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A DEVICE DESIGNED TO MANIPULATE DIVERSITY JURISDICTION: WHY COURTS SHOULD REFUSE TO RECOGNIZE POST-REMOVAL DAMAGE STIPULATIONS

BENJAMIN T. CLARK*

I. Introduction

Many federal courts allow plaintiffs to destroy diversity jurisdiction with post-removal damage stipulations.[1] As the name indicates, these stipulations state that the plaintiff's damages are below the federal jurisdictional amount, and are filed after a case has been removed from state to federal court.[2] Although courts have extensively discussed post-removal damage stipulations, legal commentators have largely ignored them.[3]

This article aims to fill that void. Specifically, it (1) explains that federal courts have inconsistently treated post-removal damage stipulations; (2) argues that recognition of post-removal damage stipulations flouts U.S. Supreme Court precedent, congressional intent, and is bad policy; and (3) proposes several solutions to ensure that post-removal stipulations are banished from the amount in controversy analysis.

To understand how post-removal damage stipulations impact federal court jurisdiction, Part II of this article provides background information on the topics of diversity jurisdiction, removal, and remand. It also explains that state law often prevents a plaintiff from pleading a specific dollar amount of damages in her complaint. Consequently, the amount in controversy is often unclear. Part III analyzes case law addressing post-removal damage stipulations, which is inconsistent and confusing. Part IV explains why this inconsistent treatment is troubling, and why courts should not recognize post-removal damage stipulations. Finally, Part V offers possible solutions toward securing a more legally sound and consistent approach.

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1. *See, e.g.*, Brooks v. Pre-Paid Legal Servs., 153 F. Supp. 2d 1299 (M.D. Ala. 2001).

2. Neighbors v. Muha, No. 05-472-CV-W-GAF, 2005 WL 2346968, at *3 (W.D. Mo. Sept. 26, 2005).

3. For a rare example of an article devoted to post-removal damage stipulations, see C. Kinnier Lastimosa, *One Man's Ceiling Is Another Man's Floor: The Effect of Post-Removal Damage Stipulations on the Amount in Controversy Requirement of a Diversity Case*, 81 WASH. U. L.Q. 633 (2003).

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II. The Applicable Law

In contrast to state courts, federal courts are courts of limited jurisdiction and may exercise jurisdiction over a case only if they have original jurisdiction over the case.[4] Original jurisdiction is usually triggered by either federal question or diversity jurisdiction. Federal question jurisdiction exists when the plaintiff's cause of action arises under federal law.[5] In contrast, diversity jurisdiction may exist where the plaintiff's cause of action arises solely under state law.[6] The purpose of diversity jurisdiction, and how to invoke it, is discussed below.

A. Diversity Jurisdiction

The wisdom of diversity jurisdiction has been extensively discussed,[7] and this article does not delve into that debate.[8] It is sufficient to say that the most cited justification for diversity jurisdiction is to protect out-of-state defendants from local bias and prejudice.[9] As one court explained,

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4. U.S. CONST. art. III, § 2; *In re* NASDAQ Mkt. Makers Antitrust Litig., 929 F. Supp. 174, 178 (S.D.N.Y. 1996) (stating that "federal courts are courts of limited jurisdiction").

5. *See* 28 U.S.C. § 1331 (2000) (providing that the "district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States"). Federal question jurisdiction is beyond the scope of this article. Generally, it is triggered when a "well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." Franchise Tax Bd. v. Constr. Laborers Vacation Trust for S. Cal., 463 U.S. 1, 27-28 (1983).

6. *See* Baker v. City of Dallas, No. 3-02-CV-1378-G, 2002 WL 31016531, at *1 (N.D. Tex. Sept. 6, 2002) ("Plaintiff allege[d] that defendant negligently maintained a city sidewalk, causing her to trip and fall. Such a claim arises solely under state law. Thus, the only basis for federal jurisdiction is diversity of citizenship.").

7. Debra Lyn Bassett, *The Hidden Bias in Diversity Jurisdiction*, 81 WASH. U. L.Q. 119, 120 (2003) (stating that "[t]he continued necessity of diversity jurisdiction has been hotly debated on many occasions, generating extensive commentary in the legal literature").

8. *Compare* Lumberman's Mut. Cas. Co. v. Elbert, 348 U.S. 48, 54 (1954) (Frankfurter, J., concurring) (stressing the "mounting mischief inflicted on the federal judicial system by the unjustifiable continuance of diversity jurisdiction"), *with* 13B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3601 (2d ed. 1984 & Supp. 2005) (stating that there is some "merit" to the argument that "federal courts qualitatively are so superior to state courts that it is desirable to channel as many cases as possible to federal courts, or at least that out-of-state litigants who have no opportunity to work for the improvement of the state courts, should be spared exposure to them"). The repeated calls for abolition of diversity jurisdiction have apparently fallen on deaf ears. "Despite trenchant criticism . . . Congress has declined to place significant limitations on the statutory diversity grant." DiRuggiero v. Rodgers, 743 F.2d 1009, 1018 (3d Cir. 1984) (footnote omitted).

9. Smallwood v. Ill. Cent. R.R., 352 F.3d 220, 224 (5th Cir. 2003) (stating that one

> The Congress that provided for diversity jurisdiction was concerned that a local jury sitting in state court might exhibit bias in favor of a 'local' party who was suing an out-of-state party. Because federal courts draw from a wider jury pool, [diversity jurisdiction], so the theory goes, provides a more neutral forum.[10]

To trigger diversity jurisdiction, the party invoking it must satisfy two requirements: (1) there must be complete diversity of citizenship between the plaintiff and the defendant, and (2) the amount in controversy must exceed $75,000 exclusive of interest and costs.[11] Complete diversity requires that the opposing parties be citizens of different states.[12] A person is a citizen of the state where she is domiciled,[13] which "is the place where [s]he has [her] true, fixed home and principal establishment, and to which, whenever [s]he is absent, [s]he has the intention of returning."[14]

To determine a person's domicile, courts consider several factors, including: the location of the person's real and personal property, the state issuing the person's driver's license, the state where the person's bank accounts are maintained, club or church membership, and the person's place of employment.[15] Domicile is determined as of the date the lawsuit is filed.[16] If the parties are completely diverse, the next step is to determine whether the amount in controversy exceeds $75,000.

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rationale underlying diversity jurisdiction is to "allow defendants to flee the state courts"); Rooney v. Tyson, 127 F.3d 295, 297 n.1 (2d Cir. 1997) (stating that "the object of diversity jurisdiction [is to present] the actual parties to a litigation with a neutral, federal, playing field"); Ho v. Ikon Office Solutions, Inc., 143 F. Supp. 2d 1163, 1164 (N.D. Cal. 2001) (stating that the "primary purpose of the diversity statute is to avoid prejudice against 'outsiders'").

10. *Ho*, 143 F. Supp. 2d at 1164.

11. 28 U.S.C. § 1332(a)(1) (2000) (providing in part that "[t]he district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between . . . citizens of different States."); *see also* Brooks v. Pre-Paid Legal Servs., Inc., 153 F. Supp. 2d 1299, 1300 (M.D. Ala. 2001) (stating that "[f]ederal courts may exercise jurisdiction in cases involving citizens of different states only if the amount in controversy exceeds $75,000, exclusive of interest and costs").

12. Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 268 (1806).

13. Bank One, Tex., N.A. v. Montle, 964 F.2d 48, 49 (1st Cir. 1992).

14. 13B WRIGHT ET AL., *supra* note 8, § 3612. For purposes of diversity jurisdiction, a corporation is considered a citizen of: (1) any state in which it is incorporated, and (2) the state where its principal place of business is located. 28 U.S.C. § 1332(c)(1).

15. Lew v. Moss, 797 F.2d 747, 750 (9th Cir. 1986). This list is not exhaustive, and the domicile determination must be made on a case-by-case basis. Delgado Ortiz v. Irelan, 830 F. Supp. 68, 70 (D.P.R. 1993).

16. Palermo v. Abrams, 62 F. Supp. 2d 408, 410 (D.P.R. 1999).

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Courts generally apply a "mechanical test" to gauge whether the jurisdictional minimum is satisfied.[17] First, the district court will simply read the *ad damnum*[18] clause of the complaint.[19] If the claim for damages appears to be made "in good faith," then the sum the plaintiff claimed controls, unless "it is apparent, to a legal certainty, that the plaintiff cannot recover the amount claimed."[20]

If, however, the complaint does not specify the amount of damages sought, then the party seeking the federal forum bears the burden of proving that the amount in controversy exceeds $75,000.[21] This situation is not uncommon, as many states have "rules expressly prohibiting plaintiffs from requesting a specific monetary sum in their prayer for relief or, in a slight variation of this rule, permitting the plaintiff to plead only that the amount in controversy exceeds a minimum amount."[22]

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17. Singer v. State Farm Mut. Auto. Ins. Co., 116 F.3d 373, 375 (9th Cir. 1997).

18. An *ad damnum* clause is the portion of a complaint where the plaintiff demands a specific amount of monetary damages from the defendant. BLACK'S LAW DICTIONARY 38 (7th ed. 1999).

19. *Singer*, 116 F.3d at 375; *see also* Chase v. Shop 'N Save Warehouse Foods, Inc., 110 F.3d 424, 427 (7th Cir. 1997) (stating that "[t]he starting point in determining the amount in controversy is typically the face of the complaint, where the plaintiff indicates the claim's value in her request for relief").

20. *Singer*, 116 F.3d at 375.

