 537 U.S. 1 (2002) (No. 01-896), *cert. dismissed as improvidently granted, available at* 2002 WL 976473, at \*3. For a transcript of the oral argument, see Oral Argument (Oct. 7, 2002), *McCauley* (No. 01-896), *available at* 2002 WL 31309171.

124. See *infra* note 92.

125. *Id.* at \*9.

126. *Zahn v. Int'l Paper Co.*, 414 U.S. 291 (1973); *Snyder v. Harris*, 394 U.S. 332, 338 (1969).

127. *Snyder*, 394 U.S. at 335.

128. For a discussion of the Eighth Circuit's position (from a Missouri federal district court) on common, undivided rights and application of the non-aggregation rule, see *Visintine v. Saab Auto. A.B.*, 891 F. Supp. 496 (E.D. Mo. 1995).

injunctive relief.<sup>129</sup> The Eighth Circuit defines the common, undivided right very narrowly.<sup>130</sup>

Critics argue that the either party or party seeking jurisdiction viewpoint would necessarily allow defendants to aggregate the class members' claims and violate the non-aggregation rule of *Zahn* and *Snyder*.<sup>131</sup> Some courts have resolved this problem by adopting the plaintiff's viewpoint in class actions.

Were the court to consider the amount in controversy from the defendant's viewpoint, the rule against nonaggregation could be circumvented. A defendant should not be able to aggregate its potential cost of complying with injunctive relief sought by multiple plaintiffs in order to obtain a federal forum when the [individual] Plaintiffs cannot do so relative to their claims.<sup>132</sup>

This quote reflects a rule of fairness: if plaintiffs cannot aggregate their own claims to establish federal jurisdictional then defendants should not be allowed to aggregate those claims for removal to federal court.

The Third and Eleventh Circuits rejected consideration of the defendant's viewpoint in class actions<sup>133</sup> but the Seventh Circuit allowed the defendant's cost of compliance to provide a basis for federal subject matter jurisdiction.<sup>134</sup>

For courts willing to consider the value of the claim to the defendant, three options exist: (1) apportion the value to the defendant among the plaintiffs, (2) rule that the non-aggregation rule does not apply, or (3) expand the definition of what constitutes a common and undivided right. Among courts that permit consideration of the defendant's viewpoint in class actions, the first option, requiring the defendant to prorate its compliance costs among all class members,

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129. *McIntire v. Ford Motor Co.*, 142 F. Supp. 2d 911, 923 (S.D. Ohio 2001).

130. *See Radmer v. Aid Ass'n for Lutherans*, No. 99-0961-CV-W-9-4, 2000 WL 33910093, at \*5 (W.D. Mo. Apr. 27, 2000). The *Radmer* court rejected the view that if a single plaintiff could bring the claim alone and receive an injunction, then the right is a single, undivided right. *Id.* Instead, the right is only single and undivided (and therefore allows the defendant to aggregate) when one plaintiff could not bring the claim alone, without "implicating the rights of other class members." *Id.* (citing *Bishop v. Gen. Motors Corp.*, 925 F. Supp. 294, 298 (D.N.J. 1996)). The *Radmer* court derived this test from the *Bishop* case and a previous Eighth Circuit opinion. *See Burns v. Mass. Mut. Life Ins. Co.*, 820 F.2d 246 (8th Cir. 1987).

131. *Zahn*, 414 U.S. at 294-95; *Snyder*, 394 U.S. at 338.

132. *McIntire*, 142 F. Supp. 2d at 920 (alteration in original) (quoting *Nelson v. Assocs. Fin. Servs. Co.*, 79 F. Supp. 2d 813, 818 (W.D. Mich. 2000)).

133. *See Cohen v. Office Depot, Inc.*, 204 F.3d 1069, 1077 (11th Cir. 2000); *Packard v. Provident Nat'l Bank*, 994 F.2d 1039, 1045 (3d Cir. 1993).

134. *See In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 609-10 (7th Cir. 1997).

is most prevalent.<sup>135</sup> However, the pro rata approach creates a bizarre result that is inconsistent with the traditional goal of an amount in controversy—to keep trivial claims out of federal court. Under the apportionment approach, the more plaintiffs that join a class action, the less likely the defendant is to satisfy the amount in controversy. Logic would dictate that the more parties a suit involves, the larger the stakes of litigation typically become. But the result of apportionment is that the largest class action cases are virtually guaranteed to fail to satisfy the amount in controversy and are doomed to remain in state court.<sup>136</sup>

The second approach has been to narrowly interpret the non-aggregation rule in *Zahn* and *Snyder* as inapplicable to valuing injunctive relief.<sup>137</sup> This approach applies the non-aggregation rule to claims for compensatory damages, but does not apply the rule to claims for injunctive relief.<sup>138</sup> It may be appropriate to distinguish monetary relief from injunctive relief in class actions because the result to the defendant is often the same for injunctive relief, no matter how many plaintiffs join the action. For example, if each plaintiff requests one thousand dollars in monetary relief, then it would take seventy-six plaintiffs to establish the requisite amount in controversy. Since the non-aggregation rule prevents plaintiffs from pooling their claims to establish federal court jurisdiction, the court should also refuse to allow the defendant to pool those claims to establish jurisdiction for removal. However, when several plaintiffs seek the same injunctive relief, the result to the defendant is the same no matter how many plaintiffs join the action. In that case, there is no aggregation involved; the cost of compliance to the defendant is the same as if one plaintiff requested the relief. Therefore, it may be perfectly legitimate to conclude that the non-aggregation rule does not apply to class action requests for injunctive relief.

