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## Note

### Diversity Jurisdiction and Injunctive Relief: Using a “Moving-Party Approach” to Value the Amount in Controversy

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Consider the following diversity jurisdiction hypothetical: Happy Apple Orchard is a family-owned apple farm struggling financially due to a sharp reduction in production. Once a thriving orchard, warmer than normal temperatures and a lack of rainfall have made apple growth impossible. The orchard owner, convinced the uncharacteristic weather is due to human-induced climate change, files for a permanent injunction to abate emissions from ABC Electric, a nearby coal-fired power plant. The apple orchard’s lost revenue or reduced property value are potential ways to value the amount in controversy.<sup>1</sup> What result occurs, however, if this plaintiff-centered approach fails to satisfy the amount in controversy necessary for diversity jurisdiction?<sup>2</sup> Can a court consider the defendant’s compliance cost, such as the value of temporarily closing the factory or installing pollution-mitigation technology, to satisfy the amount in controversy? The scenario is further complicated if

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1. See, e.g., *Am.’s MoneyLine, Inc. v. Coleman*, 360 F.3d 782, 787 (7th Cir. 2004) (noting that the amount in controversy is measured by the value of the object to the plaintiff); *Leonard v. Enter. Rent a Car*, 279 F.3d 967, 973 (11th Cir. 2002) (same).

2. See 28 U.S.C. § 1332(a) (2006) (“The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000 . . .”).

the defendant power plant plans to file a counterclaim for defamation. Can consideration of the value of the counterclaim occur in the threshold evaluation for diversity jurisdiction? Unfortunately, under the current federal jurisdictional framework the answer to these questions is unclear.

When a plaintiff alleges a sum certain—a set dollar amount above the jurisdictional threshold—no difficulty arises in determining eligibility for federal diversity jurisdiction.<sup>3</sup> Injunctions, however, are not a sum certain, and courts often struggle to value this intangible form of relief for purposes of diversity jurisdiction.<sup>4</sup> Even assuming a court is able to estimate such a monetary value, considerable confusion arises when the matter in controversy differently impacts the parties involved.<sup>5</sup>

The federal circuit courts are split regarding the proper injunction valuation technique for diversity jurisdiction. The “plaintiff-viewpoint rule” considers only the value of the injunction to the plaintiff and is followed in the Second, Third, Fifth, Eighth, and Eleventh Circuits.<sup>6</sup> Historically, courts have favored this plaintiff-centered amount-in-controversy determination, but fewer opinions since 1980 have inflexibly endorsed the plaintiff-viewpoint approach.<sup>7</sup> Instead, many contemporary decisions grant jurisdiction if the threshold amount is satisfied from either the plaintiff’s or defendant’s viewpoint. The First,

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3. See Armistead M. Dobie, *Jurisdictional Amount in the United States District Court*, 38 HARV. L. REV. 733, 734 (1925) (“[C]ases at law present much less difficulty than those on the equity side of the court.”).

4. See, e.g., *Ridder Bros., Inc. v. Blethen*, 142 F.2d 395, 398 (9th Cir. 1944) (noting confusion regarding the proper method to ascertain the jurisdictional amount).

5. See, e.g., *Snow v. Ford Motor Co.*, 561 F.2d 787, 790–91 (9th Cir. 1977) (holding the plaintiff’s estimated benefit of eleven dollars as below the jurisdictional amount and the cost of defendant’s compliance as over the jurisdictional amount); see also Brittain Shaw McInnis, Comment, *The \$75,000.01 Question: What Is the Value of Injunctive Relief?*, 6 GEO. MASON L. REV. 1013, 1015 (1998) (stating that valuing claims for injunctive relief is especially difficult if the parties involved place different values on the same right).

6. See, e.g., *Ericsson GE Mobile Commc’ns, Inc. v. Motorola Commc’ns & Elec., Inc.*, 120 F.3d 216, 219 (11th Cir. 1997); *In re Corestates Trust Fee Litig.*, 39 F.3d 61, 65 (3d Cir. 1994); *Kheel v. Port of N.Y. Auth.*, 457 F.2d 46, 49 (2d Cir. 1972); *Mass. State Pharm. Ass’n v. Fed. Prescription Serv., Inc.*, 431 F.2d 130, 132 (8th Cir. 1970); *Scalise v. Nat’l Util. Serv.*, 120 F.2d 938, 940 (5th Cir. 1941).

7. See 1 JAMES WM. MOORE, MOORE’S FEDERAL PRACTICE ¶ 0.91[1] (Danielle R. Coquillette et al. eds., 2d ed. 1996).

Fourth, Seventh, Ninth, Tenth, and D.C. Circuits employ this “either-viewpoint technique.”<sup>8</sup>

Yet another method, the “moving-party approach,” supported by several district court decisions<sup>9</sup> and dicta from another court of appeals,<sup>10</sup> is a third approach to valuing injunctions. It values the amount in controversy from the plaintiff’s viewpoint when establishing original jurisdiction and the defendant’s viewpoint in cases brought to the federal courts through removal jurisdiction.<sup>11</sup>

The valuation techniques addressed in this Note lack definitive Supreme Court direction. To address the competing valuation frameworks, the Supreme Court granted certiorari in 2002 in *Ford Motor Co. v. McCauley*.<sup>12</sup> In *McCauley*, the district court denied federal subject-matter jurisdiction when the plaintiffs’ individual claims for relief were less than the jurisdictional amount, but the defendant’s cost of compliance was greater.<sup>13</sup> The decision to dismiss the case was appealed to the Supreme Court, principally to determine the viewpoint from which to value injunctive relief.<sup>14</sup> At oral argument, the Court noted that a decision on the merits would “solve an important and serious problem of jurisdiction that [was] plaguing the low-

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8. See, e.g., *In re Ford Motor Co./Citibank*, 264 F.3d 952, 958 (9th Cir. 2001), cert. granted in part sub nom. *Ford Motor Co. v. McCauley*, 534 U.S. 1126 (2002), and cert. dismissed, 537 U.S. 1 (2002); *McCarty v. Amoco Pipeline Co.*, 595 F.2d 389, 395 (7th Cir. 1979); *Smith v. Washington*, 593 F.2d 1097, 1099 (D.C. Cir. 1978); *Berman v. Narragansett Racing Ass’n*, 414 F.2d 311, 314 (1st Cir. 1969); *Gov’t Emps. Ins. Co. v. Lally*, 327 F.2d 568, 569 (4th Cir. 1964); *Ronzio v. Denver & R.G.W.R. Co.*, 116 F.2d 604, 606 (10th Cir. 1940).

9. See, e.g., *Bedell v. H.R.C. Ltd.*, 522 F. Supp. 732, 736 (E.D. Ky. 1981) (“[I]t is clear that the requisite jurisdictional amount exists, for the defendant has already expended more than \$400,000 . . . .”); *Inman v. Milwhite Co.*, 261 F. Supp. 703, 708 (E.D. Ark. 1966) (“[W]here federal jurisdiction is invoked by the party standing to gain or lose more than his adversary the greater gain or the greater loss should be applied as the criterion of jurisdictional amount.”).

10. See *Hatridge v. Aetna Cas. & Sur. Co.*, 415 F.2d 809, 814 (8th Cir. 1969) (holding that the party seeking removal has the burden of establishing the required amount in controversy).

11. *Bedell*, 522 F. Supp. at 735; see also 14AA CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3703, at 562 (4th ed. 2011).

12. 534 U.S. 1126, cert. dismissed, 537 U.S. 1.

13. See *In re Ford*, 264 F.3d at 955–56 (discussing the district court’s holding).

14. See Petition for a Writ of Certiorari at 7–8, *McCauley*, 534 U.S. 1126 (No. 01-896) (noting that the principal issue on appeal was the viewpoint from which to assess the amount in controversy).

er courts.”<sup>15</sup> The case’s procedural posture led to its dismissal,<sup>16</sup> but the grant of certiorari and the Court’s comments, nonetheless, illustrate that pressing ambiguities exist in the current valuation framework.

This Note argues for adoption of a “moving-party approach” for purposes of satisfying the amount-in-controversy requirement in diversity jurisdiction claims. Part I introduces the historical and theoretical basis for diversity and removal jurisdiction, as well as the current Supreme Court framework for valuing injunctive relief. Part II examines why the two primary injunction valuation techniques currently employed in federal circuit courts only partially adhere to the underlying rationale for diversity jurisdiction. Finally, Part III argues for adoption of the moving-party approach through either a Supreme Court order or legislative amendment. This Note concludes that the most appropriate injunction valuation technique for purposes of diversity jurisdiction is the moving-party approach because it values the true object of litigation without overly extending federal jurisdiction.

#### I. FASHIONING INJUNCTIVE RELIEF: EXAMINING THE RATIONALE FOR CREATING DIVERSITY JURISDICTION

The issuance of injunctive relief is left primarily to the court’s discretion.<sup>17</sup> In most cases, judges undertake a balancing of interests and are reluctant to issue an injunction unless the plaintiff is threatened by an injury for which no legal remedy exists.<sup>18</sup> The criteria for granting an injunction does not, however, confer subject-matter or personal jurisdiction.<sup>19</sup> As in most civil actions, the litigants must plead an independent ba-

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15. Transcript of Oral Argument at 33, *McCauley*, 537 U.S. 1 (No. 01-896) (per curiam), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/01-896.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/01-896.pdf).

16. See *McCauley*, 537 U.S. at 2.

17. See, e.g., *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312–19 (1982) (balancing equities in determination of whether to grant an injunction).

18. See *Bonaparte v. Camden & A.R. Co.*, 3 F. Cas. 821, 827 (C.C.D.N.J. 1830) (No. 1617) (noting that an injunction should be granted only where courts cannot “afford an adequate or commensurate remedy in damages”). Rule 65 enumerates three forms of injunctive relief—temporary restraining orders, preliminary injunctions, and permanent injunctions—but for purposes of this Note, no distinction is required because courts value these three orders similarly. See FED. R. CIV. P. 65.

19. See, e.g., *Citizens Concerned for Separation of Church & State v. City of Denver*, 628 F.2d 1289, 1299 (10th Cir. 1980) (“[R]ule 65 [authorizing injunctive relief] confers no jurisdiction.”).

sis for asserting federal-question or diversity jurisdiction.<sup>20</sup> Thus, when requesting injunctive relief in federal diversity suits, plaintiffs must show not only that a remedy at law does not exist, but that the value of the requested injunctive relief is sufficient to meet the amount-in-controversy determination.

As previously discussed, the circuit courts are split regarding the proper viewpoint from which to make this determination.<sup>21</sup> As a means to resolve disagreement, this Part examines the Framers' rationale for creating diversity jurisdiction and discusses Congress's subsequent actions to limit the number of diversity claims reaching federal court. Additionally, this Part discusses the ambiguous state of Supreme Court precedent that led to competing injunction valuation techniques. More specifically, this Part outlines the history of diversity jurisdiction jurisprudence, noting that diversity jurisdiction was created to protect litigants against out-of-state biases without turning federal courts into courts of general jurisdiction.