21. Homolka v. Hartford Ins. Group, 953 F. Supp. 350, 351 (N.D. Okla. 1995). Courts have imposed three different burdens of proof on defendants attempting to establish the jurisdictional minimum. "First, the 'reverse legal certainty' standard requires a defendant to show that it is *not* a legal certainty that the plaintiff would recover less than the jurisdictional amount." Russell D. Jessee, *Pleading to Stay in State Court: Forum Control, Federal Removal Jurisdiction, and the Amount in Controversy Requirement*, 56 WASH. & LEE L. REV. 651, 652-53 (1999). Second, "the 'preponderance of the evidence' standard . . . require[s] a defendant to prove the jurisdictional amount [is satisfied] by a preponderance of the evidence." *Id.* at 653. Finally, "the 'legal certainty' standard forces a defendant to prove to a legal certainty that a prevailing plaintiff cannot recover less than the jurisdictional amount." *Id.*

22. Alice M. Noble-Allgire, *Removal of Diversity Actions When the Amount in Controversy Cannot Be Determined from the Face of Plaintiff's Complaint: The Need for Judicial and Statutory Reform to Preserve Defendant's Equal Access to Federal Courts*, 62 MO. L. REV. 681, 687-89 nn.12-13 (1997) (citing numerous state statutes and rules of civil procedure, including COLO. R. CIV. P. 8(a) (providing that "'[n]o dollar amount shall be stated in the prayer . . . for relief'") (alteration in original)); IND. R. TRIAL P. 8(a) (providing that "in any complaint seeking damages for personal injury or death, or seeking punitive damages, no dollar amount or figure shall be included in the demand"); WIS. STAT. § 802.02(1m) (1996) (providing that "[w]ith respect to a tort claim seeking the recovery of money, the demand for judgment may not specify the amount of money the pleader seeks") (alteration in original); MICH. R. CIV. P. 2.111(B) (providing that "[i]f the pleader seeks an award of money, a specific amount must be stated if the claim is for a sum certain or a sum that can by computation be made certain, or if the amount sought is $10,000 or less. Otherwise, a specific amount may not be stated, and the

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Several rationales support these state rules. One rationale is that the rules were "adopted as a means of protecting defendants from the publicity generated by multi-million dollar claims for damages."[23] Another is that the rules are designed "to curb the effect of exaggerated demands for damages which could be read to the jury and thereby bias them towards making excessive awards."[24]

Regardless of the motive, an undesirable consequence has been confusion in determining the amount in controversy. As one leading treatise recognized:

> [W]hen the state in which the federal court is sitting either does not require that the complaint contain a demand for a specific monetary amount, expressly forbids the inclusion of such a demand in the prayer for relief, or requires only that more than a certain threshold state court jurisdictional amount be alleged[, it is not surprising] the federal courts have had some difficulties in measuring the amount in controversy.[25]

Thus, when *ad damnum* clauses are prohibited or limited, "the allegations of actual damages on the face of the complaint provide the court with no basis for determining the amount of actual damages in question."[26]

B. Removing a Case from State to Federal Court

As explained above, the primary purpose behind diversity jurisdiction is to protect out-of-state defendants from local prejudice. Of course, "federal courts cannot meaningfully protect against local prejudice if a plaintiff simply can avoid a federal forum by filing his lawsuit in state court."[27] "In other words,

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pleading must include allegations that show that the claim is within the jurisdiction of the court"); NEV. R. CIV. P. 8(a) (providing that "[w]here a claimant seeks damages of more than $10,000, the demand shall be for damages 'in excess of $10,000' without further specification of amount")).

23. *Id.* at 689 (quoting a statement by Illinois Senator Glass explaining that Illinois "eliminate[d] *ad damnum* provisions so that someone suing a doctor or hospital does not state the total amount of the claim and thereby eliminate[] some adverse publicity for doctors who are inadvertently sued for large amounts of money and, in fact, later settle for . . . much less or are found not [liable]" (emphasis added)).

24. Bechard v. Eisinger, 105 A.D.2d 939, 941 (N.Y. App. Div. 1984); *see also* Sullivan v. Birmingham, 416 N.E.2d 528, 531 (Mass. App. Ct. 1981) (stating that the Massachusetts Legislature "has prohibited the inclusion of an *ad damnum* amount in a medical malpractice complaint because a specific request could improperly affect the amount of damages ultimately awarded by a jury on the claim" (emphasis added)).

25. 13B WRIGHT ET AL., *supra* note 8, § 3725 (citation omitted).

26. McCorkindale v. Am. Home Assurance Co., 909 F. Supp. 646, 655 (N.D. Iowa 1995).

27. Scott R. Haliber, *Removing the Bias Against Removal*, 53 CATH. U. L. REV. 609, 617 (2004).

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from a defendant's perspective, the theoretical existence of diversity jurisdiction is meaningless unless a procedural mechanism allows a defendant to invoke it[] . . . ."[28] Recognizing this need, Congress enacted the federal removal statute.[29]

The removal statute provides in part that

> any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.[30]

Therefore, if the requirements for diversity jurisdiction are satisfied, the defendant may remove a case from state to federal court.[31] This is accomplished by filing a notice of removal with the federal court.[32]

In the seminal case of *St. Paul Mercury Indemnity Co. v. Red Cab Co.*,[33] the Supreme Court ruled that district courts must determine whether federal jurisdiction exists with reference to the moment a case is removed, without referring to subsequent events.[34] Therefore, the federal court must only examine those facts that existed at the moment the petition for removal was filed.[35] In *St. Paul Mercury*, the plaintiff filed suit in state court and sought

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28. *Id*.

29. Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73, 79-80.

30. 28 U.S.C. § 1441(a) (2000).

31. Smith v. Union Nat'l Life Ins. Co., 187 F. Supp. 2d 635, 638 (S.D. Miss. 2001) (recognizing that the "federal removal statute permits a defendant in a state court action to remove the lawsuit to federal district court if federal subject matter jurisdiction existed when the complaint was initially filed").

32. The notice of removal must contain "a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon [the] defendant or defendants." 28 U.S.C. § 1446(a). The notice must be filed either: (1) within thirty days of receipt of the complaint or summons, whichever period is shorter; or (2) within thirty days of receiving "an amended pleading, motion, order or other paper from which [removability] may first be ascertained." 28 U.S.C. § 1146(b); *see also* Harper v. AutoAlliance Int'l, Inc., 392 F.3d 195, 201 (6th Cir. 2004) (outlining the process for removing a case from state to federal court). In all cases, an action may not be removed on the basis of diversity jurisdiction more than one year after the commencement of the action. 28 U.S.C. § 1446(b).

33. 303 U.S. 283 (1938).

34. *Id*. at 289-90 (stating that "[e]vents occurring subsequent to the institution of suit which reduce the amount recoverable below the statutory limit do not oust jurisdiction"). With respect to the amount in controversy requirement, the importance of *St. Paul Mercury* cannot be overstated. As one court recognized, "[e]very comprehensive discussion concerning the amount in controversy should begin with *St. Paul Mercury* . . . ." Threet v. Bowers, No. 1:04 CV 103-D-D, 2004 WL 2526399, at *2 (N.D. Miss. Oct. 4, 2004).

35. *St. Paul Mercury*, 303 U.S. at 289-90; Chase v. Shop 'N Save Warehouse Foods, Inc.,

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damages in the amount of $4000, at a time when the jurisdictional minimum was $3000.[36] The defendants removed the case on the basis of diversity jurisdiction, and the plaintiff responded by amending its complaint.[37] The amended complaint repeated the same allegations as the original complaint and again sought damages of $4000.[38] Attached to the amended complaint, however, was an exhibit explaining that the plaintiff's damages only totaled $1,380.84.[39] The district court refused to remand the case, and the Supreme Court affirmed.[40]

In *St. Paul Mercury*, the Court held that "[e]vents occurring subsequent to the institution of suit which reduce the amount recoverable below the statutory limit do not oust jurisdiction."[41] A contrary rule would allow the plaintiff to simply reduce the amount of her claim to defeat federal jurisdiction, making the

> defendant's supposed statutory right of removal . . . subject to the plaintiff's caprice. The claim, whether well or ill-founded in fact, fixes the right of the defendant to remove, and the plaintiff ought not to be able to defeat that right and bring the cause back to the state court at his election. If he does not desire to try his case in the federal court he may resort to the expedient of suing for less than the jurisdictional amount, and though he would be justly entitled to more, the defendant cannot remove.[42]

Therefore, when the "plaintiff after removal, by stipulation, by affidavit, or by amendment of his pleadings, reduces the claim below the requisite amount, this does not deprive the district court of jurisdiction."[43]

C. Remanding a Case Back to State Court

As indicated above, Congress also enacted a mechanism to ensure that cases improperly removed would be sent back to state court. Under 28 U.S.C. § 1447(c), "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded."[44] The removal

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110 F.3d 424, 427 (7th Cir. 1997); *see also* Hatridge v. Aetna Cas. & Sur. Co., 415 F.2d 809, 814 (8th Cir. 1969) (stating that "the situation at the time of removal . . . is determinative").

36. *St. Paul Mercury*, 303 U.S. at 285-86.
37. *Id.* at 285.
38. *Id.*
39. *Id.*
40. *Id.* at 295-96.
41. *Id.* at 289-90.
42. *Id.* at 294.
43. *Id.* at 292.
44. 28 U.S.C. § 1447(c) (2000).

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statute is strictly construed,[45] and if federal jurisdiction is doubtful, the case must be remanded to state court.[46] Courts justify this strict construction under the guise of comity and "the deference courts generally give to a plaintiff's choice of forum."[47]

As a general rule, a district court's decision to remand a case is immunized from appellate review.[48] The U.S. Supreme Court recognized that a remand order may be reviewed on appeal only if the district court ordered a remand for reasons other than those authorized by § 1447(c).[49] More specifically, appellate review is proper if the district court based its decision to remand on something other than a lack of subject matter jurisdiction or a defect in removal procedures.[50]

For example, in *Thermtron Products, Inc. v. Hermansdorfer*,[51] the district court concluded that the defendants had a right to remove the case based on federal diversity jurisdiction.[52] The court then ruled that the right to remove, however, must be "balanced against the plaintiffs' right to a forum of their choice and their right to a speedy decision on the merits of their cause of action."[53] Because of the district court's crowded docket, the "'plaintiffs' right of redress [was] being severely impaired,' which 'would not be the case if the cause had not been removed from the state courts.'"[54] For these reasons, the district court remanded the case back to state court.[55] The U.S. Court of

45. Doe v. Allied Signal, Inc., 985 F.2d 908, 911 (7th Cir. 1993).

46. Mulcahey v. Columbia Organic Chem. Co., 29 F.3d 148, 151 (4th Cir. 1994); Smith v. Union Nat'l Life Ins. Co., 187 F. Supp. 2d 635, 638 (S.D. Miss. 2001) (stating that a district court "'may retain jurisdiction only where its authority to do so is clear'" (quoting Gorman v. Abbott Labs., 629 F. Supp. 1196, 1203 (D.R.I. 1986)). Additionally, although beyond the scope of this article, there are many procedural hurdles to removing a case. *See* Haliber, *supra* note 27, at 609 (arguing that "[c]oupling supposed statutory ambiguities with judicial presumptions favoring remand to state court, federal courts littered the removal landscape with a daunting array of procedural landmines for the litigator to navigate").

