DIVERSITY JURISDICTION: A THIRD CIRCUIT PERSPECTIVE

Robert E. Bartkus

I. OVERVIEW

Of the several grants of subject matter jurisdiction to the federal courts in the Constitution and various statutes, "diversity" jurisdiction under 28 U.S.C. § 1332 tends to cause the most difficulties. The statute is long[1] but still includes a host

---

[1] The statute currently provides:
"(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between --

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

"For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

"(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

"(c) For the purposes of this section and section 1441 of this title --

"(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business; and

"(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen of the same State as the infant or incompetent.

"(d) The word 'States', as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico."

of opportunities for conflicting judicial interpretations. Many have yet to be resolved by the Supreme Court.

This article summarizes some of the principles of diversity jurisdiction and, where appropriate, some of the cases in the Third Circuit and the District of New Jersey that illustrate the principles or the conflicting interpretations. The reader should not rely on this article as an authoritative or comprehensive review of diversity jurisdiction or of the cases in the Third Circuit or District of New Jersey; review of the indicated cases and further research in treatises such as Federal Practice and Procedure: Jurisdiction and Related Matters, Moore's Federal Practice and the *Commentary* by David Siegal to 28 U.S.C.A. § 1332 are important. It also is important to review the statute -- Congress is forever tinkering with the terms and, unfortunately, the cases and treatises do not always "catch" the change.[2]

An accurate determination of the court's subject matter jurisdiction is extremely important; lack of subject matter jurisdiction can never be waived, *but see DiFrischia v. New York Central Railroad Co.*, 279 F.2d 141 (3d Cir. 1960), and if a court, even on appeal, determines that there was no subject matter jurisdiction, then the case almost always will be dismissed and any judgment or verdict entered in the case will be void. *See Brown v. Francis,* 75 F.3d 860 (3d Cir. 1996). In part because the federal courts are of limited jurisdiction, a court is obligated

[2] For example, Federal Practice and Procedure's 1997 Pocket Part, although released in the Spring of 1997, does not reflect changes to the statute that were enacted in December 1996 and took effect in January 1997.

to satisfy itself as to its subject matter jurisdiction; the parties' silence will not keep a court from making the inquiry *sua sponte*.

II. TIMING

Subject matter jurisdiction is determined at the time the action is commenced (or, in a removed case, at both the time the action is commenced in state court *and* the time the action is removed to federal court). *But see Caterpillar Inc. v. Lewis,* 117 S.Ct. 467 (1996) (in removed case. permitting jurisdiction where complete diversity existed by time of trial); *Knop v. McMahan,* 872 F.2d 1132 (3d Cir. 1989) (nondiverse partners resigned before trial; removed case not dismissed); *Iscar, Ltd. v. Katz,* 743 F. Supp. 339 (D.N.J. 1990) (despite lack of diversity at outset, statutory change during litigation "cured" defect). Thus, changes in the citizenship of parties after these points *generally* will not affect the court's ability to hear the case. *Freeport-McMoran, Inc. v. KN Energy, Inc.,* 498 U.S. 426 (1991)(addition of nondiverse partner after start of litigation does not defeat jurisdiction); *Psinakis v. Psinakis,* 221 F.2d 418 (3d Cir. 1955)(alien at time of suit became naturalized citizen in same state as plaintiffs during suit; jurisdiction not defeated). As noted in the removal section, however, a change in citizenship between the time the state court action is commenced and the time the case is removed may destroy diversity jurisdiction.

Likewise, diversity jurisdiction can be manufactured by a plaintiff moving out of the state prior to commencing suit, so

long as the move is sufficient to establish domicile. *McNello v. John B. Kelly, Inc.*, 283 F.2d 96 (3d Cir. 1960). Even though motive may not be determinative, too obvious a move may raise a question as to whether a change of residence is really a change in domicile. *Nobel v. Morchesky*, 697 F.2d 97 (3d Cir. 1982); *Korn v. Korn*, 398 F.2d 689 (3d Cir. 1968).