#### A. THE HISTORICAL BASIS FOR DIVERSITY JURISDICTION

When fashioning a proper injunction valuation technique, it is necessary to examine the Framers' rationale for including diversity jurisdiction in Article III of the Constitution.<sup>22</sup> Although diversity jurisdiction traces its origins back to the Judiciary Act of 1789 and has been in place longer than federal-question jurisdiction,<sup>23</sup> some ambiguity exists regarding the rationale for its implementation,<sup>24</sup> resulting in disagreement since the Constitutional Convention.<sup>25</sup>

The traditional justification for diversity jurisdiction is that the Framers sought to avoid prejudice against out-of-state litigants in state courts.<sup>26</sup> In *Bank of the United States v. De-*

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20. 11A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2941, at 35 (2d ed. 1995).

21. See *supra* notes 6–11 and accompanying text.

22. U.S. CONST. art. III, § 2, cl. 1 (“The judicial Power shall extend to all Cases, in Law and Equity . . . between Citizens of different States . . .”).

23. John J. Parker, *Dual Sovereignty and the Federal Courts*, 51 NW. U. L. REV. 407, 408 (1956).

24. Martin A. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and “The Martian Chronicles,”* 78 VA. L. REV. 1769, 1800 (1992).

25. See James William Moore & Donald Weckstein, *Diversity Jurisdiction: Past, Present, and Future*, 43 TEX. L. REV. 1, 1–4 (1964) (discussing “sharp attacks” on diversity jurisdiction as far back as the Constitutional Convention).

26. See John P. Frank, *For Maintaining Diversity Jurisdiction*, 73 YALE L.J. 7, 12 (1963); Redish, *supra* note 24, at 1800; Hessel E. Yntema & George

*veaux*, the Court noted that the goal of diversity jurisdiction is to “preserve the real equity of citizens throughout the union” in order to protect against “local prejudices, in particular states.”<sup>27</sup>

Some judicial scholars, however, question whether protection of out-of-state litigants was the actual rationale for diversity jurisdiction.<sup>28</sup> For example, Judge Henry Friendly noted “that there was little cause to fear that the state tribunals would be hostile to litigants from other states.”<sup>29</sup> Instead, he argued “that the desire to protect creditors against [state] legislation favorable to debtors was a principal reason for the grant of diversity jurisdiction.”<sup>30</sup> In response, however, Chief Justice Taft posited that protecting creditors and out-of-state litigants was essentially the same.<sup>31</sup> He contended that creditors were more likely to invest capital in out-of-state jurisdictions if they were assured the opportunity to litigate free from local biases, such as in the uniform federal system.<sup>32</sup> Thus, it appears protecting out-of-state litigants, from one form of prejudice or another, is the rationale for implementing diversity jurisdiction.<sup>33</sup>

In fashioning a proper injunction valuation technique, the rationale for inclusion of diversity jurisdiction in Article III is of no more than academic concern if prejudice is no longer

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H. Jaffin, *Preliminary Analysis of Concurrent Jurisdiction*, 79 U. PA. L. REV. 869, 870 n.1 (1931) (discussing how diversity jurisdiction is “designed to secure citizens against discrimination”).

27. *Bank of the U.S. v. Deveaux*, 9 U.S. (5 Cranch) 61, 86 (1809), *overruled in part by* *Louisville C. & C.R. Co. v. Letson*, 43 U.S. (2 How.) 497 (1844); *see also* *Guar. Trust Co. v. York*, 326 U.S. 99, 111 (1945) (“Diversity jurisdiction is founded on assurance to non-resident litigants of courts free from susceptibility to potential local bias.”); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 74 (1938) (stating that “[d]iversity of citizenship jurisdiction” prevents “discrimination in state courts against those not citizens of the State”). *But see* Joel M. Feinberg, *Establishing Federal Jurisdictional Amount by a Counterclaim*, 21 MO. L. REV. 243, 256 (1956) (explaining that hostility to nonresidents is non-existent today).

28. *See* Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 497 (1928).

29. *Id.*; *see also* *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 347 (1816) (noting that the Constitution presumed “whether rightly or wrongly” that state allegiances were the rationale for diversity jurisdiction).

30. Friendly, *supra* note 28, at 496–97.

31. *See* Parker, *supra* note 23, at 410.

32. *Id.*

33. *See* Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1460 (2008) (stating that diversity jurisdiction was intended to protect litigants from bias in states other than their own).

present. To this end, some scholars propose that increased “travel and communication have unified the nation and reduced interstate xenophobia.”<sup>34</sup> This does not mitigate the fact, however, that state judges are often elected and “more directly tied to the community than their federal counterparts,”<sup>35</sup> resulting in potential prejudice favoring in-state well-being.<sup>36</sup>

The perception of local biases led to numerous empirical studies examining the prevalence of prejudice against out-of-state defendants, but the results were mixed.<sup>37</sup> The inconclusive nature of these studies, however, is not surprising given that asking state court judges and prospective jurors if they can be fair to out-of-state litigants invariably invites unpredictable results.<sup>38</sup> The extent of litigant bias is not entirely clear,<sup>39</sup> but Congress has not chosen to abolish diversity jurisdiction, and

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34. Redish, *supra* note 24, at 1801.

35. *Id.*; see also RICHARD NEELY, WHY COURTS DON'T WORK 27 (1982) (“In many states judges run for office and this means they must be members of political parties . . . .”); David P. Currie, *The Federal Courts and the American Law Institute*, 36 U. CHI. L. REV. 1, 3 (1968) (discussing “life tenure, independence, respectable salary, and [the] prestige of the federal bench” as reasons for high caliber decisions in federal courts).

36. Redish, *supra* note 24, at 1801; see also David L. Shapiro, *Federal Diversity Jurisdiction: A Survey and a Proposal*, 91 HARV. L. REV. 317, 339 (1977) (noting that bias may be more prevalent in some jurisdictions than others). *But see* Feinberg, *supra* note 27, at 249 (“[T]he original policy basis of diversity jurisdiction, fear of local prejudice against foreign parties, is largely a fiction today.”).

37. Compare Kristin Bumiller, *Choice of Forum in Diversity Cases: Analysis of a Survey and Implications for Reform*, 15 LAW & SOC'Y REV. 749, 761 (1980–1981) (citing the “provincialism” of rural areas as creating an out-of-state bias), and Jerry Goldman & Kenneth S. Marks, *Diversity Jurisdiction and Local Bias: A Preliminary Empirical Inquiry*, 9 J. LEGAL STUD. 93, 104 (1980) (noting “fear and local bias” as entering the calculus in forum selection), and Note, *The Choice Between State and Federal Court in Diversity Cases in Virginia*, 51 VA. L. REV. 178, 179–84 (1965) (reporting that sixty percent of responding Virginia attorneys selected a federal forum due to out-of-state bias), with Marvin R. Summers, *Analysis of Factors that Influence Choice of Forum in Diversity Cases*, 47 IOWA L. REV. 933, 937–38 (1962) (finding only 4.3 percent of responding Wisconsin lawyers mentioned bias). An additional study found bias was a regional phenomenon. See Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369, 407–12 (1992) (finding low levels of bias against out-of-state litigants in the industrialized Midwest and far-West as opposed to southern states).

38. Currie, *supra* note 35, at 5 n.19.

39. *Cf.* Redish, *supra* note 24, at 1803 (“The dangers of prejudice may often be subtle, but that only makes them more insidious.”).

thus injunction valuation should mirror the Framers' impetus, preventing out-of-state litigant bias, for Article III inclusion.<sup>40</sup>

#### B. CONGRESS CURTAILS DIVERSITY JURISDICTION

Article III diversity jurisdiction opens federal court doors to diverse claims that satisfy the amount-in-controversy threshold.<sup>41</sup> Rather paradoxically, however, it has become an American jurisprudential principle that federal courts are limited in jurisdiction<sup>42</sup> and reticent to hear diversity claims.<sup>43</sup>

Although Article III permits diversity jurisdiction,<sup>44</sup> Congress passed diversity<sup>45</sup> and removal statutes<sup>46</sup> to limit jurisdiction. The diversity statute limits standing to cases between "citizens of different states . . . where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs."<sup>47</sup> Further, the concept of diversity is restricted by *Strawbridge v. Curtiss*, which requires complete diversity—all parties on one side of the suit must be diverse from all parties on the other side(s).<sup>48</sup>

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40. See *McInnis*, *supra* note 5, at 1024 ("[C]ourts, in analyzing the problem [fashioning an injunction valuation method], should examine the history and purpose of diversity jurisdiction."). As recently as the 2010 term, the Court reiterated the "relevant purposive concern" of diversity jurisdiction as reducing "prejudice[s] against an out-of-state party." See *Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1192 (2010).

41. See 28 U.S.C. § 1332(a) (2006).

42. See, e.g., *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994) ("Federal courts are courts of limited jurisdiction."); see also *Bowles v. Russell*, 551 U.S. 205, 212–13 (2007) ("Because Congress decides whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them."); Frank, *supra* note 26, at 9 ("The original federal court jurisdiction was almost entirely permissive; the Congress was under no obligation to create federal trial courts at all . . .").

43. See, e.g., *Horton v. Liberty Mut. Ins. Co.*, 367 U.S. 348, 351 (1961) (explaining the increase in controversy requirement from \$3000 to \$10,000 was to reduce congestion in the federal courts).

44. See U.S. CONST. art. III, § 2, cl. 1.

45. See 28 U.S.C. § 1332.

46. See *id.* § 1441.

47. *Id.* § 1332.

48. *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 267–68 (1806), *overruled in part by Louisville C. & C.R. Co. v. Letson*, 43 U.S. (2 How.) 497 (1844) ("[E]ach distinct interest should be represented by persons, all of whom are entitled to sue, or may be sued, in the federal courts."). It should be noted that not until 1967 did the Court explain that the complete diversity requirement was statutorily, rather than constitutionally, based. See *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530–31 (1967) (discussing diversity jurisdiction and how the legislature determined its usage).



In addition to limiting 28 U.S.C. § 1332 to claims between diverse citizens, Congress amended this section to classify corporations as citizens of both the state of incorporation and the principal place of business,<sup>49</sup> again limiting the reach of diversity jurisdiction.<sup>50</sup> Similarly, Congress has steadily raised the threshold jurisdictional amount required for diversity jurisdiction. It started at \$500 in 1789,<sup>51</sup> and has been raised five subsequent times to the current amount of \$75,000.<sup>52</sup> Although Article III opens the federal courts to diversity claims, Congress has greatly curtailed eligible cases,<sup>53</sup> restricting diversity disputes to those of large monetary value and between completely diverse citizens.<sup>54</sup> It has done largely the same for cases seeking federal jurisdiction through the removal statute.