47. Villano v. Kohl's Dep't Stores, Inc., 362 F. Supp. 2d 418, 419 (S.D.N.Y. 2005).

48. *In re* Bus. Men's Assurance Co. of Am., 992 F.2d 181, 182 (8th Cir. 1993); *see also* Schexnayder v. Entergy La., Inc., 394 F.3d 280, 283 (5th Cir. 2004) (stating that "Congress has severely circumscribed the power of federal appellate courts to review remand orders"). Section 1447(d) provides in part that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." 28 U.S.C. § 1447(d).

49. Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 711-12 (1996). Section 1447(c) allows remand if the "district court lacks subject matter jurisdiction." 28 U.S.C. § 1447(c).

50. *Schexnayder*, 394 F.3d at 283.

51. 423 U.S. 336 (1976), *abrogated by Quackenbush*, 517 U.S. 706.

52. *Id*. at 340.

53. *Id*. (quotations and citations omitted).

54. *Id*. at 340-41 (citations omitted).

55. *Id*. at 341.

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Appeals for the Sixth Circuit held that it lacked jurisdiction to review the remand order, and the U.S. Supreme Court reversed.[56]

In *Thermtron Products*, the Court recognized that "Congress immunized from all forms of appellate review any remand order issued on the grounds specified in § 1447(c),[57] whether or not that order might be deemed erroneous by an appellate court."[58] Importantly, however, the fact that "justice may move more slowly in some federal courts than in their state counterparts is not one of the considerations that Congress has permitted the district courts to recognize in passing on remand issues."[59] Accordingly, the Court held that the district court should not have remanded the case.[60]

D. Application of Diversity Jurisdiction, Removal, and Remand

The removal process and a federal court's consideration of diversity jurisdiction is better understood through illustration. The facts in *Yarbrough v. Household Retail Services*[61] are straightforward and tie together the concepts of diversity jurisdiction, removal, and remand. The *Yarbrough* court described the facts as follows: "The [p]laintiffs in this action are four individuals who allege that the [d]efendants engaged in tortious conduct in the selling of home satellite systems."[62] The plaintiffs filed their complaint in state court; namely, the Circuit Court of Monroe County, Mississippi.[63] The defendants removed the case to the U.S. District Court for the Northern District of Mississippi, asserting diversity jurisdiction as the basis for removal.[64] In response, the plaintiffs filed a motion to remand, arguing that diversity of citizenship was lacking and that their claims were for less than the jurisdictional minimum.[65]

The court began its analysis by noting that federal diversity jurisdiction exists when the action is between citizens of different states and the amount in controversy exceeds $75,000.[66] "At the time [the] action was commenced,

56. *Id*. at 341-42.

57. As indicated above, those grounds are that the removal procedures were not properly followed and that the district court lacked subject matter jurisdiction. *See supra* note 49.

58. *Thermtron Prods.*, 423 U.S. at 351.

59. *Id*.

60. *Id*.

61. No. 100CV63-D-D, 2000 WL 679107 (N.D. Miss. May 4, 2000).

62. *Id*. at *1.

63. *Id*.

64. *Id*. The defendants also asserted federal question jurisdiction, although the court did not address that basis for jurisdiction. *Id*.

65. *Id*.

66. *Id*. (quoting 28 U.S.C. § 1332(a) (2000)). The court also cited the well-settled rule that once a motion to remand has been filed, the removing party bears the burden of establishing that federal jurisdiction exists. *Id*.

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the [p]laintiffs . . . were citizens of Mississippi" and the defendant was a corporation incorporated in Delaware with its principle place of business in Illinois.[67] Consequently, the court found that complete diversity existed at the time the suit was commenced.[68]

The *Yarbrough* court next considered whether the amount in controversy requirement was satisfied. The *ad damnum* clause in the plaintiffs' complaint sought "damages of $74,999 per [p]laintiff, including punitive and actual damages, court costs, and attorney's fees."[69] The court noted that the face of the complaint dictates the amount in controversy analysis, "unless it appears that the amount . . . is not claimed in good faith."[70] Nonetheless, "if a defendant can prove by a preponderance of the evidence that the amount in controversy actually exceeds the jurisdictional amount, removal is proper . . . ."[71]

Although the complaint sought damages of $74,999 per plaintiff, including punitive damages,[72] under Mississippi law plaintiffs' claims for punitive damages are aggregated to determine the amount in controversy.[73] Consequently, the court ruled "that the [p]laintiffs, in the aggregate, will more likely than not be able to recover far more than $75,000 in punitive damages. Similar cases involving financing disputes in Mississippi and Alabama have resulted in jury verdicts for punitive damages in the millions."[74] Accordingly, because the plaintiffs and the defendant were citizens of different states, and because the matter in controversy exceeded $75,000, the *Yarbrough* court found that removal was proper, and denied the defendant's motion to remand.[75]

III. Case Law Construing Post-Removal Damage Stipulations

As explained above, many states prohibit plaintiffs from pleading a specific amount of damages in the complaint.[76] As a result, the amount of damages sought is ambiguous, and plaintiffs often file post-removal damage

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67. *Id*.

68. *Id*. The court further found that complete diversity existed at the time the case was removed. *Id*. at *2.

69. *Id*.

70. *Id*. (citing Horton v. Liberty Mut. Ins. Co., 367 U.S. 348, 353 (1961)).

71. *Id*.

72. *Id*.

73. *Id*.

74. *Id*. at *3.

75. *Id*.

76. *See supra* note 22 and accompanying text.

stipulations, purportedly to "clarify" the amount in controversy.[77] These stipulations are filed after a case has been removed from state to federal court and are designed to defeat diversity jurisdiction.[78]

Under *St. Paul Mercury*, however, a plaintiff may not reduce or change her demand for damages by way of stipulation to defeat diversity jurisdiction.[79] Therefore, the "narrow issue," as one court put it, is whether a plaintiff may use a post-removal damage stipulation to "clarify the amount at issue," or whether such stipulations must be disregarded when determining the amount in controversy.[80] Several federal circuit courts of appeal have yet to squarely decide the issue, and other circuits are split.[81]

A. Courts that Refuse to Recognize Post-Removal Damage Stipulations

The U.S. Courts of Appeal for the Third, Sixth, and Seventh Circuits have held that post-removal damage stipulations should be disregarded and not considered in the amount in controversy analysis.[82] These circuits, and their treatment of post-removal damage stipulations, are discussed below.

The Third Circuit has offered conflicting approaches with respect to post-removal stipulations.[83] In *Werwinski v. Ford Motor Co.*,[84] the plaintiffs filed a putative class action in Pennsylvania state court, alleging that they purchased vehicles from Ford that contained defective transmission components.[85] The complaint asserted that the plaintiffs' claims exceeded $50,000, when the

77. Dyrda v. Wal-Mart Stores, Inc., 41 F. Supp. 2d 943, 949 (D. Minn. 1999).

78. *See id.*

79. *See In re* Shell Oil Co., 970 F.2d 355, 356 (7th Cir. 1992) (recognizing that post-removal stipulations reducing the amount in controversy do not deprive a district court of jurisdiction). As explained below, whether some courts actually adhere to this principle is questionable.

80. Egan v. Premier Scales & Sys., 237 F. Supp. 2d 774, 776-77 (W.D. Ky. 2002).

81. *See* Quinn v. Kimble, 228 F. Supp. 2d 1038, 1040 (E.D. Mo. 2002) (recognizing that "[t]he Eighth Circuit has not addressed whether post-removal stipulations may be considered in determining whether a case should be remanded, and other circuits are split on the issue").

82. *See* Werwinski v. Ford Motor Co., 286 F.3d 661 (3d Cir. 2002); Rogers v. Wal-Mart Stores, Inc., 230 F.3d 868 (6th Cir. 2000); *Shell Oil Co.*, 970 F.2d at 355. A few district courts take a similar approach. *See* Halstead v. Southerncare, Inc., No. 4:05-CV-76, 2005 WL 2261454, at *3 (W.D. Mich. Sept. 16, 2005) (recognizing that "such a [damage] stipulation would constitute a post-removal event having no bearing on the propriety of removal"); Simmons v. PCR Tech., 209 F. Supp. 2d 1029, 1033 (N.D. Cal. 2002) (stating that "[t]he court gives little credence to plaintiff's post-removal statements").

83. *Compare* Werwinski v. Ford Motor Co., 286 F.3d 661 (3d Cir. 2002), *with* Angus v. Shiley Inc., 989 F.2d 142 (3d Cir. 1993).

84. 286 F.3d 661 (3d Cir. 2002).

85. *Id.* at 663.

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jurisdictional minimum required an amount in excess of $75,000.[86] "Ford . . . removed the case to [federal] district court on the basis of diversity [jurisdiction]."[87] The plaintiffs then filed a motion to remand, stating that "individual claims for compensatory damages . . . will rarely exceed $2,000, and will not exceed $3,000."[88] The district court denied the motion to remand, and the Third Circuit affirmed.

The *Werwinski* court first stated that the amount in controversy must be determined by "the 'plaintiff's complaint at the time the petition for removal was filed.'"[89] The amount must be measured "'not . . . by the low end of an open-ended claim, but rather by a reasonable reading of the value of the rights being litigated.'"[90] Because the amount in controversy must be determined by the complaint, "a plaintiff's stipulation subsequent to removal as to the amount in controversy . . . is of 'no legal significance' to the court's determination."[91]

In an earlier case, however, the Third Circuit stated that a district court may consider a post-removal stipulation for purposes of clarification. In *Angus v. Shiley Inc.*,[92] the court noted in dicta that if a complaint is (1) ambiguous as to damages, and (2) "the controversy seems small, it is conceivable that a court justifiably might consider a subsequent stipulation as clarifying rather than amending an original pleading."[93] The *Werwinski* and *Angus* cases indicate that Third Circuit case law is somewhat unsettled with respect to damage stipulations.

The Sixth Circuit appears to hold that post-removal damage stipulations should not be recognized. In *Rogers v. Wal-Mart Stores, Inc.*,[94] Rogers "tripped and fell on a wooden pallet . . . in an aisle of a Wal-Mart store."[95] She then filed a complaint in a Tennessee state court, alleging that Wal-Mart employees negligently left the pallet in a shopping area.[96] In her complaint, Rogers sought approximately $950,000 in damages.[97] Wal-Mart removed the case to federal court on the basis of diversity jurisdiction, and the parties later

86. *Id*. at 666 n.4.

87. *Id*. at 664.

88. *Id*. at 667.

89. *Id*. at 666 (quoting Steel Valley Auth. v. Union Switch Div., 809 F.2d 1006, 1010 (3d Cir. 1987)).