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135. *Snow v. Ford Motor Co.*, 561 F.2d 787, 791 (9th Cir. 1977); *McIntire*, 142 F. Supp. 2d at 923.

136. See Brief of Amicus Curiae State Farm Mut. Auto. Ins. Co., *Ford Motor Co. v. McCauley*, 537 U.S. 1 (2002) (No. 01-896), *cert. dismissed as improvidently granted*, available at 2002 WL 976473, at \*7.

137. *Zahn v. Int'l Paper Co.*, 414 U.S. 291, 295 (1973); *Snyder v. Harris*, 394 U.S. 332, 338 (1969).

138. For courts that follow this approach, see *Justice v. Atchison, Topeka & Santa Fe Ry. Co.*, 927 F.2d 503, 505 (10th Cir. 1991) (stating that claims for compensatory damages could not be aggregated, but affirming the district court's ruling that the plaintiffs' claims for injunctive relief, measured with regard to the defendant's cost of compliance, satisfied the jurisdictional minimum and were properly removed); and *McCoy v. Erie Ins. Co.*, 147 F. Supp. 2d 481, 492 (S.D. W.Va. 2001) (finding that the "amount in controversy can be satisfied by demonstrating that the injunctive relief would require the defendant to alter his method of doing business in such a manner that would cost at least the statutory minimum"). In *McCoy*, the court stated that it "makes little sense" to "require[] that the amount in controversy be satisfied even after the financial burden to the defendant is apportioned to each plaintiff." *Id.* at 494 n.14.

The courts' third response to the non-aggregation rule is to expand the scope of the rule's exception. Courts following this approach define a "common and undivided interest" to include claims where the remedy would be the same no matter how many plaintiffs joined the suit.<sup>139</sup> An injunction is a common interest because it would "benefit the putative class as a whole and not just any individual plaintiff."<sup>140</sup> Those courts reason that the defendant would sustain the loss even if only one plaintiff were to obtain the injunction.<sup>141</sup>

These final two approaches seem the most consistent with the principles of non-aggregation and also serve the general interests of allowing larger claims into federal court while relegating claims of lower monetary value to state courts.

## V. CONCLUSION

The either party viewpoint is the most consistent with the broad, general wording of the diversity and removal statutes and best captures its two goals: (1) to prevent local bias against defendants where the stakes of litigation are high, and (2) to protect the plaintiff's choice of forum where the monetary value is less significant.

The defendant stands to lose one hundred percent of what the litigation will cost her, just as the plaintiff stands to gain one hundred percent of the benefit of the claim from his viewpoint. Since the goal of the jurisdictional statutes is to offer a balanced protection to both the plaintiff and the defendant, it is illogical for a court to allow the plaintiff's viewpoint to trump the defendant's viewpoint. The plaintiff's viewpoint improperly places the plaintiff's claim on a pedestal and

139. See *Brand Name*, 123 F.3d at 599 (applying the "one plaintiff" test); *In re Cardizem CD Antitrust Litig.*, 90 F. Supp. 2d 819, 836 (E.D. Mich. 1999) ("Plaintiffs seek injunctive relief that will benefit the class as a whole. Defendants' costs of compliance do not depend upon the size of the class or the identity of its members. Accordingly, it is based upon a common and undivided interest and constitutes an integrated claim; its entire value may be considered when determining whether the amount-in-controversy requirement for diversity jurisdiction is satisfied . . ."); *Edge v. Blockbuster Video, Inc.*, 10 F. Supp. 2d 1248, 1254-56 (N.D. Ala. 1997) (injunction that would prohibit "course of conduct as a whole" and would inure to the "collective good" of the class was common and undivided and should be valued from the defendant's viewpoint for purposes of the amount in controversy); *Loizon v. SMH Societe Suisse de Microelectronics, et Horologerie*, 950 F. Supp. 250, 254 (N.D. Ill. 1996) (finding that class members had common and undivided interest in injunctive relief because "[i]n this case, only the class, and not individual class members, could request the injunctive relief"); *Earnest v. Gen. Motors Corp.*, 923 F. Supp. 1469, 1472 (N.D. Ala. 1996) (class had undivided interest in injunctive relief in the form of advertising campaign, comprehensive vehicle recall, and injunction forbidding the defendants from using allegedly defective engines and engine control modules).

140. See *Brand Name*, 123 F.3d at 607.

141. *Id.* at 483.

creates a sometimes insurmountable burden on the defendant's removal power. It encourages manipulation and forum shopping and results in the very inequities that the removal statutes were intended to prevent. The party seeking jurisdiction viewpoint produces results inconsistent with removal principles. The either party viewpoint restores balance where the scales of justice have been knocked off kilter by courts that refuse to consider the defendant's viewpoint in removal actions.

GRETA N. HININGER