At first glance, the removal statute, 28 U.S.C. § 1441, appears to reopen the federal court doors.<sup>55</sup> Section 1441(a) allows “any civil action brought in a State court of which the district courts of the United States have original jurisdiction . . . [to] be removed by the defendant.”<sup>56</sup> As stated, however, the statute applies exclusively to civil actions and is available only to defendants.<sup>57</sup> Further, the defendant must file a request for removal within thirty days of receiving the original or amended complaint and may not remove any action subsequent one year of the suit commencing.<sup>58</sup> Consequently, savvy plaintiffs regu-

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49. Act of July 25, 1958, Pub. L. No. 85-554, § 2, 72 Stat. 415, 415.

50. See Redish, *supra* note 24, at 1804 (discussing how Congress has attempted to limit diversity jurisdiction).

51. See Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 73, 78. These increases have been slightly higher than inflation. See Jaren Casazza, Note, *Valuation of Diversity Jurisdiction Claims in the Federal Courts*, 104 COLUM. L. REV. 1280, 1283 n.11 (2004).

52. See RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1453-54 (5th ed. 2003) (describing the raising of the amount to \$2000 in 1887, \$3000 in 1911, \$10,000 in 1958, \$50,000 in 1988, and \$75,000 in 1996).

53. See Harold Epstein, Comment, *Federal Courts: Jurisdictional Amount in Injunction Suits in Federal District Courts*, 25 CALIF. L. REV. 336, 336 (1936) (“At no time has Congress seen fit to give the federal District Courts the fullest measure of jurisdiction allowable under the Constitution.”). *But see* Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2, 119 Stat. 4, 5 (stating that a purpose of the Act is to “restore the intent of the framers . . . by providing for Federal court consideration of interstate cases . . . under diversity jurisdiction”).

54. See 28 U.S.C. § 1332(a) (2006) (enumerating a \$75,000 amount in controversy minimum and outlining other diversity requirements).

55. *Id.* § 1441.

56. *Id.*

57. *Id.*

58. *Id.* § 1446(b).

larly amend their complaint to more than the statutory amount only after the one-year window has elapsed, thus guaranteeing their case will be heard in state court.<sup>59</sup> Additionally, removal is not allowed if the action is filed in the home state of the defendant.<sup>60</sup> The general tenor of the removal statute is one of “strict construction,”<sup>61</sup> with the federal courts reticent to infringe on general principles of federalism.<sup>62</sup>

The oft-cited rationale for curtailing diversity jurisdiction is to prevent the “diversion of judge-power” to “the dullest cases” that result in a clogging of the federal courts.<sup>63</sup> Docket control considerations attract commentary, including from the Supreme Court<sup>64</sup> and the American Law Institute,<sup>65</sup> but have failed to generate enough support to overturn the diversity statute altogether. Proponents of diversity jurisdiction counter that federal courts do not exist for the purpose of clearing their dockets. Rather, their goal is to create judicial uniformity, to interpret and enforce federal law, and “to prevent interstate prejudices and allegiances from balkanizing the nation.”<sup>66</sup> Ir-

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59. See Michael W. Lewis, *Comedy or Tragedy: The Tale of Diversity Jurisdiction and the One-Year Bar*, 62 SMU L. REV. 201, 201–02 (2009) (citing *Omi’s Custard Co. v. Relish This, LLC*, No. 04-cv-861-DRH, 2006 WL 2460573, at \*1 (S.D. Ill. Aug. 24, 2006)) (describing an instance where a plaintiff with a cognizable \$3 million claim files a complaint for damages of only \$74,900 and waits for the one-year removal restriction to pass).

60. 28 U.S.C. § 1441(b) (“Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which the action was brought.”).

61. See *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108 (1941) (noting both the language of the Act of 1887 and subsequent congressional action as evidence for strict construction of the removal statute); see also *Luther v. Countrywide Homes Loan Servicing LP*, 533 F.3d 1031, 1034 (9th Cir. 2008) (“In general, removal statutes are strictly construed against removal.”).

62. *Sheets*, 313 U.S. at 108–09 (acknowledging that state power to resolve controversies may only be abridged by an act of Congress in conformity to the Judiciary Articles of the Constitution).

63. HENRY J. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 141, 144 (1973); see also Shapiro, *supra* note 36, at 317–18 (advocating that few cases belong in federal courts).

64. See *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 672 (1950) (noting the difficulty of making federal judges decide state law cases).

65. See AM. LAW INST., *STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS* § 1302, at 124 (1969) (recognizing that federal courts often offer a speedier trial because of “lesser docket congestion”).

66. Redish, *supra* note 24, at 1786. Professor Redish argues that restricting diversity claims because of docket concerns is an “‘astrological sign’ approach” because “equally as rational a result would have been achieved by elimination of all cases brought by those born under the signs Pisces, Leo, and Virgo.” *Id.* at 1787.

respective of its validity, docket control considerations shaped the current diversity framework<sup>67</sup> and, as such, they should be considered in fashioning a proper injunction valuation method.

### C. SUPREME COURT INJUNCTION VALUATION FRAMEWORK

In an action for injunction, it is well settled that the amount in controversy is measured by the value of the litigated object.<sup>68</sup> What is less clear, however, is how to measure the value of this litigated object.<sup>69</sup> The diversity statute fails to specify a viewpoint from which to value the amount in controversy,<sup>70</sup> and, as such, courts are left to the statute's historical underpinnings. Given these seemingly contradictory signals—opening federal courts to protect out-of-state litigants vis-à-vis restricting the reach of the diversity and removal statutes to reduce docket loads<sup>71</sup>—it is unsurprising that the circuit courts are split regarding a proper injunction valuation technique. Unfortunately, attempts by the Supreme Court to clarify this issue have done little to assuage ambiguity. One judicial scholar even went so far as to describe the Court's precedent as reading “more like Delphic riddles than carefully plotted legal reasoning.”<sup>72</sup>

The first Supreme Court case addressing the issue was *Mississippi & Missouri Railroad Co. v. Ward*, where a steamboat owner sought removal of a bridge over the Mississippi River.<sup>73</sup> The Court upheld jurisdiction between diverse citizens, stating: “But the want of a sufficient amount of damage having been sustained to give the federal courts jurisdiction, will not defeat the remedy, as the removal of the obstruction is the matter of controversy, and the value of the object must govern.”<sup>74</sup> Historic syntax aside, the decision provides little in terms of direction. The plaintiff's steamboat business, the cost of removing

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67. *See id.*

68. *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 347 (1977).

69. *See Ericsson GE Mobile Commc'ns, Inc. v. Motorola Commc'ns & Elec., Inc.*, 120 F.3d 216, 218 (11th Cir. 1997) (“Whether courts, in determining the amount in controversy, are to measure the value of the object of the litigation solely from the plaintiff's perspective or whether they may also consider the value of the object from the defendant's perspective is considerably less well-established.”).

70. *See* 28 U.S.C. § 1332 (2006).

71. *See infra* Part II.A–B.

72. *McInnis*, *supra* note 5, at 1039.

73. *Miss. & Mo. R.R. Co. v. Ward*, 67 U.S. (2 Black) 485, 491–92 (1863).

74. *Id.* at 492.

the bridge, or the plaintiff's right to be free of obstruction all fit the Court's "value of the object" inquiry,<sup>75</sup> so it is no wonder *Ward* has left subsequent courts without clear direction.<sup>76</sup>

The Court again tried to clarify the injunction valuation framework in *Glenwood Light & Water Co. v. Mutual Light, Heat & Power Co.*<sup>77</sup> In this case, the plaintiff electric company sought to enjoin a rival company from erecting poles and wires that interfered with its business activities.<sup>78</sup> The trial court dismissed the case after determining that the defendant's cost of removing the poles was less than the jurisdictional amount,<sup>79</sup> but the Supreme Court reversed on grounds that the plaintiff's right to operate, exclusive of defendant's interference, exceeded the jurisdictional threshold.<sup>80</sup>

*Glenwood* seemingly supports a plaintiff-centered approach, but its holding and numerous other cases cited as support for the plaintiff-viewpoint technique<sup>81</sup> fail to foreclose the possibility that jurisdiction is present if the value to the defendant is greater than the statutory requirement.<sup>82</sup> No Supreme Court decisions reject subject-matter jurisdiction when the statutorily prescribed amount in controversy is satisfied from the defendant's viewpoint, and only a case of this character can conclusively establish the plaintiff viewpoint approach.<sup>83</sup>

Advocates for an either-viewpoint framework cite *Smith v. Adams*.<sup>84</sup> The *Smith* Court enumerated the amount in contro-

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75. See WRIGHT ET AL., *supra* note 11, § 3703, at 541.

76. Judge Learned Hand noted that *Ward* is "at best ambiguous." See *M&M Transp. Co. v. City of N.Y.*, 186 F.2d 157, 158 (2d Cir. 1950).

77. 239 U.S. 121 (1915).

78. *Id.* at 122–24.

79. *Id.* at 125.

80. *Id.* at 126 ("The District Court erred in testing the jurisdiction by the amount that it would cost defendant to remove its poles and wires . . . . Complainant sets up a right to maintain and operate its plant and conduct its business free from wrongful interference by defendant. This right is alleged to be of a value in excess of the jurisdictional amount . . . .").

81. Armistead Dobie, a Fourth Circuit judge, relied upon *Western & A.R.R. v. Railroad Commission of Georgia*, 261 U.S. 264 (1923), *Bitterman v. Louisville & Nashville Railroad Co.*, 207 U.S. 205 (1907), and *Hunt v. New York Cotton Exchange*, 205 U.S. 322 (1907), to support the plaintiff-viewpoint approach. See Dobie, *supra* note 3, at 742–44; see also WRIGHT ET AL., *supra* note 11, § 3703, at 541, 551.

82. See WRIGHT ET AL., *supra* note 11, § 3703, at 551–52.

83. *Id.* at 552.

84. 130 U.S. 167 (1889); see *Hoffman v. Vulcan Materials Co.*, 19 F. Supp. 2d 475, 480–81 (M.D.N.C. 1998) (noting that proponents of the either-

versy as not only the money judgment requested, but also under certain circumstances, the “increased or diminished value of the property directly affected by the relief prayed.”<sup>85</sup> While this decision lends insight into the Court’s amount-in-controversy determination, the language was dicta and did not bind future Court decisions.<sup>86</sup> Other circuit courts cite *Illinois v. City of Milwaukee*,<sup>87</sup> an interstate water pollution dispute, as supporting the either-viewpoint approach.<sup>88</sup> This case held that “[t]he considerable interests involved in the purity of interstate waters would seem to put beyond question the jurisdictional amount.”<sup>89</sup> As one commentator noted, the Court in *City of Milwaukee* cited to *Glenwood, Ward*, a Tenth Circuit opinion, a federal practice treatise, and law review commentary, but explained that “reading the Court’s string cites like tea leaves is a dubious method of legal scholarship.”<sup>90</sup> The dictum of the Court’s decision in *City of Milwaukee* appears to support an either-viewpoint approach, but this esoteric language fails to provide decisive authority.<sup>91</sup>

Prior to the Court’s decision in *City of Milwaukee*, a uniform framework for valuing injunctions failed to emerge and resolving this discord became even more difficult in 1948 with the passage of 28 U.S.C. § 1447(d).<sup>92</sup> Section 1447(d) prohibits the appeal of federal court decisions that remand cases to state court.<sup>93</sup> Although implemented with the laudatory goal of moving cases along on the merits and reducing protracted jurisdictional litigation,<sup>94</sup> it had the ancillary side effect of freezing in

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viewpoint rule rely on *Smith* because no Supreme Court case “definitively establishes their test”).