90. *Id*. (quoting Angus v. Shiley Inc., 989 F.2d 142, 146 (3d Cir. 1993) (alteration in original)).

91. *Id*. at 667 (quoting *Angus*, 989 F.2d at 145).

92. 989 F.2d 142.

93. *Id*. at 145 n.3.

94. 230 F.3d 868 (6th Cir. 2000).

95. *Id*. at 870.

96. *Id*.

97. *Id*.

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agreed to dismiss the case without prejudice on October 9, 1998, which the district court entered on October 14, 1998.[98]

On February 4, 1999, Rogers filed a second complaint in Tennessee state court.[99] This complaint alleged the same set of facts as the first complaint, but stated that Rogers sought damages in an amount "not exceeding $75,000."[100] Wal-Mart again filed a motion to remove, citing Rogers's answers to interrogatories where she estimated her damages at $447,000.[101] Rogers responded with a motion to remand, and "submitted an affidavit stating that she . . . instructed [her] attorney to stipulate that [her] demand for damages will not exceed $75,000 at any time in the future."[102] In addition, Rogers filed a stipulation providing that her damages did not exceed $75,000 and that she would not attempt to amend her complaint for additional damages.[103] The district court denied Rogers's motion to remand, and the Sixth Circuit affirmed.[104]

The *Rogers* court first recognized that "in reviewing the denial of a motion to remand, a court [must examine] 'whether the action was properly removed in the first place.'"[105] Because Rogers had previously sought far more than $75,000, the court ruled that "[i]f one does not take into account plaintiff's post-removal stipulation, then there is no question that . . . at the time of removal, the amount in controversy was 'more likely than not' above the $75,000 pleaded in the plaintiff's complaint."[106]

The issue, then, was whether the plaintiff's post-removal damage stipulation should be recognized.[107] The Sixth Circuit answered that question in the negative. Citing *In re Shell Oil Co.*,[108] the court ruled that "'because jurisdiction is determined as of the instant of removal, a post-removal affidavit or stipulation is no more effective than a post-removal amendment of the complaint.'"[109]

Accordingly, and consistent with *St. Paul Mercury*, the *Rogers* court held that a "post-removal stipulation reducing the amount in controversy to below

98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.* (second and third alteration in original).
103. *Id.*
104. *Id.* at 871.
105. *Id.* at 871-72 (quoting Ahearn v. Charter Twp. of Bloomfield, 100 F.3d 451, 453 (6th Cir. 1996)).
106. *Id.* at 872.
107. *Id.*
108. 970 F.2d 355 (7th Cir. 1992).
109. *Rogers*, 230 F.3d at 872 (quoting *Shell Oil Co.*, 970 F.2d at 356).

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the jurisdictional limit does not require remand to state court."[110] The court found that this holding was also dictated by "sound policy."[111] "If plaintiffs were able to defeat jurisdiction by way of a post-removal stipulation, they could unfairly manipulate proceedings merely because their federal case begins to look unfavorable. Moreover, the interests of simplicity and uniformity dictate that post-removal stipulations be treated just like any other post-removal event."[112]

Under *Rogers*, it appears that the Sixth Circuit will not recognize a post-removal damage stipulation, whether binding or not, to determine whether the jurisdictional minimum is satisfied.[113]

Finally, the Seventh Circuit holds that a post-removal damage stipulation should not be recognized in an amount in controversy analysis.[114] In *Chase v. Shop 'N Save Warehouse Foods, Inc.*,[115] Chase was assaulted by an unknown person in Shop 'N Save's store parking lot.[116] She then filed a one-count complaint in Illinois state court, alleging many injuries, including disabling head injuries and mental anguish.[117] Because Illinois law does not allow a plaintiff to plead a specific amount of damages, Chase's complaint simply alleged "damages in excess of $15,000."[118]

Shop 'N Save removed the action to federal district court on the basis of diversity jurisdiction.[119] "Chase responded with a motion to remand," and the district court denied that motion.[120] "[A]fter Shop 'N Save filed a motion for

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110. *Id*.

111. *Id*.

112. *Id*.

113. District courts within the Sixth Circuit have interpreted *Rogers* in varying manners. *Compare* Egan v. Premier Scales & Sys., 237 F. Supp. 2d 774, 776-77 (W.D. Ky. 2002) (arguing that *Rogers* did not address the "narrow issue" of whether a stipulation may be considered to "clarify" an ambiguous complaint), *with* Fenger v. Idexx Labs., Inc., 194 F. Supp. 2d 601, 604 (E.D. Ky. 2002) (stating that "[t]he breadth of . . . *Rogers* remains unclear"). A reasonable interpretation, however, is that the *Rogers* court unconditionally rejected post-removal stipulations. The court stressed that such stipulations should be afforded "no effect." *Rogers*, 230 F.3d at 873. In addition, the court stressed that post-removal stipulations must not be recognized to prevent forum shopping, and to promote uniformity and simplicity. *Id*. at 872-73. These laudable goals would be undermined if post-removal stipulations were recognized in some cases and not in others.

114. Chase v. Shop 'N Save Warehouse Foods, Inc., 110 F.3d 424 (7th Cir. 1999); *Shell Oil Co.*, 970 F.2d 355.

115. 110 F.3d 424 (7th Cir. 1997).

116. *Id*. at 426.

117. *Id*.

118. *Id*. (quotation omitted).

119. *Id*.

120. *Id*.

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summary judgment . . . Chase . . . obtained an order granting voluntary dismissal of her claim."[121] One year later, Chase filed a second action for negligence in Illinois state court, which was based on the same facts as alleged in her first complaint.[122] Shop 'N Save again removed the case to federal court. Chase filed a motion to remand, and stipulated that her claim was not above the jurisdictional amount.[123] The district court denied Chase's motion to remand, and the Seventh Circuit affirmed.[124]

The Seventh Circuit first noted that "[t]he starting point in determining the amount in controversy is typically the face of the complaint."[125] Because Illinois law prohibits parties from requesting a specific amount of monetary damages,[126] however, the complaint itself was unhelpful. Under these circumstances, "the district court may look outside the pleadings to other evidence of jurisdictional amount in the record."[127] The court stated that any outside evidence, however, must have been "available at the moment the removal petition was filed."[128]

Under this backdrop, the court "held that post-removal affidavits or stipulations are ineffective to oust federal jurisdiction."[129] Therefore, because Chase's damage stipulation "came one month post-removal, [it was] too late . . . to consider."[130] The court further found that "[d]espite the Illinois *ad damnum* restriction, a plaintiff . . . who wants to proceed in state court, can control her forum by . . . 'fil[ing] a binding stipulation or affidavit with [her] complaint[]; once a defendant has removed the case, *St. Paul* makes later filings irrelevant.'"[131]

Consequently, and as a practical matter, courts in the Seventh Circuit will not recognize a post-removal damage stipulation in deciding a motion to remand. Instead, if a plaintiff wants to prevent removal, she must file a binding damage stipulation at the same time she files her complaint.

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121. *Id.*
122. *Id.*
123. *Id.* at 426-27.
124. *Id.* at 427, 431.
125. *Id.* at 427.
126. *Id.* (citing 735 ILL. COMP. STAT. ANN. 5/2-604 (West 2003) (stating that "in actions for injury to the person, no *ad damnum* may be pleaded except to the minimum extent necessary to comply with the circuit rules of assignment where the claim is filed" (emphasis added))).
127. *Id.* at 427-28.
128. *Id.* at 428.
129. *Id.* at 429 (citing *In re* Shell Oil Co., 970 F.2d 355, 356 (7th Cir. 1992)).
130. *Id.*
131. *Id.* at 430 (quoting *Shell Oil Co.*, 970 F.2d at 356 (emphasis added)).

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B. Courts that Recognize Post-Removal Damage Stipulations to "Clarify" the Amount of Damages Sought in the Plaintiff's Complaint

In contrast, the U.S. Court of Appeals for the Fifth Circuit[132] and a myriad of federal district courts[133] have held that post-removal damage stipulations may be considered to clarify the amount in controversy. These courts reason that a post-removal damage stipulation merely serves to clarify, but not reduce, the amount of damages when a state rule prohibits a specific demand for damages in a complaint. The following discussion examines a representative sample of these decisions.

The Fifth Circuit holds that a post-removal damage stipulation may be considered in deciding a motion to remand, but only when the complaint is ambiguous.[134] For example, in *Gebbia v. Wal-Mart Stores, Inc.*,[135] the plaintiff was shopping in a Wal-Mart store when she slipped and fell in the produce section.[136] She filed suit in Louisiana state court, seeking damages for, among other things, medical expenses, physical and mental suffering, loss of wages,

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132. *See* Asociacion Nacional de Pescadores a Pequena Escala O Artesanales de Colombia v. Dow Quimica de Colombia, 988 F.2d 559, 566 (5th Cir. 1993) (holding that a post-removal stipulation may be considered when the complaint is ambiguous on damages and the stipulation is unrebutted, and when the defendant's notice of removal only offers conclusory information with respect to the jurisdictional minimum), *abrogated by* Marathon Oil Co. v. Ruhrgas, 145 F.3d 211 (5th Cir. 1998).

133. *See* Varboncoeur v. State Farm Fire & Cas. Co., 356 F. Supp. 2d 935, 952 (S.D. Iowa 2005) (stating that although "there remains much disagreement on the effect of such a stipulation, it appears possible that . . . where state law prohibits clear pleading of amounts in controversy, it may be used as persuasive, though not necessarily conclusive, evidence of the amount in controversy at the time of removal"); Satterfield v. F.W. Webb, Inc., 334 F. Supp. 2d 1, 4 (D. Me. 2004) (stating that a post-removal damage stipulation can serve "to clarify the amount in controversy rather than alter it"); Lawson v. Tyco Elec. Corp., 286 F. Supp. 2d 639, 642 (M.D.N.C. 2003) (stating that although "[t]he Supreme Court has frowned upon the use of stipulations," they may be used when the amount in controversy is "indeterminate"); Cleary v. Murphy Oil U.S.A., Inc., No. Civ.A. 03-1718, 2003 WL 21977163, at *2 (E.D. La. Aug. 15, 2003) (stating that a damages stipulation may be considered if the amount in controversy is ambiguous at the time of removal); Quinn v. Kimble, 228 F. Supp. 2d 1038, 1040 (E.D. Mo. 2002) (considering post-removal stipulation "for clarification purposes only"); Dyrda v. Wal-Mart Stores, Inc., 41 F. Supp. 2d 943, 949 (D. Minn. 1999) (stating that "[a] post petition affidavit is relevant to clear up the ambiguity in the amount of damages that were alleged at the time of removal").