III. "CITIZENS OF A STATE" - GENERALLY

As indicated by the terms of the statute, States are not "citizens" of a State for purposes of diversity jurisdiction. Likewise, because the terms "States" is defined to include the territories, the District of Columbia and Puerto Rico, these juridical entities cannot be "citizens" of a state. *E.g., Brown v. Francis*, 75 F.3d 860 (3d Cir. 1996). However, political subdivisions, some other *state* governmental bodies (not federal) and governmental officials may be citizens of a state. *See Muth v. Central Bucks School District*, 839 F.2d 113 (3d Cir. 1988)(suit against state official in official capacity was suit against state); *Blake v. Kline*, 612 F.2d 718 (3d Cir. 1979); *compare Gidson-Homans Co. v. New Jersey Transit Corp.*, 560 F. Supp. 110 (D.N.J. 1982)(Authority as *alter ego* of state).

Resident aliens (individuals, not corporations or partnerships) are deemed "citizens" of a state for some purposes, by reason of subsection 1332(a). *Singh v. Daimler-Benz* AG, 9 F.3d 303 (3d Cir. 1993).

However, United States citizens who are not also "citizens" of a state -- because, for example, they are domiciled outside the United States and its Territories -- are not citizens for purposes of the diversity statute. *E.g., Pemberton v. Colonna*, 290 F.2d 220 (3d Cir. 1961). Nor are they citizens of a foreign state.

There are two concepts of "citizenship" running through the statute: (1) being a citizen of either the United States or of a foreign state; and (2) being a citizen of one or more particular states. Only Congress and the federal government can determine whether someone is a United States citizen; and for the purposes of diversity jurisdiction, United States citizenship is a prerequisite to being a "citizen of a State." Although a state may make an individual a citizen, that gesture is meaningless unless the person also is a United States citizen. However, citizenship of a state is measured by state rules, especially the state-law concept of domicile, *Krasnov v. Dinan*, 465 F.2d 1298 (3d Cir. 1972); *Vail v. Pan Am Corp.*, 752 F. Supp. 648 (D.N.J. 1988); thus if an individual is not a citizen of a particular state, according to its rules, then diversity cannot support subject matter jurisdiction. Note that mere "residence", although evidence of domicile (and citizenship) and sufficient to constitute prima facie proof, is not conclusive. *Krasnov, supra; Guerrino v. Ohio Casualty Insurance Co.*, 423 F.2d 419 (3d Cir. 1970); *Butler v. Farnsworth*, 4 F. Cas. 902 (3d Cir. 1821). The burden of establishing domicile is on the party asserting the jurisdiction of the court, *i.e.*, the plaintiff in original cases and the removing defendant in removed cases. *Tanzymore v. Bethlehem Steel*

Corp., 457 F.2d 1320 (3d Cir. 1972); *Ramsey v. Mellon National Bank & Trust Co.*, 350 F.2d 874 (3d Cir. 1965). Self-serving declarations may be given little weight. *Korn v. Korn*, 398 F.2d 689 (3d Cir. 1968).[3]

The citizenship of a corporation is determined by two facts: the state or states in which the corporation is incorporated and the state where it has its principal place of business. The test is not where the corporation is "doing" business. Note that a corporation can be a citizen of more than one state based on its incorporation, since it can be incorporated in more than one state; however, it cannot have its principal place of business in more than one state. Thus, for example, it is important to allege a corporation's place of business is the specific manner stated in the statute; if one alleges that a corporation as "a" principal place of business, the case can be dismissed. *J & R Ice Cream Corp. v. California Smoothie Licensing Corp.*, 31 F.3d 1259 (3d Cir. 1994); *Hunt v. Acromed*, 961 F.2d 1079 (3d Cir. 1992). *See also Shahmoon Industries, Inc. v. Imperato*, 338 F.2d 449 (3d Cir. 1970) (remanding for hearing on principal place of business); *Tanzymore v. Bethlehem Steel Corp.*, 457 F.2d 1320 (3d Cir. 1972)(full evidentiary hearing not required).