85. *Smith*, 130 U.S. at 175.

86. See *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 627 (1935) (citing *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821)) (acknowledging that dicta, although persuasive, are not controlling).

87. 406 U.S. 91, 93 (1972).

88. See *McCarty v. Amoco Pipeline Co.*, 595 F.2d 389, 393–94 (7th Cir. 1979) (noting that *City of Milwaukee* provides important but cryptic direction); cf. *United States v. Am. Tel. & Tel. Co.*, 551 F.2d 384, 389 (D.C. Cir. 1976) (noting the per se approach taken by the *City of Milwaukee* Court).

89. *City of Milwaukee*, 406 U.S. at 98.

90. *McInnis*, *supra* note 5, at 1042.

91. See *WRIGHT ET AL.*, *supra* note 11, § 3703, at 566 (“[T]his dictum can be read as a cryptic suggestion that a federal court may take a view for jurisdictional amount purposes from the perspective of either party.”).

92. Act of May 24, 1949, ch. 139, § 84, 63 Stat. 89, 102.

93. See 28 U.S.C. § 1447(d) (2006).

94. See Joan Steinman, *Removal, Remand, and Review in Pendent Claim and Pendent Party Cases*, 41 VAND. L. REV. 923, 997 & n.352 (1988).

place injunction valuation jurisprudence. This is because appellate review is not possible from decisions by federal court judges, such as occurred in *McCauley*, remanding cases for lack of subject-matter jurisdiction.<sup>95</sup>

No injunction valuation technique finds direct support in congressional intent or Supreme Court holdings.<sup>96</sup> Consequently, it is not surprising that lower courts struggle to fashion a uniform valuation procedure, especially given that their only guidance, as outlined in this Part, is to protect out-of-state litigants while simultaneously limiting the breadth of diversity jurisdiction. In response, courts have fashioned two leading approaches to injunction valuation. The next Part examines these approaches and explains why neither method comprehensively adheres to the considerations that shaped diversity jurisdiction.

## II. DRAWBACKS TO THE CURRENT INJUNCTION VALUATION FRAMEWORK

The viewpoint from which to value the amount in controversy is a particularly thorny issue.<sup>97</sup> The federal circuit courts have been left to fashion their own approach to valuing injunctive relief, due to a lack of Supreme Court direction.<sup>98</sup> Two primary techniques have arisen,<sup>99</sup> and this leaves litigants uncertain as to their prospects of federal court admittance.<sup>100</sup>

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95. Section 1447(d) limits the number of cases eligible for appellate review. It does not, however, completely preclude such review. *See infra* Part III.C.

96. *See* *McCarty v. Amoco Pipeline Co.*, 595 F.2d 389, 392–94 (7th Cir. 1979) (describing the difficulty courts have had in deciding upon a valuation method in suits for injunctive relief).

97. *See* Recent Case, *Amount in Controversy; Suit to Set Aside Workmen's Compensation Award*, 46 MINN. L. REV. 960, 962–63 (1962) (“Since the inception of the amount in controversy requirement for diversity suits, questions concerning the factors to be considered in determining the jurisdictional amount have plagued the courts.”); Note, *The Effect of the Horton Case on the Determination of the Amount in Controversy Under Statutes Limiting Federal Court Jurisdiction*, 17 RUTGERS L. REV. 200, 200 (1962) (“The determination of the ‘value of the matter in controversy’ is a continuing problem of federal jurisdiction.”).

98. *See* WRIGHT ET AL., *supra* note 11, § 3703, at 537–66 (describing the various approaches taken by federal circuit courts); *id.* § 3703, at 538 (“The leading [Supreme Court] case on the point is so cryptic—and so old—that it sheds little if any light on the answer to this question.”).

99. Eleven of the twelve circuits purport to follow either the plaintiff or either-party viewpoints. *See supra* notes 6, 8 and accompanying text.

100. *See* Comment, *Federal Jurisdictional Amount Requirement in Injunction Suits*, 49 YALE L.J. 274, 284 (1939) (explaining that litigants may be left “somewhat in the dark as to their prospects of gaining admittance to the federal courts”).

To clarify the issue, this Part analyzes the two amount-in-controversy approaches and explains why each is less than satisfactory—indicating that large-scale reconsideration of the injunction valuation framework is necessary. More specifically, it argues that the plaintiff-viewpoint approach fails to properly gauge the value of the litigated object and promotes out-of-state prejudices, while the either-party viewpoint overextends federal jurisdiction in such a fashion that it conflicts with the historical scope of the diversity statute.

#### A. PLAINTIFF-VIEWPOINT APPROACH

The plaintiff-viewpoint approach to injunction valuation considers only the value to the plaintiff of the right sought.<sup>101</sup> Judging the amount in controversy from the plaintiff's viewpoint is logical considering the plaintiff is the “master of the claim”<sup>102</sup> and because the sum alleged by the plaintiff controls if made in good faith.<sup>103</sup> Further, the plaintiff-viewpoint approach is consistent with the “well-pleaded complaint” rule that prevents plaintiffs from creating federal subject-matter jurisdiction merely by anticipating defendant defenses.<sup>104</sup> In other words, the plaintiff-viewpoint approach prevents a defendant, merely by recasting the cost of injunctive relief, to defeat the plaintiff's choice-of-law forum.<sup>105</sup>

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101. See Dobie, *supra* note 3, at 734–36.

102. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987); see also Lonny S. Hoffman, *Burn Up the Chaff with Unquenchable Fire: What Two Doctrinal Intersections Can Teach Us About Judicial Power over Pleadings*, 88 B.U. L. REV. 1217, 1244 (2008) (noting the long-standing principal that the plaintiff is master of the complaint).

103. See *Saint Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288 (1938).

104. *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152 (1908) (“[A] suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution.”). The well-pleaded complaint rule is typically applied in federal-question cases, *Caterpillar Inc.*, 482 U.S. at 392, but the Supreme Court recently explained its application in the diversity context. See *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 559 (2005) (“When the *well-pleaded complaint* contains at least one claim that satisfies the *amount-in-controversy* requirement . . . the district court, beyond all question, has original jurisdiction over that claim.” (emphasis added)). This Note adopts the Court's use of the well-pleaded complaint rule in *Allapattah Services* and refers only to the sufficiency of the plaintiff's amount-in-controversy pleadings.

105. Cf. *Caterpillar Inc.*, 482 U.S. at 99 (stating that “the plaintiff would be master of nothing” if the defendant could recast the jurisdictional requirements); *Red Cab Co.*, 303 U.S. at 294 (explaining that the plaintiff's claim “fixes the right of the defendant to remove”).

Supporting the plaintiff-viewpoint approach is the principle that federal courts are limited in jurisdiction.<sup>106</sup> Because the plaintiff-viewpoint rule considers only the pecuniary value of the injunction to the plaintiff and disregards the defendant's cost of compliance,<sup>107</sup> fewer cases are eligible for federal jurisdiction—supporting Congress's desire to limit the number of diversity suits obtaining federal jurisdiction.<sup>108</sup> Courts that analyze the jurisdictional amount from only the plaintiff's viewpoint limit federal jurisdiction and simplify the valuation inquiry by considering the amount-in-controversy from only one party's perspective.

The plaintiff-viewpoint's ease of application and greater certainty of results are often cited as underlying rationales for the rule.<sup>109</sup> Some courts find, however, that excluding variables from the valuation inquiry causes parties to contest what factors are permitted, potentially complicating the jurisdictional determination.<sup>110</sup> Further, because the plaintiff-viewpoint amount-in-controversy inquiry only examines the benefit to the plaintiff of the right requested and fails to consider the defendant's cost of compliance, the approach potentially understates the true value of the litigated object.<sup>111</sup>

Casting the value of the litigated object from the plaintiff's viewpoint is not only facially unfair to defendants, but it also contradicts the diversity statute's attempts to protect against out-of-state biases. This is because plaintiffs' lawyers are often familiar with the state forum they choose and know how to maximize local biases, which leads to greater plaintiff success

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106. See *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (noting that federal courts are limited in jurisdiction); *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986) (same).

107. See *Dobie*, *supra* note 3, at 735–36.

108. See *Red Cab Co.*, 303 U.S. at 288 (“The intent . . . to restrict federal jurisdiction in controversies between citizens of different states has always been rigorously enforced by the courts.”).

109. See, e.g., *WRIGHT ET AL.*, *supra* note 11, § 3703, at 550; *Dobie*, *supra* note 3, at 736.

110. *Associated Press v. Emmett*, 45 F. Supp. 907, 914–15 (S.D. Cal. 1942) (explaining that the plaintiff-viewpoint model “is not always easy to apply” in the context of considering the applicability of liquidated damages (citing *Smith v. Adams*, 130 U.S. 167, 175 (1889))).

111. See *Alfonso v. Hillsborough Cnty. Aviation Auth.*, 308 F.2d 724, 727 (5th Cir. 1962) (refusing to consider the value of the object of litigation from the defendant's perspective).



rates.<sup>112</sup> A recent survey of diversity cases showed that plaintiff win rates dropped from seventy-one percent in original diversity cases to thirty-four percent in cases removed to federal court.<sup>113</sup> The authors of the study noted that state biases are not the only factors driving these results,<sup>114</sup> but since the plaintiff-viewpoint approach only considers the value of the injunction to the plaintiff, fewer cases are eligible for removal jurisdiction and, in turn, fewer cases have the opportunity to avoid potentially biased state courts.

Latent biases also arise in the context of counterclaims. Suppose, for example, that Happy Apple Orchard files suit against ABC Electric in a plaintiff-viewpoint jurisdiction. Since the court will only consider the value to the plaintiff of the right it seeks to protect, the power plant cannot remove the case to federal court unless the plaintiff's claim is for more than the jurisdictional amount. Not only are defendants forced to litigate amongst in-state biases in this scenario, but they also must do so when possessing a compulsory counterclaim for more than the jurisdictional amount. The practical implication of this restriction is that if ABC Electric has evidence that Happy Apple's claim is unfounded and wishes to file a compulsory counterclaim that exceeds the jurisdictional amount,<sup>115</sup> it cannot use this claim to satisfy the minimum amount-in-controversy requirement.<sup>116</sup> This inequity against out-of-state litigants, which is ameliorated when courts look beyond the initial claimant's perspective,<sup>117</sup> illustrates how the plaintiff-viewpoint framework fails to adhere to the Framers' desire for diversity jurisdiction to protect against out-of-state biases.