134. A-Best Sewer & Drain Serv., Inc. v. A Corp., No. Civ.A. 05-253, 2005 WL 1038419, at *2 (E.D. La. Apr. 22, 2005) (citing Fifth Circuit precedent for the proposition that "[t]he Court may consider a plaintiff's post-removal affidavit that clarifies the amount in controversy only when the petition is ambiguous" (citing *Asociacion Nacional*, 988 F.2d at 565)).

135. 233 F.3d 880 (5th Cir. 2000).

136. *Id.* at 881.

and permanent disability.[137] Pursuant to Louisiana state law, however, the plaintiff was prohibited from pleading a specific amount of damages.[138]

The defendant removed the case on the basis of diversity jurisdiction, and the plaintiff responded with a motion to remand.[139] Along with the motion, the plaintiff filed an affidavit stating that her damages were less than $75,000.[140] The district court denied the motion to remand, finding that the "[p]laintiff's [complaint] at the time of removal alleged injuries that exceeded $75,000."[141] Based on medical evidence, the plaintiff then filed a motion for reconsideration with a stipulation, stating that her claims did not exceed $75,000.[142] The district court denied the motion for reconsideration, and the Fifth Circuit affirmed.[143]

The *Gebbia* court recognized that post-removal stipulations may be considered only if the amount of damages sought is ambiguous at the time of removal.[144] Because Louisiana law prohibited the plaintiff from pleading a specific amount of damages, the plaintiff argued that the amount of damages she sought was unclear.[145] Therefore, she asserted her stipulation should be recognized.[146]

The Fifth Circuit disagreed, holding that "if it is facially apparent from the petition that the amount in controversy exceeds $75,000 at the time of removal, post-removal affidavits, stipulations, and amendments reducing the amount do not deprive the district court of jurisdiction."[147] In *Gebbia*, the petition sought damages for medical expenses, physical and mental suffering, loss of wages, and permanent disability and disfigurement.[148] On the basis of these factors, the court held that "[b]ecause it was facially apparent that [p]laintiff's claimed damages exceeded $75,000, the district court properly disregarded [p]laintiff's post-removal affidavit and stipulation for damages . . .

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137. *Id*.

138. *Id*. (citing LA. CODE CIV. PROC. ANN. 893(A)(1) (West Supp. 2000) (stating in part that "[n]o specific monetary amount of damages shall be included in the allegations or prayer for relief of any original, amended, or incidental demand")).

139. *Id*. at 881-82.

140. *Id*. at 882.

141. *Id*.

142. *Id*.

143. *Id*. at 882, 884.

144. *Id*. at 883.

145. *Id*. at 881-82.

146. *Id*. at 882.

147. *Id*. at 883 (citing St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 292 (1938)).

148. *Id*.

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and such affidavit and stipulation did not divest the district court's jurisdiction."[149]

District courts in numerous federal circuits have also held that post-removal damage stipulations can be considered for purposes of "clarifying" an otherwise ambiguous complaint.[150] For example, in *Halsne v. Liberty Mutual Group*,[151] Halsne filed an action in Iowa state court alleging that his insurer failed in bad faith to pay his medical bills.[152] The defendant removed the action to federal district court based on diversity jurisdiction, and Halsne filed a motion to remand.[153] At oral arguments, Halsne stipulated that he did not seek more than $75,000 in damages.[154] The *Halsne* court then considered "whether such a stipulation is effective to defeat this court's subject matter jurisdiction on removal."[155]

The court first recognized that because Iowa law prohibited Halsne from pleading a specific amount in controversy, the complaint itself provided little guidance concerning the amount of damages.[156] In this regard, the court found that

> Generally, such a post-removal stipulation limiting the amount in controversy — like a post-removal amendment — would not defeat removal jurisdiction. However, this general rule has consistently been applied to cases in which the petition at the time of the removal expressly stated a claim in excess of the jurisdictional amount, and therefore, removal jurisdiction had already attached. . . . Here, the proffered stipulation indicates that the value of the claim at the time of removal did not exceed the jurisdictional minimum, in a situation where pleading rules make the amount in controversy on the face of the complaint ambiguous at best. In these circumstances, the stipulation serves to clarify rather than amend the pleadings. Consideration of such a 'clarifying' stipulation is in accord with the fundamental principle of removal jurisdiction that whether subject matter jurisdiction exists is a question answered by looking to the complaint as it existed at the

149. *Id*. at 883-84 (citing *St. Paul Mercury*, 303 U.S. at 390).

150. English v. Home Depot U.S.A., Inc., No. Civ.A.B.-05-58, 2005 WL 1155694, at *2 (S.D. Tex. May 11, 2005).

151. 40 F. Supp. 2d 1087 (N.D. Iowa 1999).

152. *Id*. at 1088.

153. *Id*.

154. *Id*. at 1089.

155. *Id*.

156. *Id*. at 1090 (citing McCorkindale v. Am. Home Assurance Co., 909 F. Supp. 2d 646, 655 (N.D. Iowa 1995)).

> time the petition for removal was filed, as well as the further principles that the court's removal jurisdiction must be strictly construed, and that the court is required to resolve all doubts about federal jurisdiction in favor of remand.[157]

Therefore, the *Halsne* court held that because the *ad damnum* clause was ambiguous, a post-removal damage stipulation could be used to destroy diversity jurisdiction.

Similarly, in *Ryan v. Cerullo*,[158] Ryan filed a complaint in Connecticut state court against an accountant and the accountant's partnership.[159] The defendants removed the case to the federal district court, and Ryan filed a motion to remand.[160] Ryan attached an affidavit to his motion to remand stating that his damages did not exceed $75,000.[161] He also filed a brief arguing that his damages "add up to $62,325.03," and a sworn stipulation that stated, "'in no circumstances shall the damages, exclusive of interest and costs, be in excess of [$75,000].'"[162]

The *Ryan* court began its analysis by repeating the oft-cited rule from *St. Paul Mercury* that "once a federal district court's jurisdiction has attached to a case removed from state court, a plaintiff cannot deprive the district court of jurisdiction by reducing his claim . . . 'by stipulation, by affidavit, or by amendment of his pleadings.'"[163] The court then ruled, however, that a plaintiff is permitted to "clarify" the complaint after removal if it is silent or ambiguous as to the amount in controversy.[164]

Under Connecticut law, a complaint must simply state whether the alleged damages are (1) $15,000 or more, exclusive of interest and costs; (2) between $2500 and $15,000 exclusive of interest and costs; or (3) less than $2500, exclusive of interest and costs.[165] In conformance with Connecticut law, Ryan's complaint merely stated that the amount in controversy was "greater than [$15,000]."[166] Therefore, because the post-removal damage stipulation

157. *Id.* at 1090, 1092 (citations omitted) (emphasis omitted).
158. 343 F. Supp. 2d 157 (D. Conn. 2004).
159. *Id.* The court did not discuss any additional facts concerning the underlying dispute.
160. *Id.* at 158.
161. *Id.* at 159.
162. *Id.*
163. *Id.* (quoting St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 292-93 (1938)).
164. *Id.* at 159.
165. *Id.* at 160 (citing CONN. GEN. STAT. § 52-91 (1991)).
166. *Id.*

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merely served to clarify Ryan's complaint, the court considered it, and then remanded the case to state court.[167]

Finally, in *Brooks v. Pre-Paid Legal Services, Inc.*,[168] the plaintiffs' complaint alleged the defendants fraudulently sold them legal insurance.[169] The complaint, filed in Alabama state court, sought compensatory damages of $74,500 and an unspecified amount of punitive damages.[170] The defendants removed the case to federal court on the basis of diversity jurisdiction, and the plaintiffs filed a motion to remand.[171] Along with this motion, the plaintiffs also "filed an affidavit stating that . . . they [would] never claim or accept more than $74,500 [and would] agree to a court order capping their damages at $74,500."[172]

The *Brooks* court framed the issue as "whether a court can remand a case when a plaintiff's post-removal stipulation limits the scope of an *ad damnum* clause to less than $74,500."[173] In resolving this issue, the court first acknowledged that some courts refuse to recognize post-removal damage stipulations for two reasons.[174] First, post-removal stipulations "ostensibly are inconsistent with [*St. Paul Mercury*], which teaches that courts must determine jurisdiction as of the moment of filing rather than on the basis of subsequent events."[175] Second, post-removal stipulations may "lead to forum shopping by [plaintiffs] who might 'unfairly manipulate proceedings merely because their federal case begins to look unfavorable.'"[176] The *Brooks* court was not impressed by either rationale, and believed that "these unpersuasive decisions have improvidently expanded the holding of *St. Paul* and have given unduly narrow consideration to the basic principles of federal jurisdiction."[177]

The court first held that *St. Paul Mercury* did not prohibit post-removal stipulations.[178] Instead, the *Brooks* court noted that in *St. Paul Mercury* the plaintiff admitted that the complaint satisfied the jurisdictional minimum at the time of removal.[179] Therefore, according to *Brooks*, *St. Paul Mercury* only prohibited post-removal stipulations from divesting federal jurisdiction that

167. *Id.*
168. 153 F. Supp. 2d 1299 (M.D. Ala. 2001).
169. *Id.* at 1300.
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.* at 1301.
175. *Id.* (citations omitted).
176. *Id.* (quoting Rogers v. Wal-Mart Stores, Inc., 230 F.3d 868, 872 (6th Cir. 2000)).
177. *Id.*
178. *Id.*
179. *Id.*

had already attached.[180] In *Brooks*, however, the plaintiffs "submitted affidavits bearing on their initial demand and showing that federal jurisdiction has never properly attached."[181]

In addition, the court found that "four bedrock principles of federal jurisdiction require courts to effectuate post-removal stipulations."[182] The first principle is that federal courts are courts of limited jurisdiction.[183] Second, "the diversity statute is [to be] strictly construed because of . . . federalism concerns raised by federal courts [presiding over] matters of state law.[184] Third, because "a plaintiff is the master of her complaint," she is entitled to limit her damages to less than $75,000 and thereby avoid federal court.[185] Finally, "a plaintiff [has] knowledge of her complaint, and the amount of damages she seeks."[186] According to the *Brooks* court, "[n]one of these interests are furthered when a federal court keeps a diversity case because of some doctrinaire reading of judicial dicta that is divorced from congressional will and any legitimate policy interests."[187] For these reasons, the *Brooks* court accepted the plaintiffs' damage stipulation, and remanded the case to state court.