---

[3] There have been some rules of thumb applied to general categories, such as married men, married women, minor children, military personnel, prisoners, out of state students and officials of organizations, but these cannot be relied upon, especially as times change and individual circumstances vary. *See, e.g., Gallagher v. Philadelphia Transportation Co.*, 185 F.2d 543 (3d Cir. 1950) (husband and wife); *Price v. Greenway*, 167 F.2d 196 (3d Cir. 1948)(military); *Tumminello v. Bergen Evening Record, Inc.*, 454 F. Supp. 1156 (D.N.J. 1978) (prisoners); *Wendel v. Hoffman*, 24 F. Supp. 63 (D.N.J. 1938), *app. dismissed*, 104 F.2d 56 (3d Cir. 1939)(prisoners); *Shishko v. State Farm Insurance Co.*, 553 F. Supp. 308 (E.D. Pa. 1982), *aff'd*, 722 F.2d 734 (3d Cir. 1982)(students)

In contrast, the citizenship of unincorporated companies, such as partnerships, is determined by the citizenship of all of its partners. To the extent that the rule of complete diversity, *see Strawbridge v. Curtiss*, 3 Cranch (7 U.S.) 267 (1806), is applicable (*i.e.*, where all necessary parties and all partners are citizens of a state)[4], then diversity jurisdiction is defeated by the existence of a lone partner who is a citizen of the same state as one of the adverse parties. *Carden v. Arkoma Assoc.*, 494 U.S. 185 (1990)(limited partnerships); *United Steelworkers of Am. v. Bouligny*, 382 U.S. 145 (1965); *HB General Corp. v. Manchester Partners, L.P.*, 95 F.3d 1185 (3d Cir. 1995); *Trent Realty Assoc. v. First Federal Savings & Loan Assn.*, 657 F.2d 29 (3d Cir. 1981); *Plechner v. Widener College, Inc.*, 569 F.2d 1250 (3d Cir. 1977); *Carlsberg Resources Corp. v. Cambria Savings & Loan Assn.*, 554 F.2d 1254 (3d Cir. 1977). This same rule has been applied to labor unions. *Local No. 1 v. International Board of Teamsters*, 630 F.2d 1058 (3d Cir. 1980); *Underwood v. Maloney*, 256 F.2d 334 (3d Cir. 1958). However, the New Jersey district court has held that in a suit involving Lloyds of London syndicates, the citizenship of the "names" governs rather than of the syndicate. *Lowsley-Williams v. North River Insurance Co.*, 84 F. Supp. 166 (D.N.J. 1995). Changing a partner's citizenship in order to create diversity may be deemed a sham. *Nobel v. Morchesky*, 697 F.2d 97 (3d Cir. 1982).

---

[4] Note that the Supreme Court has said that the complete diversity rule is a statutory rather than a constitutional requirement, *see Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983), so that the rule is settled only as to 28 U.S.C. § 1332(a)(1); other applications of the rule await separate analysis and a final ruling by the Supreme Court.

Note that section 1332(c)(1) directly regulates the citizenship of certain insurance companies in direct action.

IV. PARTIES CONSIDERED AND REALIGNMENT

Under the rule of complete diversity, "where more than one plaintive sues more than one defendant and the jurisdiction rests on diversity of citizenship, each plaintiff must be capable of suing each defendant." *Soderstrom v. Kungsholm Baking Co.*, 189 F.2d 1008, 1014 (7th Cir. 1951); *see also Development Finance Corp. v. Alpha Housing & Health Care, Inc.*, 54 F.3d 15 (3d Cir. 1995); *Midlantic National Bank v. Hansen*, 48 F.3d 693 (3d Cir. 1995); *Carlsberg Resources Corp. v. Cambria Savings & Loan Association*, 54 F.2d 1254 (3d Cir. 1977); *Lewis v. World Boxing Council*, 914 F. Supp. 1121 (D.N.J. 1996); *Lior v. Sit*, 913 F. Supp. 868 (D.N.J. 1996).