The plaintiff-viewpoint approach limits the number of cases reaching federal courts. Although this comports with Congress's general desire to limit federal jurisdiction, the approach fails to consider the defendant's cost of compliance and contra-

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112. See Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581, 599 (1998).

113. *Id.* at 594 tbl.1.

114. See *id.* at 599 (noting disparities in court quality and differences in procedural law as also affecting plaintiff victory rates).

115. ABC Electric would likely require evidence from prior proceedings that plaintiff's allegations are false. For example, see *Lothschuetz v. Carpenter*, 898 F.2d 1200 (6th Cir. 1990), where the court issued an injunction to prevent disparagement of property and for defamation causing harm to a business.

116. See *infra* notes 153–56 and accompanying text.

117. See *infra* notes 160–65 and accompanying text.

dicts the principle that diversity jurisdiction protects against out-of-state biases. These drawbacks are further exacerbated in the context of counterclaims. As the next section examines, the either-party approach ameliorates these inequitable weaknesses, but it does so in such a fashion that overly extends federal jurisdiction.

#### B. EITHER-PARTY APPROACH

The either-party approach, an alternative to the plaintiff viewpoint approach, assesses the value of the litigated object from the perspective of either the plaintiff or the defendant.<sup>118</sup> Proponents of the either-party approach argue that the diversity statute is silent regarding how courts should interpret its wording.<sup>119</sup> For example, nothing in the diversity statute's text, through the use of the words "sum," "value," or "matter in controversy," suggest it pertains only to the plaintiff's viewpoint.<sup>120</sup> The statute is silent, which leads to ambiguity, and under such circumstances interpretation should, among other things, mirror the history of the statute.<sup>121</sup> Given this premise, endorsement of the either-party viewpoint is plausible considering it allows defendants a greater opportunity to remove cases to federal court and avoid in-state biases.<sup>122</sup>

Additionally, the either-party approach gives judges greater flexibility and discretion, while not blinding them to the true amount in controversy.<sup>123</sup> In valuing the actual object of litigation from the viewpoint of either litigant, and not just its value to the plaintiff, the either-party viewpoint promotes equity and fairness. It does, however, have the side effect of increasing the number of cases eligible for federal court since consideration of the defendant's cost of compliance occurs.<sup>124</sup>

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118. See *Miller v. First Serv. Corp.*, 84 F.2d 680, 681 (8th Cir. 1936) (explaining the test for jurisdiction as the amount the plaintiff claims to recover or the sum the defendant will lose).

119. See Brief for Petitioners at 6–7, *Ford Motor Co. v. McCauley*, 534 U.S. 1126 (2002) (No. 01-896), 2002 WL 955476, at \*6–7.

120. See Brief for the United States as Amicus Curiae Supporting Petitioners at 10–11, *McCauley*, 534 U.S. 1126 (No. 01-896), 2002 WL 939555, at \*10–11.

121. See, e.g., *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 373–75 (2006) (using the history of the Bankruptcy Clause in reaching a decision).

122. See *supra* notes 112–17 and accompanying text.

123. See *McCarty v. Amoco Pipeline Co.*, 595 F.2d 389, 394 (7th Cir. 1979) (explaining that federal courts should not be blinded "to the realities of the magnitude of the controversy" (citation omitted)).

124. See *id.*

The either-party rule admittedly allows a greater number of cases to be brought in federal court.<sup>125</sup> It is important to note, however, that the additional cases achieving federal diversity jurisdiction are those in which the defendant's cost of compliance is greater than the diversity statute's jurisdictional threshold amount. And this comports with one objective of diversity jurisdiction—providing a neutral forum to out-of-state defendants with sizeable disputes.<sup>126</sup>

The either-party viewpoint is not, however, without drawbacks. One such issue is its presumption that plaintiffs can determine defendants' costs of compliance. In some instances, especially antitrust cases that enumerate precise injunctive orders,<sup>127</sup> ascertaining the defendant's cost of compliance may be straightforward. For example, in the unfair competition case *Sherwood v. Microsoft Corp.*, the plaintiff sought to enjoin Microsoft from coupling its Internet browser and computer software programs.<sup>128</sup> Since the defendant, upon an adverse decision, could no longer market its software suite as developed, the amount in controversy was the cost associated with designing, developing, and testing a version of the software that would comply with the injunction.<sup>129</sup> Because the defendant only had one way to comply with the injunction, determining the cost of compliance was relatively straightforward.

Plaintiffs' determination of the defendants' cost of compliance is not always so simple. In nuisance cases, for example, judges often allow the defendant to mitigate an offending action however it sees fit.<sup>130</sup> For example, suppose Happy Apple Orchard files suit in an either-party district to enjoin the defend-

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125. See McInnis, *supra* note 5, at 1032 (explaining that the either-viewpoint rule makes it easier for defendants to remove cases to federal court).

126. See WRIGHT ET AL., *supra* note 11, § 3703, at 558–61 (“[T]he purpose of a jurisdictional amount in controversy requirement—to keep trivial cases away from the federal court system—is satisfied when the case is worth a large sum of money to either party.”). *But see* Redish, *supra* note 24, at 1801–03 (suggesting concerns other than restricting federal dockets as shaping jurisdictional rules).

127. See Keith N. Hylton, *Remedies, Antitrust Law, and Microsoft: Comment on Shapiro*, 75 ANTITRUST L.J. 773, 774 (2009) (explaining the precise nature of antitrust injunctive remedies).

128. *Sherwood v. Microsoft Corp.*, 91 F. Supp. 2d 1196, 1197 (M.D. Tenn. 2000).

129. See *id.* at 1198–99 (approximating the cost of designing, developing, and testing a new version that would comply with the injunction at \$58.5 million).

130. See, e.g., *Schlotfelt v. Vinton Farmers' Supply Co.*, 109 N.W.2d 695, 699 (Iowa 1961) (ordering the defendant to cease operation unless it could continue to operate without disturbing plaintiff).

ant's pollution. If the plaintiff's proposed benefit, measured by the increase in property value or improved apple yield, is less than the diversity statute's threshold amount, Happy Apple Orchard can still obtain federal jurisdiction if the defendant's cost of compliance is greater than the statutory requirement.<sup>131</sup> While Happy Apple Orchard could determine ABC Electric's cost of compliance by dividing its annual profit by the number of days the injunction prevented operation of the factory, the defendant would likely be given permission to mitigate pollution by alternative means. Instead of closing the factory, the defendant may choose to install clean-coal technology or engage in a cap-and-trade scheme. In other words, the plaintiff's calculation of the defendant's cost of compliance, under an either-party framework, is speculative and may conflict with the well-pleaded complaint doctrine since it requires the plaintiff to surmise not only the defendant's planned mitigation technique, but also the cost of such action.<sup>132</sup>

The above-outlined example illustrates the potential ambiguities that exist if plaintiffs plead based on the defendants' cost of compliance. This is somewhat mitigated, however, by the pleading framework established in *Saint Paul Mercury Indemnity Co. v. Red Cab Co.*<sup>133</sup> The standard allows dismissal or remand to state court only if the plaintiff's allegations "appear to a legal certainty" to be less than the jurisdictional amount.<sup>134</sup> Generally speaking, it is very difficult for defendants to overcome the "legal certainty" standard.<sup>135</sup> Although the "legal certainty" standard supports the either-party pleading requirements, it appears to conflict with the underlying principle that federal courts are limited in jurisdiction.<sup>136</sup>

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131. See, e.g., *McCarty v. Amoco Pipeline Co.*, 595 F.2d 389, 391-95 (7th Cir. 1979) (determining the amount in controversy from either the plaintiff's or defendant's viewpoint).

132. See, e.g., *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 153 (1908) (limiting pleading to plaintiff's cause of action and not defendant's response).

133. 303 U.S. 283 (1938).

134. *Id.* at 289.

135. See, e.g., *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 511-13 (7th Cir. 2006) (discussing the difficulty of overcoming the *Red Cab Co.* standard); *Duchesne v. Am. Airlines, Inc.*, 758 F.2d 27, 28 (1st Cir. 1985) ("[W]hile it seems unlikely that [appellant] will recover [the jurisdictional amount], we cannot say that it is legally certain.").

136. See *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994) (noting the limited jurisdiction of federal courts, the presumption that a claim lies

Additionally, the Court's decisions in *Bell Atlantic Corp. v. Twombly*<sup>137</sup> and *Ashcroft v. Iqbal*<sup>138</sup> may make the either viewpoint approach untenable. *Twombly* heightened pleading requirements from "conceivable to plausible"<sup>139</sup> and plaintiffs must now make "a 'showing,' rather than a blanket assertion, of entitlement to relief."<sup>140</sup> Although no federal cases or scholarly commentaries have addressed the application of *Twombly* to the amount-in-controversy pleading requirements and the *Red Cab Co.* "legal certainty" test, it seems reasonable that the Court will reexamine this standard—especially given *Iqbal*'s extension of *Twombly* to "all civil actions."<sup>141</sup> Not only does the "either-viewpoint approach" potentially conflict with the *Twombly* pleading requirements, but it is in disagreement with the historical basis—to limit jurisdiction—of the well-pleaded complaint doctrine.<sup>142</sup>

One objective of requiring plaintiffs to plead with specificity is to improve judicial efficiency.<sup>143</sup> The well-pleaded complaint doctrine serves as a quick guidepost for resolving juris-

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outside that jurisdiction, and that the party asserting jurisdiction has the burden of overcoming that presumption).

137. 550 U.S. 544 (2007).

138. 129 S. Ct. 1937, 1940 (2009).

139. *Twombly*, 550 U.S. at 570.

140. Arthur D. Hellman, *Another Voice for the "Dialogue": Federal Courts as a Litigation Course*, 53 ST. LOUIS U. L.J. 761, 767 (2009) (quoting Gregory P. Joseph, *Federal Litigation—Where Did It Go Off Track?*, LITIGATION, Summer 2008, at 5).

141. See *Iqbal*, 129 S. Ct. at 1940 ("Our decision in *Twombly* expounded the pleading standard for 'all civil actions,' and it applies to antitrust and discrimination suits alike." (citation omitted)); see also Allison Sirica, Case Comment, *The New Federal Pleading Standard: Ashcroft v. Iqbal*, 62 FLA. L. REV. 547, 550 (2010) (identifying questions about *Twombly*'s "applicability, implementation, and scope," and noting uncertainty before *Iqbal* if "the Court intended to confine the heightened pleading standard to complex litigation, such as the antitrust claim in *Twombly*, or whether the heightened pleading standard applied more generally to all civil actions").

142. See Donald L. Doernberg, *There's No Reason for It; It's Just Our Policy: Why the Well-Pleaded Complaint Rule Sabotages the Purpose of Federal Question Jurisdiction*, 38 HASTINGS L.J. 597, 653 (1987) (noting that one of the well-pleaded complaint rule's three purposes is to limit the amount of federal litigation).