IV. Why Should We Care?

The treatment of post-removal damage stipulations is a model of inconsistency. Some courts appear willing to remand a case under the auspices of a post-removal damage stipulation,[188] while some only consider a post-removal damage stipulation to the extent it "clarifies" the damages sought in the complaint.[189] Still others banish post-removal damage stipulations from the amount in controversy analysis altogether.[190]

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180. *Id*.
181. *Id*.
182. *Id*.
183. *Id*.
184. *Id*.
185. *Id*.
186. *Id*. at 1301-02.
187. *Id*. at 1302.
188. *See*, *e.g.*, Burdick v. Teal, No. 1:02CV727, 2003 WL 1937118, at *2 (M.D.N.C. Apr. 22, 2003) (stating that "[t]he court finds that this stipulation of damages . . . fixes that amount below the jurisdictional minimum").
189. St. Paul Reinsur. Co. v. Greenberg, 134 F.3d 1250, 1254 n.18 (5th Cir. 1998); Angus v. Shiley Inc., 989 F.2d 142, 145 n.3 (3d Cir. 1993); Halsne v. Liberty Mut. Group, 40 F. Supp. 2d 1087, 1090-92 (N.D. Iowa 1999).
190. Rogers v. Wal-Mart Stores, Inc., 230 F.3d 868, 872-73 (6th Cir. 2000); Chase v. Shop 'N Save Warehouse Foods, Inc., 110 F.3d 424, 430 (7th Cir. 1997).

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One possible explanation for this inconsistent treatment is that there appears to be two types of post-removal damage stipulations. The first type of stipulation is filed because of a state law restriction on *ad damnum* clauses. If a plaintiff is prohibited from pleading a specific amount of damages in her state complaint, a post-removal damage stipulation may be the first opportunity to specify the amount of damages sought. Under these circumstances, a plaintiff who files a damage stipulation may not be acting in bad faith, or with the specific intent of destroying diversity jurisdiction. Instead, the plaintiff is merely attempting to "clarify" the amount in controversy.

The second type of post-removal damage stipulation is filed with the intent of destroying diversity. For example, regardless of any *ad damnum* restriction, a plaintiff who files a damage stipulation after her case begins to look unfavorable once in federal court is more likely than not attempting to improperly manipulate diversity jurisdiction.[191] Under these circumstances, a plaintiff's intent is to waive, or trade, her potential right to additional damages for a more favorable state court forum.

Regardless of the plaintiff's motive for filing a post-removal damage stipulation, courts should treat all such stipulations equally for at least one of the following five reasons. First, recognizing post-removal damage stipulations disregards Supreme Court precedent, clearly exceeding the authority of the lower courts. Second, recognizing post-removal damage stipulations disregards congressional intent by denying a defendant her statutorily protected right to defend an action in federal court. Third, recognizing post-removal damage stipulations encourages forum shopping. This result is particularly troubling when a plaintiff resorts to a damage stipulation after her claim in federal court begins to turn sour. Fourth, post-removal damage stipulations are an unreliable way to gauge the amount of damages at issue. Finally, the inconsistent treatment of post-removal stipulations generates unpredictability in litigation and wastes judicial resources. It therefore goes without saying that our civil justice system suffers as a result. These concerns are addressed in more detail below.

First, "[t]he Supreme Court has long discouraged reliance on post-removal stipulations and affidavits."[192] As *St. Paul Mercury* held, events that occur

191. *See* Bailey v. Wal-Mart Stores, Inc., 981 F. Supp. 1415 (N.D. Ala. 1997) (plaintiff filed a damages stipulation over sixteen months after the defendant removed the case, and after the court granted partial summary judgment in favor of the defendant).

192. Simmons v. PCR Tech., 209 F. Supp. 2d 1029, 1033 (N.D. Cal. 2002); *see also* Wis. Dep't of Corr. v. Schacht, 524 U.S. 381, 390 (1998) (stating that "for purposes of removal jurisdiction, we are to look at the case as of the time it was filed in state court — prior to the time the defendants filed their answer in federal court").

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"subsequent to the institution of suit which reduce the amount recoverable below the statutory limit do not oust jurisdiction."[193] Consequently, once a defendant has removed a case, *St. Paul Mercury* demands that subsequent stipulations must be disregarded in determining the amount in controversy.[194]

Many cases half-heartedly distinguish *St. Paul Mercury* by holding that post-removal damage stipulations simply "clarify," but do not change the amount in controversy.[195] According to these courts, clarification is needed when state law prohibits a plaintiff from pleading a specific amount of damages.[196]

As explained above, restrictions on *ad damnum* clauses force some plaintiffs to clarify the amount of damages with a post-removal stipulation. Other plaintiffs may intend to fraudulently defeat diversity jurisdiction after their case in federal court begins to look unfavorable. But a plaintiff's good-faith or evil intent is not at issue. The rule on post-removal damage stipulation was decided long ago by the Supreme Court. If a plaintiff wishes to avoid removal and have her case tried in state court, she "must file a binding stipulation or affidavit with [her] complaint[]; once a defendant has removed the case, *St. Paul* makes later filings irrelevant."[197] Courts that consider post-removal damage stipulations for clarification or otherwise are impermissibly making such stipulations relevant, either expressly or implicitly.

Second, post-removal damage stipulations thwart the purpose of removal of cases from state to federal court, as evidenced by the original Judiciary Act of 1789.[198] As indicated above, it is a "familiar notion that Congress has created diversity jurisdiction and the right of removal . . . for the purpose of protecting out-of-state litigants from local prejudice . . . ."[199] Therefore,

> so long as federal diversity jurisdiction exists . . . the need for its assertion may well be greatest when the plaintiff tries hardest to defeat it. The plaintiff who chooses to sue a non-citizen defendant

193. St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 289-90 (1938).

194. *In re* Shell Oil Co., 970 F.2d 355, 356 (7th Cir. 1992).

195. Halsne v. Liberty Mut. Group, 40 F. Supp. 2d 1087, 1092 (N.D. Iowa 1999).

196. *See* Lawson v. Tyco Elec. Corp., 286 F. Supp. 2d 639, 642 (M.D.N.C. 2003) (stating that because "the amount in controversy is indeterminate from the face of the complaint, the court will acknowledge [p]laintiff's stipulation"); Dyrda v. Wal-Mart Stores, Inc., 41 F. Supp. 2d 943, 949 (D. Minn. 1999) (holding that because state law prohibited the plaintiff from pleading an amount greater than $50,000 but less than $75,000, the "post-petition affidavit is relevant to clear up the ambiguity in the amount of damages that were alleged at the time of removal").

197. *Shell Oil Co.*, 970 F.2d at 356.

198. Cole v. Great Atl. & Pac. Tea Co., 728 F. Supp. 1305, 1307 (E.D. Ky. 1990) (citing Judiciary Act of 1789, ch. 20 § 12, 1 Stat. 73).

199. Douglas Energy of N.Y., Inc. v. Mobil Oil Co., 585 F. Supp. 546, 548 (D. Kan. 1984).

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> in a state court may be motivated by the hope that the out-of-state defendant will be at a substantial disadvantage in that court and the likelihood of such motivation increases with the lengths to which the plaintiff will go to prevent removal to a federal forum.[200]

For these reasons, both the diversity and removal statute should be interpreted in a manner that protects out-of-state parties from local bias and prejudice.

When a plaintiff is willing to limit her damages in exchange for home-field advantage, it logically follows that she expects to benefit from local bias. A court that facilitates this trade-off by recognizing post-removal damage stipulations undermines Congress's desire to protect out-of-state defendants from local prejudice.[201] This recognition therefore invades the province of the legislative branch; Congress's role is to enact statutes, and the judiciary has a duty to interpret statutes as drafted.[202] Further, as discussed above,[203] a district court's decision to remand a case is generally immunized from appellate review.[204] Therefore, if a post-removal damage stipulation is the cause of a remand, the defendant's right to remove is thwarted, and the defendant cannot even appeal that ruling.[205]

Third, the recognition of post-removal damage stipulations may encourage plaintiffs to forum shop.[206] Forum shopping occurs when a party "seek[s] out a forum solely on the basis of having the suit heard in a forum where the law or judiciary is more favorable to one's cause than in another."[207] Many courts have expressed concerns "about plaintiffs who devilishly move to limit their damages and return to state court only after litigation has taken an unfavorable turn."[208] Of course, some may argue that forum shopping is simply strategic

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200. *Id*. at 548 (alteration in original) (quotations omitted).

201. *See* Glazer & Assocs., P.C. v. Teleport, Inc., No. Civ.01-1080-ST, 2001 WL 34041792, at *4 (D. Or. Sept. 13, 2001) (recognizing that allowing "a plaintiff to defeat jurisdiction by post-removal pleading manipulation . . . undermine[s] a defendant's statutory right of removal").

202. United States v. Childress, 104 F.3d 47, 53 (4th Cir. 1996) (stating that "Congress' role is to enact statutes; the judiciary's to interpret those statutes as written").

203. *See supra* note 48.

204. Schexnayder v. Entergy La., Inc., 394 F.3d 280, 283 (5th Cir. 2004).

205. *See* 28 U.S.C. § 1447(d) (2000) (providing in part that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise").

206. Lastimosa, *supra* note 3, at 645-46 (arguing that the "plaintiff's use of a damage stipulation to destroy federal jurisdiction has forum control as its primary motive").

207. Roadmaster Corp. v. NordicTrack, Inc., Civ. A. No. 93 C 1260, 1993 WL 625537, at *3 (N.D. Ill. Sept. 20, 1993).

208. Brooks v. Pre-Paid Legal Servs., Inc., 153 F. Supp. 2d 1299, 1302 (M.D. Ala. 2001); *see also* Rogers v. Wal-Mart Stores, Inc., 230 F.3d 868, 872 (6th Cir. 2000) (stating that "[i]f plaintiffs were able to defeat jurisdiction by way of a post-removal stipulation, they could

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lawyering. Semantics aside, using a post-removal damage stipulation after a state court and the parties have invested extensive time and resources into a case is troubling. It is also a practice that, as explained throughout this article, is contrary to Supreme Court precedent.