Only parties who have an interest in the case are considered when determining diversity of citizenship. Thus, nominal or formal parties may be ignored. *E.g., Bumberger v. Insurance CO. of N.A.*, 952 F.2d 764 (3d Cir. 1991); *Ramada Inns, Inc. v. Rosemount Memorial Park Association*, 598 F.2d 1303 (3d Cir. 1979); *Lior v. Sit*, 913 F. Supp. 868 (D.N.J. 1996). *But see Miller & Lux, Inc. v. East Side Canal & Irrigation Co.*, 211 U.S. 293 (1908)(citizenship of party of record may be ignored if real party in interest is nondiverse). Improperly or fraudulently joined parties[5] will be

[5] The rules regarding fraudulent joinder are discussed in *Batoff v. State Farm Ins. Co.*, 977 F.2d 848 (3d Cir. 1992); *Lewis v. World Boxing Council*, 914 F. Supp. 1121 (D.N.J. 1996); *Ingemi v. Pelino & Lentz*, 866 F. Supp. 156 (D.N.J. 1994); *Glass Molders Int'l Union v. Wickes Co.*, 707 F. Supp. 174 (D.N.J. 1989).

ignored, even if that means dismissing them from the suit after judgment has been entered. *Publicker Industries, Inc. v. Roman Ceramics Corp.*, 603 F.2d 1065 (3d Cir. 1979). *See also Fields v. Volkswagenwerk A.G.*, 626 F.2d 293, 302 (3d Cir. 1980); *Girardi v. Lipsett, Inc.*, 275 F.2d 492 (3d Cir. 1960); *Zelaskowski v. Johns-Manville, Corp.*, 578 F. Supp. 11 (D.N.J. 1983). Or, the court may realign the parties. *Angst v. Royal Maccabees Life Insurance Co.*, 77 F.3d 701 (3d Cir. 1996); *Employers Ins. of Wausau v. Crown Cork & Seal Co.*, 942 F.2d 862 (3d Cir. 1991). But the court will not dismiss where there is an independent basis of jurisdiction over the non-diverse party. *HB General Corp. v. Manchester Partners, L.P.*, 95 F.3d 1185 (3d Cir. 1996); *Shiffler v. Equitable Life Assurance Society of U.S.*, 838 F.2d 78 (3d Cir. 1988).

The citizenship of the real-party-in-interest or other indispensable parties, such as a legal representative, cannot be ignored, however. *See Ramada, supra*, 598 F.2d 1303 (3d Cir. 1979); *Estrella v. V & G Management Corp.*, 158 F.R.D. 575 (D.N.J. 1994). Note the statute's amendment regarding the legal representative of an estate or of an infant or incompetent, 28 U.S.C. § 1332(c)(2), so that now only the citizenship of the decedent, minor or incompetent -- rather than the representative -- is considered. Trustees also present unusual problems.

Similarly, "John Doe" defendants cannot be ignored; they will defeat diversity, *Abels v. State Farm Fire & Casualty Co.*, 770 F.2d 26 (3d Cir. 1985) -- unless the action is being removed, in

which case the removal statute now requires that "John Doe" parties be ignored, 28 U.S.C. § 1441(a).

Courts will sometime realign the parties to create or destroy diversity if that realignment more nearly comports with the parties' real interests, sometimes called the "primary purpose" test. *In re Texas Eastern Transmission Corp. PCB Contamination Insurance Litigation*, 15 F.3d 1230 (3d Cir. 1994); *see also Angst v. Royal Maccabees Life Insurance Co.*, 77 F.3d 701 (3d Cir. 1996). The may happen in derivative litigation or in insurance coverage litigation. *E.g., HB General Corp. v. Manchester partners, L.P.*, 95 F.3d 1185 (3d Cir. 1996); *Employers Ins. of Wausau v. Crown Cork & Seal Co.*, 942 F.2d 862 (3d Cir. 1991). However, generally the pleadings themselves will govern. *B.J. Van Ingen & Co. v. Burlington County Bridge Commission*, 83 F. Supp. 778 (D.N.J. 1949), though they are not conclusive, *Estrella v. V. & G. Management Corp.*, 158 F.R.D. 575 (D.N.J. 1994).