143. See Roger A. Ragazzo, *Reconsidering the Artful Pleading Doctrine*, 44 HASTINGS L.J. 273, 327–28 (1993) ("The well-pleaded complaint rule avoids the large costs of case-by-case investigation by fairly approximating the cases that belong in federal courts.").

dictional disputes<sup>144</sup> and allows litigants to determine the proper forum at the outset of litigation.<sup>145</sup> In other words, the doctrine acts as a means to improve judicial efficiency by streamlining the jurisdictional venue determination.<sup>146</sup> Under the either-party viewpoint, however, it is not difficult to imagine a scenario in which the plaintiff alleges the jurisdictional threshold is met, while the defendant claims its cost of compliance is actually far less. In such situations, it is common for the judge to order limited discovery as to whether the requisite jurisdictional threshold is met,<sup>147</sup> which further demonstrates that the either-viewpoint model curtails judicial efficiency.

The either-party approach values the true object of litigation. As such, it eliminates the biases against out-of-state litigants that are prevalent in the plaintiff-viewpoint approach. It, however, greatly extends federal jurisdiction and prevents certainty in pleading, neither of which characterize an ideal valuation framework. A solution, as Part III proposes, is the moving-party approach. It both protects against out-of-state biases and extends jurisdiction in a lesser manner than the either-party viewpoint.

### III. THE MOVING-PARTY APPROACH: A BETTER VALUATION TECHNIQUE

Part II examined how the plaintiff and either-party viewpoints are undesirable because they fail to either value the amount at controversy from the perspective of both litigants, thereby perpetuating in-state biases, or because of the principle

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144. See, e.g., *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 11 (1983) (“[T]he well-pleaded complaint rule makes sense as a quick rule of thumb.”).

145. See Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1, 36 (1989) (explaining that “a major justification for applying the [well-pleaded complaint] rule” is “to have a mechanism for deciding quickly whether a case falls within the competence of a federal trial court”).

146. See Mary P. Twitchell, *Characterizing Federal Claims: Preemption, Removal, and the Arising-Under Jurisdiction of the Federal Courts*, 54 GEO. WASH. L. REV. 812, 821–22 (1986).

147. See, e.g., *Rippee v. Bos. Mkt. Corp.*, 408 F. Supp. 2d 982, 983 (S.D. Cal. 2005) (ordering the parties to engage in ninety days of limited discovery to determine the amount in controversy); *Sherwood v. Microsoft Corp.*, 91 F. Supp. 2d 1196, 1197–98 (M.D. Tenn. 2000) (permitting limited oral argument to ascertain jurisdictional amount). *But see* *Walsh v. Am. Airlines, Inc.*, 264 F. Supp. 514, 515 (E.D. Ky. 1967) (“Where there is doubt as to federal jurisdiction, the doubt should be construed in favor of remanding the case to the State court where there is no doubt as to its jurisdiction.”).

that federal courts are limited in jurisdiction. This Part proposes endorsement of the moving-party approach as a way to mitigate these drawbacks. Although the technique is a minority valuation approach, drawing support almost exclusively from the District of Kentucky,<sup>148</sup> it nonetheless is of sound rationale and adheres to the historical context of diversity jurisdiction. This is because the moving-party approach assesses the actual object of litigation from the perspective of both parties<sup>149</sup> and circumvents limited jurisdiction and well-pleaded complaint issues.<sup>150</sup> Additionally, the moving-party approach avoids a race to the courthouse pleading scenario.

This Part also outlines two ways in which implementation of the moving-party approach is feasible. The first is for courts to interpret the "original jurisdiction" language of 28 U.S.C. § 1332 as conferring jurisdiction to the moving-party approach. An alternative, and more straightforward approach, however, is a legislative amendment to § 1332 that would specifically allow for the moving-party approach.

#### A. ADVANTAGES OF THE MOVING-PARTY APPROACH

The moving-party approach values the amount in controversy from the plaintiff's viewpoint when establishing original jurisdiction and the defendant's viewpoint upon removal.<sup>151</sup> A benefit of such an approach, when compared to the plaintiff-viewpoint model, is that it values the true amount in controversy.<sup>152</sup> Stated another way, it takes into account the defendants' compliance costs in removal settings, thereby considering the totality of the circumstances and also mitigating in-state biases.

Additionally, the moving-party approach prevents a race-to-the-courthouse scenario that arises in the context of counterclaims. In most jurisdictions, courts will not consider the value of a compulsory counterclaim for purposes of meeting the diversity statute's amount-in-controversy requirement.<sup>153</sup> For exam-

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148. See, e.g., *Bedell v. H.R.C. Ltd.*, 522 F. Supp. 732, 735 (E.D. Ky. 1981) (implementing the moving-party approach); *Family Motor Inn, Inc. v. L-K Enters. Div. Consol. Foods Corp.*, 369 F. Supp. 766, 769 (E.D. Ky. 1973) (same).

149. See *Bedell*, 522 F. Supp. at 735.

150. See *supra* Part II.B.

151. See *Bedell*, 522 F. Supp. at 735.

152. See *WRIGHT ET AL.*, *supra* note 11, § 3703, at 562-63.

153. See *Mesa Indus., Inc. v. Eaglebrook Prods., Inc.*, 980 F. Supp. 323, 325 (D. Ariz. 1997) (holding that a compulsory counterclaim cannot be used to satisfy the jurisdictional amount); *Cont'l Carriers, Inc. v. Goodpasture*, 169 F.

ple, in *Ingram v. Sterling*<sup>154</sup> the plaintiff filed suit in state court alleging \$2650 in damages stemming from an automobile accident. The defendant subsequently filed a counterclaim for \$15,450, well above the then-jurisdictional amount of \$3000, and removed to federal court.<sup>155</sup> Upon review, the federal court remanded the case after concluding that a counterclaim, even though compulsory, cannot establish federal subject-matter jurisdiction.<sup>156</sup>

Strictly construing the removal statute appears to be the impetus for this interpretation. One commentator noted that such a practice is legally sound because it restricts the removal statute to its historical context.<sup>157</sup> It “is, however, of questionable justice.”<sup>158</sup> This is because denying jurisdiction to a compulsory counterclaim that satisfies the jurisdictional amount means that the litigant who wins the race to the courthouse is able to dictate forum selection. Essentially, a plaintiff asserting a small claim can force the opposing party, with a cognizable federal diversity claim, to litigate in state court since counterclaims cannot satisfy the amount-in-controversy requirement.<sup>159</sup>

Returning to the orchard example, suppose both parties intend to file a request for injunction: the plaintiff to enjoin defendant’s pollution and the defendant to enjoin plaintiff’s defamation. Under the plaintiff-viewpoint approach, since the

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Supp. 602, 603–04 (M.D. Ga. 1959) (same); *Nat’l Upholstery Co. v. Corley*, 144 F. Supp. 658, 661 (M.D.N.C. 1956) (“This court accepts without question the general proposition that the complaint normally determines the removability by the nonresident defendant and also agrees that a counterclaim is not available to increase the amount involved in the litigation.”); Jay Tidmarsh, *Finding Room for State Class Actions in a Post-CAFA World: The Case of the Counterclaim Class Action*, 35 W. ST. U. L. REV. 193, 233 (2007) (noting that original claims, not counterclaims, establish federal jurisdiction). *But see* *Swallow & Assocs. v. Henry Molded Prods., Inc.*, 794 F. Supp. 660, 663 (E.D. Mich. 1992) (“Because the damages pled in the defendant’s compulsory counterclaim exceed the amount in controversy prerequisite to federal diversity jurisdiction, this case was removed providently.”). A counterclaim arising out of the same “transaction or occurrence” as the subject matter of the opposing party’s claim is a compulsory claim and requires assertion in the pending case or it is barred from subsequent litigation. *See, e.g.*, *Baker v. Gold Seal Liquors, Inc.*, 417 U.S. 467, 469 n.1 (1974) (holding that a compulsory counterclaim must be asserted or “is thereafter barred”).

154. 141 F. Supp. 786, 786 (W.D. Ark. 1956).

155. *Id.*

156. *Id.* at 789.

157. Recent Decisions, 45 VA. L. REV. 737, 738 (1959).

158. *Id.*

159. WRIGHT ET AL., *supra* note 11, § 3706, at 730–33.



court only values the amount in controversy from the plaintiff's perspective,<sup>160</sup> jurisdiction is established by the party whose complaint is first filed. Conversely, under the moving-party approach whether the orchard or coal-fired power plant is the first party to the courthouse doors has no bearing on the forum for litigation. This is because ABC Electric can remove to federal court based on its compliance costs and then use federal supplemental jurisdiction to assert its compulsory counterclaim.<sup>161</sup>

To mitigate this courthouse race, a straightforward solution would be to allow defendants to establish jurisdiction based on the value of their compulsory counterclaim. A problem with such an approach, however, is that doing so then makes federal removal dependent upon each state court's definition of permissive and compulsory claims.<sup>162</sup> The practical consequence of such a method is that removal then becomes dependent upon state court rules, thereby eliminating uniformity in the federal system. An alternative solution, of course, is the moving-party approach, because it allows defendants to establish federal jurisdiction based on their cost of compliance and then assert a compulsory counterclaim under federal supplemental jurisdiction. Admittedly, the compulsory counterclaim will only achieve federal jurisdiction if the defendant's cost of complying with the plaintiff's request is greater than the jurisdictional amount. Such a rule, however, not only circumvents unfair treatment of defendants and gamesmanship by plaintiffs, but it maintains certainty in pleading that would otherwise be lost if counterclaims could be used to satisfy the jurisdictional amount.

The primary advantages of the moving-party approach over the plaintiff-viewpoint model are its consideration of the amount in controversy from all litigants' perspectives and its amelioration of the race-to-the-courthouse scenario. Although the either-party viewpoint also mitigates these drawbacks, it is less preferable than the moving-party approach because it overly extends diversity jurisdiction. Under an either party framework, the plaintiff is only required to meet the *Red Cab Co.* "le-

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160. See Dobie, *supra* note 3, at 734.

161. See 28 U.S.C. § 1367 (2006).

162. See *Meridian Aviation Serv. v. Sun Jet Int'l*, 886 F. Supp. 613, 615 (S.D. Tex. 1995) ("[I]f compulsory counterclaims were considered [for purposes of jurisdiction], federal subject-matter jurisdiction would be reliant on state law distinctions between compulsory and permissive counterclaims.").

gal certainty” standard for federal court admittance, and this inquiry is far less searching than the preponderance-of-the-evidence removal burden present under the moving-party approach.<sup>163</sup> Further, the moving-party approach does not allow plaintiffs to assert the defendants’ anticipated compliance costs as grounds for federal court admittance, which adheres to the well-pleaded complaint doctrine.<sup>164</sup> As such, from a judicial efficiency standpoint, the moving-party approach is more suitable than the either-party approach because the party seeking jurisdiction bears the burden of producing evidence that jurisdiction is proper.<sup>165</sup>

Courts should endorse the moving-party approach because it promotes fairness and equity in the adjudication of diversity jurisdiction injunction suits while still adhering to the principle that federal courts are courts of limited jurisdiction. As one court noted, the moving-party approach is “preferable from the standpoint of logic, practicality, and [in] achieving the policies of the statutes creating removal jurisdiction.”<sup>166</sup> Justification for endorsing the moving-party framework is even stronger after addressing the improper criticism it has garnered.