These concerns are justified. For example, in *Bailey v. Wal-Mart Stores, Inc.*,[209] the plaintiff filed a motion to remand, and expressly stated that her damages did not exceed $49,999 at a time when the amount in controversy was $50,000.[210] This stipulation came only after the federal district court judge granted partial summary judgment in favor of the defendant, over sixteen months after the defendant removed the case.[211] The facts of *Bailey* and similar cases[212] demonstrate that plaintiffs are willing to use post-removal stipulations to escape federal court when their case begins to look unfavorable. Indeed, as one court recently recognized under similar facts, the recognition of a post-removal event

> facilitates gamesmanship and forum- and judge-shopping by encouraging plaintiffs filing in state court to seek exorbitant damages against the chance the case will not be removed, and then to reduce their demands if the case is removed to federal court, or not, depending on their happiness with the assigned judge. Such gamesmanship, and the resulting ping-ponging of cases from state to federal court and back again, should not be permitted.[213]

Fourth, post-removal damage stipulations are little more than a short-cut — a conclusory method to determine the amount in controversy. This is certainly not a desirable way to determine whether a federal court should exercise jurisdiction over a case. An independent, and more reliable damages analysis would, for example, rigorously examine

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unfairly manipulate proceedings merely because their federal case begins to look unfavorable"); Simmons v. PCR Tech., 209 F. Supp. 2d 1029, 1033 (N.D. Cal. 2002) (stating that post-removal stipulations are "likely to manipulate the amount in controversy to secure jurisdiction in the desired court").

209. 981 F. Supp. 1415 (N.D. Ala. 1997).

210. *Id.* at 1415.

211. *Id.*

212. *E.g.*, Looney v. Zimmer, Inc., No. 03-0647-CV-W-FJG, 2004 WL 1918720, at *6 (W.D. Mo. Aug. 19, 2004) (stating that because the plaintiff waited nearly eight months after removal to file a damages stipulation, it was "simply an attempt to avoid an adverse judgment in federal court").

213. Purple Passion, Inc. v. RCN Telecom Servs., Inc., No. 05C1V3795GEL, 2005 WL 1944268, at *2 (S.D.N.Y. Aug. 11, 2005) (refusing to remand a case on the basis of a subsequent amendment of the complaint).

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> the type and extent of the plaintiff's injuries and the possible damages recoverable therefore, including punitive damages if appropriate. The possible damages recoverable may be shown by the amounts awarded in other similar cases. Another factor for the court to consider would be the expenses or losses incurred by the plaintiff up to the date the notice of removal was filed.[214]

Of course, a post-removal damage stipulation may make it easier and less time-consuming for the court to decide a motion to remand; therefore, such stipulations may be welcomed by a federal judiciary that is increasingly overworked and under-funded.[215] Neither the Supreme Court or Congress, however, have injected expediency into the amount in controversy equation. Until and unless Congress or the Supreme Court instructs otherwise, lower courts exceed their authority by recognizing post-removal damage stipulations and denying a defendant her statutory right to removal.

Finally, consistency and predictability are lost when courts apply contradictory standards to post-removal damage stipulations. As with the doctrine of stare decisis,[216] a uniform standard with respect to post-removal stipulations would "provide predictability, continuity, and consistency in the law so that the populace may expect courts to apply the same or similar legal maxims to similar factual scenarios."[217] Consistency in the law helps ensure that procedural and substantive rules are not arbitrarily or selectively enforced against either party. It also allows parties to plan and develop their case or defense without the fear of unknown pitfalls.

For example, without a uniform standard that restricts the use of post-removal damage stipulations, defendants could expend significant resources and time in federal court, only to then have the case remanded. Furthermore,

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214. Watterson v. GMRI, Inc., 14 F. Supp. 2d 844, 850 (S.D. W. Va. 1997) (citations omitted); *see also* Campbell v. Rests. First/Neighborhood Rest., Inc., 303 F. Supp. 2d 797, 798 (S.D. W. Va. 2004) (holding that a post-removal affidavit is ineffective to destroy diversity jurisdiction, and instead finding that "a variety of other factors" should be examined to determine whether the jurisdictional minimum is satisfied).

215. Lisa Combs Foster, Note, *Section 1447(e)'s Discretionary Joinder and Remand: Speedy Justice or Docket Clearing?*, 1990 DUKE L.J. 118, 145 (1990) (recognizing that "[t]he problem of federal court overload is structural; too few courts, judges, and resources cannot match the demand placed on the courts by rising caseloads").

216. Stare decisis is a doctrine that provides courts should adhere to previous decisions and refrain from undoing settled issues. Mendenhall v. Cedarapids, Inc., 5 F.3d 1557, 1570 (Fed. Cir. 1993). It has been described as "one of the fundamental building blocks of our nation's legal system." Bankers Trust N.Y. Corp. v. United States, 36 Fed. Cl. 30, 37 (1996), *rev'd on other grounds*, 225 F.3d 1368 (2000).

217. *In re* Brand Name Prescription Drugs Antitrust Litig., No. 94 C 897, 2000 WL 204061, at *2 (N.D. Ill. Feb. 10, 2000).

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judicial economy may also be compromised. If remand is granted after the federal court has "performed a substantial amount of legal analysis," the state court may have to consider the same issues and legal arguments once again.[218] Bouncing back and forth between state and federal court wastes the time and resources of the court and the parties, and slows the wheels of justice.

V. Solutions to the Post-Removal Damage Stipulation Problem

Despite the deleterious consequences discussed above, some courts continue to recognize post-removal damage stipulations. The following discussion offers several solutions to steer these, and other jurisdictions yet to decide the issue, in the right direction. Although some solutions may be more favorable than others, they all share the common goal of prohibiting, or at least restricting, the recognition of post-removal damage stipulations.

A. The Removal Statute Should Be Amended to Specifically Address Post-Removal Damage Stipulations

The removal statute should be amended to require a plaintiff to file, within ten days after the defendant's notice of removal, a stipulation on damages. For example, 28 U.S.C. § 1447(f)[219] could be amended to provide that

> (f) If jurisdiction is based on 28 U.S.C. § 1332, then within ten days after the filing of the notice of removal under section 1446(a), the plaintiff shall file a stipulation, under penalty of perjury, stating her reasonable estimate of damages. The stipulation shall only state the plaintiff's damages as of the date the notice of removal was filed. The district court shall consider the post-removal stipulation in determining the amount in controversy, but the stipulation shall not be deemed dispositive with respect to the amount of damages. Other relevant factors shall also be considered by the court.
>
> The district court shall strike any post-removal damage stipulation filed after the ten day period has elapsed, and shall not consider it in deciding a motion to remand. In its discretion, the district court may sanction a party that fails to comply with the requirements of this provision.

This amendment would alleviate many of the problems associated with post-removal damage stipulations as described above.[220] First, it complies with

218. Millar v. Bay Area Rapid Transit Dist., 236 F. Supp. 2d 1110, 1116 (N.D. Cal. 2002).
219. 28 U.S.C. § 1447 is entitled "Procedure after removal generally."
220. *See supra* notes 192-218 and accompanying text.

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St. Paul Mercury by only recognizing the amount in controversy at the moment the case was removed.[221] Second, "allowing a plaintiff to follow the 'wait and see' approach to choosing her forum is unfair to defendants."[222] By requiring that all damage stipulations be filed within ten days after removal, the amendment would curtail undesirable forum shopping by plaintiffs. It would also help ensure that restrictions on *ad damnum* clauses in state courts do not force a plaintiff to try her case in federal court. If, because of *ad damnum* restrictions, a plaintiff innocently files a damage stipulation to "clarify" the amount of damages she seeks, the amendment would permit her to do so if the stipulation was filed within ten days.

Third, the amendment provides that the district court must consider the stipulation in its amount in controversy analysis, but that the stipulation does not control the issue of damages. This requirement helps ensure that the district court takes a holistic approach to the amount in controversy. The court must consider not only the plaintiff's damage stipulation, but other relevant factors, such as "the substance and nature of the injuries and damages described in the pleadings."[223] This independent analysis would provide a more accurate estimate of damages than simple reliance on a plaintiff's stipulation. Fourth, determining the amount in controversy is not always an easy task.[224] Therefore, a timely filed stipulation may save the court time and resources in deciding whether it may exercise jurisdiction.[225]

Finally, "a plaintiff is charged with knowledge of her complaint, and the amount of damages that she seeks."[226] Therefore, as a practical matter, the requirements imposed by the amendment are not onerous and can be easily complied with.

B. Courts Should Reject Post-Removal Damage Stipulations

If Congress does not amend the removal statue, courts should uniformly reject post-removal damage stipulations, and such stipulations should play no

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221. St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 290 (1938).

222. Chase v. Shop 'N Save Warehouse Foods, Inc., 110 F.3d 424, 430 (7th Cir. 1997) (citing Shaw v. Dow Brands, Inc., 994 F.2d 364, 367 (7th Cir. 1993)).

223. Hanna v. Miller, 163 F. Supp. 2d 1302, 1306 (D.N.M. 2001).

224. *See* Engel v. Chevron Corp., Inc., No. 3:96-CV-377, 1996 WL 1687454, at *1 (E.D. Tenn. June 21, 1996) (stating that "[w]hether or not the amount in controversy has been met is the difficult question that this court must answer").

225. *See* Millar v. Bay Area Rapid Transit Dist., 236 F. Supp. 2d 1110, 1116 (N.D. Cal. 2002) (explaining that judicial resources may be wasted in the process of removing and remanding a case).

226. Brooks v. Pre-Paid Legal Servs., Inc., 153 F. Supp. 2d 1299, 1301-02 (M.D. Ala. 2001); *see also St. Paul Mercury*, 303 U.S. at 290 (stating that a plaintiff "knows or should know whether his claim is within the statutory requirement as to amount").

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part in the amount in controversy determination.[227] This result is dictated by several principles. First, as explained above,[228] recognizing post-removal damage stipulations is inconsistent with the holding in *St. Paul Mercury* and Congress's intent to protect defendants from local bias.[229] Second, it invites mischievous forum shopping. Third, post-removal damage stipulations are analogous to other devices designed to destroy diversity jurisdiction, such as fraudulent joinder.[230] Indeed, it is curious why courts have not already drawn this analogy. Both tactics share the common goal of remanding a case back to state court, and neither should be countenanced by federal courts.

Instead, if a plaintiff wants to prevent removal, courts should require that a binding damages stipulation be filed with the complaint.[231] Any subsequently filed damages stipulation should be stricken and disregarded by the court. This bright-line rule would promote efficiency, consistency, and would help ensure that the court's damages inquiry is focused solely on the amount of damages sought at the time of removal.

C. State Legislatures Should Abolish Restrictions on Ad Damnum *Clauses*

As discussed throughout this article, many states prohibit or restrict plaintiffs from making a specific demand for damages in the complaint. The state legislatures which passed these rules had good intentions. One goal was to "protect[] defendants from [negative] publicity generated by multi-million dollar claims for damages."[232] Another goal was to prevent an exaggerated claim of damages to be read to the jury, thereby influencing the jury's verdict.[233] Unfortunately, by restricting *ad damnum* clauses, these states have also unwittingly undermined defendants' statutory right to remove a case.