V. LIMITS ON DIVERSITY JURISDICTION

Despite what may otherwise appear to be a proper case for invoking diversity jurisdiction, there are some notable exceptions, such as domestic relations cases, *Solomon v. Solomon*, 516 F.2d 1018 (3d Cir. 1975); *Albanese v. Richter*, 161 F.2d 688 (3d Cir. 1947); *La Maina v, Brannon*, 804 F. Supp. 607 (D.N.J. 1992); *Anastasi v. Anastasi*, 532 F. Supp. 720 (D.N.J. 1982) (palimony case); *Walpert v. Walpert*, 329 F. Supp. 25 (D.N.J. 1971), and probate matters, *Watson v. Manhattan & Bronx Surface Transit Operating Authority*, 487 F. Supp. 1273 (D.N.J. 1980). As

indicated by the cited cases, the rule is often easier to state than to apply, *See, e.g., DiRuggiero v. Rodgers,* 743 F.2d 1009 (3d Cir. 1984), *aff'd sub nom,* 484 U.S. 174 (1988); *Flood v. Braaten,* 727 F.2d 303 (3d Cir. 1984)(domestic relations exception not applicable to Parental Kidnapping act).

VI. UNUSUAL SITUATIONS REGARDING INDIVIDUALS

United States citizens resident abroad and not citizens of any particular state, are not able to sue or be sued under the diversity statute; they are neither citizens of a State or citizens of a foreign state. *Pemberton v. Colonna,* 290 F.2d 220 (3d Cir. 1961).

Where an individual is a dual citizen of the United States and another country, courts have held that the foreign citizenship will be ignored. *Gefen by Gefen v. Upjohn Co.,* 893 F. Supp. 471 (E.D. Pa. 1995). Persons without any nationality may be denied diversity jurisdiction.

Citizens or subjects of a foreign state may come within "alienage" jurisdiction under 28 U.S.C. § 1332(a)(2), and may sue or be sued under certain conditions. An alien may not sue another alien based on diversity. However, if a person is a permanent resident alien within the United States, that person is a citizen of the state in which he or she is domiciled, 28 U.S.C. § 1332(a), may sue or be sued as if he or she were a United States citizen domiciled in the same state. *Singh v. Daimler-Benz AG,* 9 F.3d 303 (3d Cir. 1993). There remains a question whether that resident

alien can take advantage of section 1332(a)(2) as an alien if, for example he or she sues a citizen of the same state where he or she is domiciled.

But aliens who are "additional parties," in an action in which there otherwise would exist diversity jurisdiction, do not defeat jurisdiction based on the provisions of 28 U.S.C. § 1332(a)(3), and *Dresser Industries, Inc. v. Underwriters at Lloyd's of London,* 106 F.3d 494 (3d Cir. 1997), has held that, under section 1332(a)(3), there is jurisdiction in an action between otherwise diverse citizens even though there are aliens on both sides of the caption.

VII. SPECIFIC ISSUES INVOLVING CORPORATIONS

As already indicated, a corporation's citizenship is measured by two points: its place (or places) of incorporation and its principal place of business. One cannot elect one or the other. *McLauglin v. Arco Polymers, Inc.*, 721 F.2d 426 (3d Cir. 1983). Several problems can arise in applying these points.

The most common problem arises in determining "the" principal place of business. Often the notion of a single "principal" place of business is unrealistic; nevertheless, the court must attempt to determine what is that place. The primary case in the Third Circuit setting forth the appropriate test is *Kelly v. United States Steel Corp.*, 284 F.2d 850 (3d Cir. 1960), but one must realize that other courts have formulated their own, different tests and criteria. In *Kelly*, the Third Circuit focused on the

center of the corporation's actual business activities, such as its manufacturing operations, rather than on where the corporation's policy makers, executives or financial people were located. *See also Boysen v. Treadway Inn*, 53 F.R.D. 96, *aff'd per curiam*, 463 F.2d 247 (3d Cir. 1972).