#### B. UNFOUNDED CRITICISM OF THE MOVING-PARTY APPROACH

The moving-party approach is a minority injunction valuation technique. As such, relatively little commentary is available outside the Sixth Circuit—the only jurisdiction where the viewpoint from which to value injunctions remains unsettled.<sup>167</sup> The commentary that is available, however, is of questionable rationale, especially given the current federal court pleading framework.

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163. Cf. Kevin M. Clermont & Theodore Eisenberg, *CAFA Judicata: A Tale of Waste and Politics*, 156 U. PA. L. REV. 1553, 1571–72 (2008) (“[T]he courts, and especially the appellate courts, markedly appear to be converging on the preponderance-of-the-evidence standard, which requires a more-likely-than-not showing. This still-tough approach against removal jurisdiction is seemingly incongruent with the anything-goes flavor of the *St. Paul* test for original jurisdiction.” (footnotes omitted)).

164. Cf. *Bedell v. H.R.C. Ltd.*, 522 F. Supp. 732, 735 (E.D. Ky. 1981) (describing original jurisdiction as established by the plaintiff).

165. See *Hatridge v. Aetna Cas. & Sur. Co.*, 415 F.2d 809, 814 (8th Cir. 1969) (explaining that the burden of removal lies on the defendant).

166. *Bedell*, 522 F. Supp. at 735.

167. See *McIntire v. Ford Motor Co.*, 142 F. Supp. 2d 911, 920 (S.D. Ohio 2001) (“District courts within the Sixth Circuit have recognized that the law is unsettled regarding whose viewpoint . . . should be considered in determining the value of an injunction case.”).

For example, in *Southern States Police Benevolent Ass'n v. Second Chance Body Armor, Inc.* the court criticized the moving-party approach because it “allow[s] either party to easily avoid the rule of non-aggregation.”<sup>168</sup> Essentially, the court was concerned that such a framework would allow defendants to join claims in order to satisfy the jurisdictional amount. This decision, however, was issued prior to two key changes in federal subject-matter jurisprudence. First, in *Exxon Mobil Corp. v. Allapattah Services, Inc.*, the Court held that so long as one claim satisfies the amount-in-controversy determination for diversity jurisdiction, joinder of claims by other plaintiffs may occur under supplemental jurisdiction even if they do not independently satisfy the jurisdictional amount.<sup>169</sup> Additionally, with the 2005 passage of the Class Action Fairness Act (CAFA),<sup>170</sup> defendants can now join class action claims in order to satisfy the jurisdictional amount for purposes of diversity jurisdiction.<sup>171</sup> Subsequent to *Second Chance's* criticism of the moving-party approach,<sup>172</sup> both the judicial and legislative branches altered their stance on the practice of claim aggregation, thereby undercutting *Second Chance's* criticism.

Commentators also note that the moving-party approach can cause anomalous results. For example, a case originally brought in federal court could be remanded to state court due to the plaintiff's failure to allege damages sufficient to meet the jurisdictional amount. Thereafter, however, the defendant could still remove the case back to federal court, citing his or her compliance costs as sufficient to satisfy the jurisdictional amount.<sup>173</sup> Although this potentially circuitous route exists,<sup>174</sup> it is likely no more than a theoretical argument since defend-

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168. *S. States Police Benevolent Ass'n v. Second Chance Body Armor, Inc.*, 336 F. Supp. 2d 731, 736 (W.D. Mich. 2004).

169. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 559 (2005).

170. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4.

171. See 28 U.S.C. § 1332(d)(6) (2006) (“In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of \$5,000,000 . . .”).

172. *Second Chance*, 336 F. Supp. at 736.

173. WRIGHT ET AL., *supra* note 11, § 3703, at 563–64.

174. The law of the case doctrine, which notes that a decision by the highest court is final, may prevent the defendant from removing the case back to federal court if the jurisdictional amount was previously found insufficient by that court. Compare *Jefferson v. City of Tarrant*, 522 U.S. 75, 85 n.1 (1997) (Scalia, J., concurring) (suggesting that courts would reject the claim if raised again), with *Castro v. United States*, 540 U.S. 375, 385 (2003) (holding that the doctrine does not pose an insurmountable obstacle to reexamination).

ants that wish to remain in federal court are unlikely to challenge the plaintiff's jurisdiction.<sup>175</sup> Admittedly, the court can perform a *sua sponte* examination of the amount in controversy, but this is unlikely to result in remand to state court because upon such an examination federal jurisdiction is proper "if it appears that for any member . . . the matter in controversy is of the value of the jurisdictional amount."<sup>176</sup> This language appears to afford jurisdiction for moving-party injunction cases, but the approach, according to some, still contradicts the removal statute's requirement that federal courts possess original jurisdiction in cases removed from state court.<sup>177</sup>

For example, in *Snow v. Ford Motor Co.*, the plaintiffs, in state court, requested damages and injunctive relief valuing eleven dollars per plaintiff, whereas the defendant's cost of compliance was well above the jurisdictional amount.<sup>178</sup> The court denied the defendant's request for removal, stating it is "well-settled" that the federal court cannot exercise removal jurisdiction, absent a specific statutory exception, unless the case could have originally been brought in federal court by the plaintiff.<sup>179</sup> Strict adherence to 28 U.S.C. § 1441 seems to be the primary concern regarding endorsement of the moving-party approach.<sup>180</sup>

This strict adherence to the removal statute's "original jurisdiction" language, however, seems overly doctrinal given that courts look beyond the plaintiff's complaint when making

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175. See, e.g., *Gibbs v. Buck*, 307 U.S. 66, 72 (1939) (noting that the damages outlined in the complaint are left unchallenged unless the court has doubt regarding the "good faith of the allegations").

176. *Id.* But see *Saint Paul Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288–89 (1938) (acknowledging that jurisdiction is improper only if it appears beyond a "legal certainty" that the claim is for less than the threshold amount, but remaining silent regarding the viewpoint for this determination).

177. 28 U.S.C. § 1441(a) (2006) ("[A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant . . . to the district court of the United States . . .").

178. *Snow v. Ford Motor Co.*, 561 F.2d 787, 788 (9th Cir. 1977).

179. *Id.* at 789.

180. See, e.g., *Am. Ass'n of Orthodontists v. Yellow Book USA, Inc.*, No. 4:07-CV-351 (CEJ), 2007 WL 1687259, at \*1 (E.D. Mo. June 28, 2007) (noting removal is proper only after examining the plaintiff's pleadings); cf. *City of Chi. v. Int'l Coll. of Surgeons*, 522 U.S. 156, 163 (1997) ("The propriety of removal thus depends on whether the case originally could have been filed in federal court.").

amount-in-controversy examinations after removal requests.<sup>181</sup> Often this occurs when plaintiffs, filing in state court and who are not concerned with requirements for federal subject-matter jurisdiction, leave the complaint silent as to the amount in controversy.<sup>182</sup> Although some federal courts will remand cases to state court under these circumstances,<sup>183</sup> most courts look to the removal petition<sup>184</sup> or undertake an independent examination of the amount in controversy to determine if jurisdiction is proper.<sup>185</sup>

There is sound rationale in favor of allowing courts to make such an ad hoc inquiry beyond the plaintiff's complaint. One basis for such a practice is that it prevents plaintiffs from trying to evade federal jurisdiction by omitting factually relevant allegations.<sup>186</sup> For strategic reasons, the Happy Apple Orchard attorney may want to bring a claim against ABC Electric in state court. A jury selected from the surrounding community, many of whom are rural farmers, may be more sympathetic to the orchard owner than a federally selected jury would be. In hopes of keeping the claim in state court, the complaint may remain silent regarding the citizenship of the parties or the amount in controversy. Further, some court rules prohibit plaintiffs from pleading specific damage amounts in state

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181. See *Family Motor Inn, Inc. v. L-K Enters. Div. Consol. Foods Corp.*, 369 F. Supp. 766, 768 (1973) (indicating that the court may look to the petition for removal when the complaint fails to mention monetary damages); MOORE, *supra* note 7, ¶ 0.92[3.-2].

182. *Family Motor Inn, Inc.*, 369 F. Supp. at 768.

183. See, e.g., *Gaitor v. Peninsular & Occidental S.S. Co.*, 287 F.2d 252, 254 (5th Cir. 1961) ("It is . . . settled that a case non-removable on the complaint, when commenced, cannot be converted into a removable one by the evidence of the defendant or by an order of the court . . . ." (citing *Great N. Ry. Co. v. Alexandar*, 246 U.S. 276, 281 (1918))).

184. See, e.g., *Williams v. Best Buy Co.*, 269 F.3d 1316, 1319 (11th Cir. 2001) ("If the jurisdictional amount is not facially apparent from the complaint, the court should look to the notice of removal and may require evidence relevant to the amount in controversy at the time the case was removed."); *Jones & Laughlin Steel v. Johns-Manville Sales Corp.*, 626 F.2d 280, 282 n.1 (3d Cir. 1980) (acknowledging that the complaint fails to allege diversity jurisdiction, but deciding that federal jurisdiction is proper given the allegation in the removal petition).

185. See, e.g., *Jadair, Inc. v. Walt Keeler Co.*, 679 F.2d 131, 133 (7th Cir. 1982) (disposing of subject-matter jurisdiction after the court's inquiry into the defendant's damages).

186. See 14C CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3734, at 667 (4th ed. 2009) ("[S]uch a limitation would encourage a plaintiff who wished to remain in state court to plead in a way that would obscure any basis for removal.").

court.<sup>187</sup> Without the ability to look beyond the face of the complaint to establish “original jurisdiction,” unfair dismissal of cases qualifying for removal jurisdiction occurs.

Fortunately, the predominant federal court practice allows courts to look beyond the face of the plaintiff’s complaint and consider factors in the record as a whole.<sup>188</sup> This approach is sound given that there would be little point in requesting a “short and plain statement” supporting the grounds for removal in 28 U.S.C. § 1446(a) if a court could not consider the statement when gauging the propriety of removal.<sup>189</sup> For example, if a plaintiff pleads with an *ad damnum* clause,<sup>190</sup> quantifying the extent of its damages, it would be illogical to prevent the defendant from making an inquiry as to the *actual* amount in controversy. Otherwise, all litigants wishing to remain in state court could plead less than the jurisdictional amount, and removal to federal court would then be impossible. This is why defendants are allowed to look beyond the complaint and notice of removal to establish removal jurisdiction.<sup>191</sup> Section 1446(b) also supports this practice and allows removal evidence through “stipulation, pre-removal discovery or other means.”<sup>192</sup> Additionally, possession of jurisdictional information to support a viable claim is often only in the possession of one party,<sup>193</sup> and thus it seems logical to allow establishment of jurisdictional facts by the party who controls that information, as opposed to only the plaintiff.