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227. *See* Werwinski v. Ford Motor Co., 286 F.3d 661, 667 (3d Cir. 2002) (stating that a "plaintiff's stipulation subsequent to removal as to the amount in controversy . . . is of 'no legal significance' to the court's determination"); Rogers v. Wal-Mart Stores, Inc., 230 F.3d 868, 873 (6th Cir. 2000) (stating that "[p]laintiff's post-removal stipulation has no effect because jurisdiction is decided as of the time of removal").

228. *See supra* notes 33-43 and accompanying text.

229. *See supra* notes 191-96, 198-200 and accompanying text.

230. Fraudulent joinder occurs when a plaintiff joins a non-diverse party to ensure that the complete diversity requirement is not satisfied. Briarpatch Ltd. v. Phoenix Pictures, Inc., 373 F.3d 296, 302 (2d Cir. 2004) (stating that "[t]he doctrine of fraudulent joinder is meant to prevent plaintiffs from joining non-diverse parties in an effort to defeat federal jurisdiction").

231. *See In re* Shell Oil Co., 970 F.2d 355, 356 (7th Cir. 1992) (requiring that "[l]itigants who want to prevent removal must file a binding stipulation or affidavit with their complaint; once a defendant has removed the case, *St. Paul* makes later filings irrelevant").

232. Noble-Allgire, *supra* note 22, at 687-89.

233. Bechard v. Eisinger, 481 N.Y.S.2d 906, 908-09 (N.Y. App. Div. 1984).

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Therefore, state legislatures should do away with restrictions on *ad damnum* clauses or, in the alternative, require plaintiffs to simply plead whether the alleged damages are greater than or less than the federal jurisdictional minimum. Some states have already done the latter, and should be applauded for alleviating much confusion.[234] Other states should follow their lead. True, removing the *ad damnum* restriction may lead to inflated claims for damages in some cases.[235] In all cases, however, it will help ensure that a defendant can invoke diversity jurisdiction when applicable.[236]

Removal of *ad damnum* restrictions by state legislatures will also nullify those cases holding that post-removal damage stipulations may be used for "clarification."[237] If a complaint specifies the amount of damages sought, or whether the plaintiff's damages exceed the federal jurisdictional minimum, there is nothing left to "clarify."

Finally, federal courts often remand cases under the guise of "comity," which is frequently cited as the primary reason to strictly construe the removal statute. Comity is "the respect a court of one state or jurisdiction shows to another state or jurisdiction in giving effect to the other's laws . . . ."[238] In the context of diversity jurisdiction, comity is particularly relevant because it is "preferable for a state court judge to adjudicate state law claims."[239] To help ensure that federal courts do not mistakenly assume diversity jurisdiction and

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234. Some states have enacted laws providing that the plaintiff must plead whether the amount of damages sought is more or less than the federal jurisdictional minimum. Noble-Allgire, *supra* note 22, at 690 n.18 (quoting ARK. R. CIV. P. 8(a) (providing that "'[i]n claims for unliquidated damage, a demand containing no specified amount of money shall limit recovery to an amount less than required for federal court jurisdiction in diversity of citizenship cases, unless language of the demand indicates that the recovery sought is in excess of such amount'" (alteration in original)); LA. CODE CIV. PROC. ANN. art. 893(A) (providing that "'[i]f a specific amount of damages is necessary to establish . . . the lack of jurisdiction of federal courts due to insufficiency of damages . . . a general allegation that the claim . . . is less than the requisite amount is sufficient'" (alterations in original))).

235. *See supra* notes 23-24 and accompanying text (explaining that the prohibition on plaintiffs from alleging a specific dollar amount of damages was designed in part to protect defendants from the "publicity generated by multi-million dollar claims for damages").

236. *See generally* Noble-Allgire, *supra* note 22, at 689-90 (recognizing that state-imposed restrictions on *ad damnum* clauses "have had the unintended effect of making it difficult for federal courts to determine whether they have jurisdiction over the state-pleaded complaint because the complaint either is silent as to the amount in controversy or is ambiguous as to whether the amount exceeds the federal minimum").

237. *See*, *e.g.*, Satterfield v. F.W. Webb, Inc., 334 F. Supp. 2d 1, 4 (D. Me. 2004) (stating that because Maine law prohibited the plaintiff from stating a dollar amount in her complaint, the post-removal stipulation "served to clarify the amount in controversy").

238. BLACK'S LAW DICTIONARY 262 (7th ed. 1999).

239. Emrick v. Fujitec Am., Inc., No. C-04-04514 MJJ, 2005 WL 162235, at *5 (N.D. Cal. Jan. 24, 2005).

decide matters of state law, state legislatures should do their part to make the amount in controversy analysis simple and straightforward.

D. The Defendant Should Be Awarded Costs

Finally, at the very least the defendant should be reimbursed for litigation costs incurred in the removal of the case when the *ad damnum* clause is vague and the plaintiff files a post-removal damage stipulation. Such costs would include attorneys' fees incurred in drafting the notice of removal and filing fees, where applicable.[240] For example, citing § 1447(c),[241] the *Brooks* court held that "plaintiffs, as a general rule, should pay defendants all 'just costs and any actual expenses, including attorney fees, incurred as a result of the removal' if the defendants removed on the basis of an unspecified, arguably ambiguous *ad damnum* clause."[242]

The *Brooks* court stated that this general rule was justified by sound policy:

> Although the litigants bear all of the first costs, the American people generally suffer from overcrowded dockets and needless state-federal friction. If courts do not compensate defendants . . . then courts suboptimally encourage precision in pleadings and suboptimally protect the public's interest in a speedy resolution on the merits.[243]

Accordingly, courts should require a plaintiff to pay a defendant's expenses incurred in removing a case when the *ad damnum* clause is unclear, and when the plaintiff failed to file a binding damages stipulation with the complaint. As the *Brooks* court indicated, this rule would deter plaintiffs from using post-removal damage stipulations as a manipulative litigation device.[244]

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240. *See* Ryan v. Cerullo, 343 F. Supp. 2d 157, 160 (D. Conn. 2004) (warning the plaintiff and his counsel that failure to comply with a binding stipulation would subject them to sanctions).

241. This section provides in part that "[a]n order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." 28 U.S.C. § 1447(c) (2000). The United States Supreme Court recently held that absent unusual circumstances, a plaintiff may be awarded attorney fees only if the removing party lacked an objectively reasonable basis for seeking removal. Martin v. Franklin Capital Corp., 126 S. Ct. 704 (2005).

242. Brooks v. Pre-Paid Legal Servs., Inc., 153 F. Supp. 2d 1299, 1302 (M.D. Ala. 2001) (quoting 28 U.S.C. § 1447(c)).

243. *Id.*

244. This article has assumed throughout that plaintiffs unilaterally file post-removal stipulations to destroy diversity jurisdiction and secure a remand back to state court. In rare cases, however, the plaintiff and the defendant file a joint stipulation on damages after removal. *E.g.*, Paul v. Hall, Civ. A. No. 95-0778, 1995 WL 384505 (E.D. La. June 26, 1995).

If a plaintiff does not demand a specific amount of damages in her complaint, courts should

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VI. Conclusion

Post-removal damage stipulations should play no role in an amount in controversy analysis. There are many reasons for this conclusion. The Supreme Court indicated long ago that such stipulations should not be considered. When lower courts disregard that directive, they exceed their authority and undermine the hierarchy of the federal judiciary. The recognition of self-serving damage stipulations to defeat diversity jurisdiction also frustrates Congress's intent to protect defendants from local bias. A plaintiff's desire for local favoritism is particularly evident, and troubling, when she files a damage stipulation after her case begins to look unfavorable in federal court. If the stipulation is not filed immediately after removal, both the parties and the federal court could waste significant time and resources if the case is later remanded. Furthermore, the recognition of damage stipulations not only promotes forum shopping and wastes resources, but damage stipulations are also an unreliable way to assess the amount in controversy. Many factors should be used to determine whether the jurisdictional minimum is satisfied, not just a plaintiff's self-serving stipulation. Finally, because the law on post-removal damage stipulations is in flux, parties may not know whether, or when, a case may be remanded. In contrast, courts could encourage consistency and predictability in civil litigation by rejecting all post-removal damage stipulations.

As proposed in this article, there are many solutions to the post-removal damage stipulation problem. First, courts should award a defendant litigation costs for the needless movement between state and federal court. Second, the Supreme Court indicated long ago that post-removal damage stipulations should be disregarded. Therefore, lower courts should comply with the

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recognize a joint post-removal damage stipulation. These stipulations comply with *St. Paul Mercury* because the plaintiff is not reducing her demand for damages; instead, both parties are simply agreeing that the case was improperly removed in the first instance. In this regard, the joint stipulation is simply the functional equivalent of the defendant withdrawing her motion to remove. Moreover, by agreeing to such a stipulation, the defendant knowingly waives any right to remove the case. *See* Collings v. E-Z Serve Convenience Stores, Inc., 936 F. Supp. 892, 894 (N.D. Fla. 1996) (recognizing that a defendant may waive its right to remove). She also knowingly assumes the risk of local bias or prejudice against her. Therefore, the concerns discussed above are not applicable to joint post-removal damage stipulations.

Such joint stipulations, however, should not be dispositive of the amount in controversy issue. The court should consider the stipulation and all other relevant facts to determine if federal jurisdiction attached at the moment of removal. As one court noted, although a joint stipulation "does not reduce the amount of the claims after removal, it is a factor suggesting that the amount in controversy did not exceed [$75,000] prior to removal." *Paul*, 1995 WL 384505, at *2 n.3.

judicial hierarchy and reject such stipulations. Third, state legislatures should abolish *ad damnum* restrictions, and allow plaintiffs to freely plead the amount of damages allegedly at issue. Finally, Congress should amend the removal statute to expressly restrict the use of post-removal damage stipulations. Congress enacted the diversity and removal statutes to protect out-of-state parties from local prejudice, and it should take steps to ensure that its intent is not undermined by recognizing post-removal damage stipulations.

Lower courts, state legislatures, and Congress have all had a hand in the post-removal damage stipulation problem. Acting in concert or solo, these groups have the ability to ensure that plaintiffs do not use post-removal damage stipulations as a device to manipulate diversity jurisdiction.

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