An interesting unpublished opinion holds that, where a subsidiary runs virtually all of its operations from its parent corporation' offices by means of a service contract, the principal place of business of the subsidiary will be the parent's state rather than the state where the subsidiary has its nominal corporate offices. *The Mennen Co. v. Atlantic Mutual Insurance Co.*, Civil Action No. 93-5273 (WGB)(Opinion dated Jan. 13, 1997). Normally, the subsidiary is deemed to have its own principal place of business. *Quaker State Dyeing & Finishing Co. v. ITT Terryphone Corp.*, 461 F.2d 1140 (3d Cir. 1972); *Carnera v. Lancaster Chemicals Corp.*, 387 F.2d 946 (3d Cir. 1967). In *Lior v. Sit*, 913 F. Supp. 868 (D.N.J. 1996), the court noted that the principal place of business of a holding company (a parent) was the location of its headquarters rather than the location of the operations of its subsidiaries.

Since no single factor is controlling in the Third Circuit test, the issue may be deemed a question of fact, rather than of law. *See Shahmoon Industries, Inc. v. Imperato*, 338 F.2d 449 (3d Cir. 1964). As usual, the party asserting subject matter jurisdiction bears the burden of providing the necessary facts. However, it apparently is not necessary that a full hearing be had

or that the issue be determined by a jury. *Tanzymore v. Bethlehem Steel Corp.*, 457 F.2d 1320 (3d Cir. 1972).

Where the corporation has been dissolved or is otherwise inactive, so that it does not have a principal place of business at the time of filing suit, it will be deemed a citizen only of the state in which it had been incorporated. *Midlantic National Bank v. Hansen*, 48 F.3d 693 (3d Cir. 1995).

One might think that a corporation that is incorporated in more than one state must accept that it is a citizen of each (as well as its place of business, if different) for diversity purposes. The answer is not so simple, however. The Supreme Court has adopted the so-called "forum doctrine:" if a corporation was sued in one of the states in which it was incorporated, that will be deemed its state of incorporation. *Jacobson v. New York, New Haven & Hartford Ry. Co.*, 347 U.S. 909 (1953). The Third Circuit had followed this test, *Di Frishia v. New York Central R.R. Co.*, 279 F.2d 141 (3d Cir. 1960), altering its prior rejection of the forum test in *Gavin v. Hudson & Manhattan R.R. Co.*, 185 F.2d 104 (3d Cir. 1950). However, since that time, the statute has been amended to add the corporation's principal place of business as a second state of citizenship. Although one New Jersey case says the forum test still prevails (at least as to place of incorporation point), *Kozikowski v. Delaware River Port Authority*, 397 F. Supp. 1115 (D.N.J. 1975), others have disagreed.

There also is an issue as to the availability of either diversity or alienage jurisdiction to a foreign corporation that

is doing business in the United States or of a United States corporation with its principal place of business outside the United States. However, I am not aware of any Third Circuit or New Jersey cases on these points.

VIII. AMOUNT IN CONTROVERSY

The current amount in controversy requirement is more than $75,000, exclusive of interest and costs. That does not mean $75,000, which would be insufficient. *Valhal Corp. v. Sullivan Associates, Inc.*, 44 F.3d 195 (3d Cir. 1995)(contract limited damages to $50,000; no jurisdiction); *Boardwalk Regency Corp. v. Karabell*, 719 F. Supp. 1254 (D.N.J. 1989) (claim for exactly $50,000 dismissed at time when the statute required an amount "exceed[ing] the sum of $50,000 ...").

When attempting to understand the rules for determining whether the amount in controversy requirement has been met in a case, it is critical to differentiate between cases originally brought in federal court and cases removed to federal court.