Not only will a court look beyond the original complaint upon a request for removal, but courts will do the same in the context of amended complaints. For example, in *Kirby v. American Soda Fountain Co.*, the plaintiff filed suit in state court originally alleging \$1500 in damages—well below the \$2000 statutory requirement in 1904—but later amended the com-

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187. See, e.g., *Burk v. Med. Savs. Ins. Co.*, 348 F. Supp. 2d 1063, 1067 (D. Ariz. 2004) (holding that the district court could look beyond the face of the complaint to establish original jurisdiction given that Arizona state court rules prohibit plaintiffs from pleading unliquidated damages).

188. See, e.g., *Baccus v. Parrish*, 45 F.3d 958, 960–61 (5th Cir. 1995) (“[C]ourts will typically look beyond the face of a complaint to determine whether removal is proper.”).

189. WRIGHT ET AL., *supra* note 186, § 3734, at 671.

190. Defined as a statement estimating the amount in controversy from the plaintiff’s perspective. BLACK’S LAW DICTIONARY 40 (8th ed. 2004).

191. Hoffman, *supra* note 102, at 1250.

192. *Id.*

193. *Id.* at 1261.

plaint to above the threshold amount.<sup>194</sup> The defendant then removed the case to federal court and counterclaimed for \$1700.<sup>195</sup> In response, Kirby requested the court to dismiss the case, arguing it should only consider the original complaint per the removal statute's text.<sup>196</sup> The Supreme Court affirmed the lower court's grant of jurisdiction, noting that the plaintiff's amendment satisfied the jurisdictional requirement.<sup>197</sup>

Section 1446(b) echoes this practice, stipulating that a previously unremovable case may be removed within thirty days of an "amended pleading, motion, order or other paper."<sup>198</sup> It is illogical to think Congress intended for district courts to look beyond the complaint for renewed removal actions, but did not intend for similar treatment of original complaints.<sup>199</sup> This is another example of how courts will look beyond the original face of the complaint when ascertaining the amount in controversy.

The removal statute requires district courts to have original jurisdiction,<sup>200</sup> but since courts already look beyond the original complaint when it is silent as to jurisdictional elements or upon amendment, it seems logical to allow courts to do the same for purposes of endorsing the moving-party approach. Especially considering the moving-party approach will reduce in-state biases without overly extending federal jurisdiction.

### C. IMPLEMENTING THE MOVING-PARTY APPROACH

Endorsement of the moving-party approach is possible through two different routes. Since federal courts already look beyond the face of the complaint when assessing the suitability of removal jurisdiction, implementation of the moving-party approach can occur without any changes to the statutory framework. But given that no federal circuit courts have officially endorsed the moving-party approach, implementation would more likely need to come in the form of a Supreme Court order. As this section discusses, however, the procedural posture necessary for Supreme Court review is quite rare, and, in the alternative, Congress should implement the moving-party

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194. Kirby v. Am. Soda Fountain Co., 194 U.S. 141, 141-42 (1904).

195. *Id.* at 142.

196. *Id.* at 142-43.

197. *Id.* at 144.

198. 28 U.S.C. § 1446(b) (2006).

199. See WRIGHT ET AL., *supra* note 186, § 3734, at 671.

200. 28 U.S.C. § 1441(a).

approach through an amendment to the Federal Rules of Civil Procedure.

A Supreme Court order can implement the moving-party approach. The Supreme Court tried resolving the circuit split in 1992 in *McCauley*, but ultimately had to dismiss the case after determining that 28 U.S.C. § 1447(d) precluded appellate review.<sup>201</sup> In order for the Court to resolve the injunction valuation dispute, it will require appeal of a case that was dismissed for lack of subject-matter jurisdiction as opposed to merely remanded to state court.

In *McCauley*, multiple state actions filed against Ford were consolidated for pretrial purposes only.<sup>202</sup> The district court found it lacked subject-matter jurisdiction and dismissed the case, but the Ninth Circuit granted review, deciding that § 1447(d) was inapplicable because the lower court dismissed as opposed to remanded the action.<sup>203</sup> The Supreme Court disagreed with this characterization, commenting during oral argument that consolidation was for pretrial purposes only and that remand was necessary after the completion of discovery.<sup>204</sup> The Court did not issue an opinion in *McCauley*, but it has previously held that courts hearing multidistrict litigation for pretrial purposes cannot issue binding decisions.<sup>205</sup> With that in mind, it is likely that the Court dismissed *McCauley* because the district court was not allowed to make a binding decision on jurisdiction; rather, it could only remand to state court.

Section 1447(d) does not, however, have to present an insurmountable obstacle to Supreme Court review. With consent of all parties involved, the transferee jurisdiction can permanently consolidate claims.<sup>206</sup> If the litigants in *McCauley* had agreed to a consolidated action for more than pretrial discovery purposes, the Court's grant of certiorari would have been prov-

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201. *Ford Motor Co. v. McCauley*, 534 U.S. 1126, 1126 (2002), *cert. dismissed*, 537 U.S. 1 (2002); *see also In re Ford Motor Co./Citibank*, 264 F.3d 952, 964–65 (9th Cir. 2001) (finding that 28 U.S.C. § 1447(d) forbids appellate review of certain remand orders).

202. *See In re Ford Motor Co./Citibank*, 264 F.3d at 956.

203. *Id.* at 957.

204. *See* Transcript of Oral Argument, *supra* note 15, at 6.

205. *See, e.g., Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 40 (1998) (noting that the “straightforward” language of 28 U.S.C. § 1407(a) prevents “transferee courts [from] mak[ing] self-assignments”).

206. *See, e.g., In re African-Am. Slave Descendants Litig.*, 471 F.3d 754, 756 (7th Cir. 2006) (holding that, notwithstanding *Lexecon*, a final decision was proper given that parties consented to a consolidated action).



ident and the Court could have resolved the injunction valuation circuit split.

Nonetheless, because the procedural posture necessary for appellate review of the viewpoint from which to value injunctions is quite rare, implementation of the moving-party approach should occur in the form of a congressional amendment. Such an action would specifically extend federal diversity jurisdiction to the moving-party approach. Although the general tenor of Congress is to limit the number of diversity claims that reach federal courts,<sup>207</sup> jurisprudential rules are constructed to prevent forum shopping and other gamesmanship.<sup>208</sup> When necessary, courts devise rules that broaden federal jurisdiction in order to prevent abusive manipulation of the courts.<sup>209</sup>

For example, Congress recently passed CAFA and expanded the federal courts' definition of original jurisdiction.<sup>210</sup> Deviating from the \$75,000 and complete diversity requirement of § 1332(a), Congress extended original jurisdiction, in the context of class action suits, to any action where the matter in controversy exceeds \$5,000,000 and "any member of a class of plaintiffs is a citizen of a State different from any defendant."<sup>211</sup> Endorsement of CAFA demonstrates that Congress will alter jurisdictional rules to prevent inequities and forum shopping.<sup>212</sup>

Accordingly, Congress should explicitly amend the diversity and removal statutes to allow defendants to use their compliance costs as a means to satisfy the amount-in-controversy requirement. Such an amendment is possible since both diversity jurisdiction and removal are statutorily, as opposed to constitutionally, derived.<sup>213</sup> Although a moving-party amendment

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207. See WRIGHT ET AL., *supra* note 11, § 3701, at 247–48, 265–66.

208. See, e.g., *Ferens v. John Deere Co.*, 494 U.S. 516, 527 (1990) (acknowledging the impetus of past decisions as preventing forum shopping).

209. For example, once jurisdiction is found, subsequent events will not abrogate it. See *Mollan v. Torrance*, 22 U.S. (9 Wheat.) 537, 539 (1824).

210. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4.

211. 28 U.S.C. § 1332(d) (2006) (emphasis added).

212. See Adam N. Steinman, *What Is the Erie Doctrine? (And What Does It Mean for the Contemporary Politics of Judicial Federalism?)*, 84 NOTRE DAME L. REV. 245, 299 (2008) (noting that the primary impetus for CAFA was to curb venue gamesmanship).

213. See *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530–31 (1967) (explaining that Chief Justice Marshall's decision in *Strawbridge* was premised on the text of § 1331 and not the Constitution); *Hoyt v. Sears, Roebuck & Co.*, 130 F.2d 636, 637 (9th Cir. 1942) (noting that removal is statutori-

to diversity jurisdiction expands federal jurisdiction, it does so in a lesser fashion than the either-party approach and prevents the inequitable race-to-the-courthouse scenario present under the plaintiff-viewpoint framework. An amendment would curtail gamesmanship, while only marginally expanding jurisdiction.

Moreover, implementation of such a practice would require no ancillary changes in how courts value the amount in controversy. Jurisdiction-specific valuation practices, such as whether to value corporate “good will” or future, immature, and contingent claims would remain unchanged. Plaintiffs wishing to litigate in state court would plead according to local procedure, and defendants could remove to federal court if their compliance costs exceeded the jurisdictional requirement.

The circuit courts lack a uniform injunction valuation technique for purposes of diversity jurisdiction, but implementing the moving-party approach will ameliorate this discord. Such action is desirable because uniformity in the federal courts is not only a topic of extensive scholarly discussion,<sup>214</sup> but it is also reflected in the U.S. Supreme Court docket—seventy percent of which is devoted to addressing legal issues over which lower courts have differed.<sup>215</sup> Facilitation of the moving-party approach will ameliorate the circuit split and do so in a fashion that values the true amount in controversy without overly extending jurisdiction.

### CONCLUSION

The circuit courts are split regarding the viewpoint for injunction valuation, and this creates a jurisprudential model that leaves litigants uncertain as to their ultimate forum for litigation.<sup>216</sup> The plaintiff-viewpoint framework is easy to apply, but it fails to consider the true value of the litigated object, it promotes in-state prejudices, and it is susceptible to jurisdictional gamesmanship. Meanwhile, the either-party viewpoint conflicts with the well-pleaded complaint doctrine and extends federal diversity jurisdiction in a manner that is inconsistent

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ly derived); Scott Dodson, *In Search of Removal Jurisdiction*, 102 NW. U. L. REV. 55, 73 (2008) (same).

214. Compare Lewis, *supra* note 59, at 227 (advocating for uniformity), with Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1573 (2008) (arguing legislation, not federal courts, should establish uniformity).

215. Frost, *supra* note 214, at 1569.

216. See *supra* note 100 and accompanying text.

with the historical context of the diversity statute. The moving-party approach, however, more accurately takes into account the true value of litigation from the perspective of all parties and it mitigates in-state prejudices. Further, the moving-party approach comports with the well-pleaded complaint doctrine and extends federal diversity jurisdiction in a lesser fashion than the either-party viewpoint. Because the procedural posture necessary for judicial implementation of the moving-party approach is quite rare, Congress should amend the diversity statute so as to specifically implement the moving-party approach.