In the first instance, the plaintiff has the burden of showing that there is subject matter jurisdiction. *E.g., Development Finance Corp. v. Alpha Housing & Health Case, Inc.*, 54 F.3d 156, 158 (3d Cir. 1995); *Nelson v. Keefer*, 451 F.2d 289 (3d Cir. 1971). The Supreme Court has said that the plaintiff's good faith allegations of a jurisdictional amount shall control unless it "appear[s] to a legal certainty that the claim is really for less than the jurisdictional amount ...." *St. Paul Mercury*

Indemnity Co. v. Red Cab Co., 303 U.S. 283 (1938). *See also State Farm Mutual Auto Ins. Co. v. Powell*, 87 F.3d 93 (3d Cir. 1996); *In re Corestates Trust Fee Litigation*, 39 F.3d 61 (3d Cir. 1994); *Jumara v. State Farm Ins. Co.*, 55 F.3d 873 (3d Cir. 1995); *Associated Business Telephone System Corp. v. Danihels*, 829 F. Supp. 707 (D.N.J. 1993); *Hunter v. Greenwood Trust Co.*, 856 F. Supp. 207 (D.N.J. 1992).

Thus, the burden is on the party asserting jurisdiction to show that the "legal certainty" test has been met. *Columbia Gas Transmission Corp. v. Tarbuck*, 62 F.3d 538 (3d Cir. 1995); *Packard v. Provident National Bank*, 994 F.2d 1039 (3d Cir. 1993); *Associated Business Telephone System Corp. v. Danihels*, 829 F. Supp. 707 (D.N.J. 1993). The court may not dismiss an action, however, unless it is convinced, after "minimal scrutiny," that plaintiff cannot succeed. *See Suber v. Chrysler Corp.*, 104 F.3d 578, 583-84 (3d Cir. 1997); *Jaconski v. Avisun Corp.*, 359 F.2d 931 (3d Cir. 1966). The measure of damages is tested by the state law governing the claims. *See In re Corestates Trust Fee Litigation, 39 F.3d 61 (3d Cir. 1994) (punitive damages); Young v. Malcolm*, 568 F. Supp. 839 (D.N.J. 1983).

In removed cases, the "legal certainty" test is harder to administer, since the defendant bears the burden of establishing jurisdiction. *E.g., Bishop v. General Motors Corp.*, 925 F. Supp. 294 (D.N.J. 1996). [The standard under removed cases is discussed separately in this seminar.]

In either case, it is clear that the parties may not agree or stipulate as to the amount in controversy. *Kaufman v. Liberty Mutual Insurance Co.*, 245 F.2d 918 (3d Cir. 1957). The issue is a question of fact; affidavits, depositions or direct testimony may be taken. *Fidelity & Casualty Co. v. First National Bank in Fort Lee*, 397 F. Supp. 587 (D.N.J. 1975), *appeal dismissed*, 538 F.2d 319 (3d Cir. 1976), but, at least in the Third Circuit, it is not a jury question, *Nelson v. Keefer*, 451 F.2d 289 (3d Cir. 1971). The court also has questioned the propriety of engaging in extensive discovery to determine the jurisdictional issue. *Carlough v. Amchem Products, Inc.*, 10 F.3d 189 (3d Cir. 1993). However, the plaintiff must have a fair opportunity to present facts to support its position. *Berardi v. Swanson Memorial Lodge*, 920 F.2d 198 (3d Cir. 1990); *Local 336 v. Bonatz*, 475 F.2d 433 (3d Cir. 1973).

The liberal rule for determining the amount in controversy set forth in *Wade v. Rogala*, 270 F.2d 280 (3d Cir. 1959), has been questioned in *Nelson v. Keefer*, 451 F.2d 289 (3d Cir. 1971).

As with determining the parties' citizenship, the amount in controversy must be determined as of the time the action is commenced (or, in removed cases, both at the time the state action is commenced and at the time of removal). *Lindsey v. M.A. Zeccola*, 26 F.3d 1236 (3d Cir. 1994); *Wade v. Rogala*, 270 F.2d 280 (3d Cir. 1959); *Estrella, supra*, 158 F.R.D. 575 (D.N.J. 1994); *Boardwalk Regency Corp. v. Karabell*, 719 F. Supp. 1254 (D.N.J. 1989); *Adamar of New Jersey, Inc. v. Karabell*, 719 F. Supp. 1251 (D.N.J. 1989).

Reductions in the amount claimed will not affect jurisdiction. *Albright v. R.J. Reynolds Tobacco Co.*, 531 F.2d 132 (3d Cir. 1976). Where a plaintiff sought to amend its complaint to assert diversity jurisdiction (and there had been an intervening increase in the amount in controversy required), the amount in controversy requirement was determined by the statute in effect at the time the action was commenced rather than at the time the amendment was sought. *Berkshire Fashions, Inc. v. The M.V. Hakusan II*, 954 F.2d 874 (3d Cir. 1992). *See also State Farm Mutual Inc. Co. v. Powell*, 87 F.3d 93 (3d Cir. 1996) (subsequent discovery that one of three policies sued on was not in effect reduced the amount in controversy); *Bryan v. Associated Container Tr.*, 837 F. Supp. 633 (D.N.J. 1993) (amendment); *Packard v. Provident National Bank*, 994 F.2d 1039 (3d Cir. 1993);

How to value the right or relief claimed is sometimes difficult in this jurisdiction because of the rule prohibiting making a dollar demand for unliquidated damages. Local Civil Rule 8.1. Moreover, monetary damages are not the only relief sought, in which case one must place a "value" on the right seeking to be protected. *Handsome v. Rutgers University*, 445 F. Supp. 741 (D.N.J. 1978). This problem is reduced somewhat in diversity cases, as compared to federal question cases (when a jurisdictional amount was required in 28 U.S.C. § 1331), since it is less frequent that intangible rights, such as civil or constitutional rights, will be in issue in diversity cases. But there are instances where parties seek declaratory judgments in diversity cases or press civil rights or similar claims under

state law. A "reasonable reading of the value" is required, rather than the low end of an open-ended claim. *Angus v. Shiley, Inc.*, 989 F.2d 142, 146 (3d Cir. 1993). Speculative estimates of the value of a right are not sufficient. *Walpert v. Walpert*, 329 F. Supp. 25 (D.N.J. 1971). However, courts can consider objective facts such as verdicts or settlements in similar cases or other similar facts. *Jaconski v. Avisun Corp.*, 359 F.2d 931 (3d Cir. 1966); *cf. Wade v. Rogala, supra; but see Hahn v. United States*, 757 F.2d 581 (3d Cir. 1985) (record considered may not contradict allegations in complaint) Otherwise, damages can be limited by the terms of the contract on which the parties are suing, *see Valhal Corp. v. Sullivan Associates, Inc.*, 44 F.3d 195 (3d Cir. 1995) (contract limited damages to $50,000; no jurisdiction), or by a rule of law, *see Hatcher v. Emergency Medical Specialty Services*, 643 F. Supp. 1124 (D.N.J. 1986).

The value of a trust is not the amount in controversy when the action is for the removal of the trustee. *In re Corestates Trust Fee Litigation*, 39 F.3d 61 (3d Cir. 1994).

The amount being sought is not necessarily limited to the damages already suffered, *John B. Kelly, Inc. v. Lehigh Nav. Coal Co.*, 151 F.2d 743 (3d Cir. 1945), but this rule, too does not always have a clear consequence. There are special problems arising in installment contracts and insurance policy declaratory judgment actions. *See Trinity Universal Ins. Co. v. Woody*, 47 F. Supp. 327 (D.N.J. 1942); *Travelers Ins. Co. v. Young*, 18 F. Supp. 450 (D.N.J. 1937).

It is sometimes said that it is "well settled" that the amount in controversy is determined by the plaintiff's viewpoint, *see* Federal Practice & Procedure 2d § 3703 at 62; that is, courts should look to the "benefit" sought by the plaintiff in the litigation or the "value" to be received by the plaintiff. *See John B. Kelly, Inc. v. Lehigh Nav. Coal Co.*, 151 F.2d 743 (3d Cir. 1945). Nevertheless, the cases are not always clear as to how to apply that standard regarding demands for non-money damages, such as the removal of an obstruction or the vindication of a right. Moreover, the language of at least one New Jersey case is confusing. *Trail v. Green*, 206 F. Supp. 896, 900 (D.N.J. 1962) ("the pecuniary result to either party ...."). There is at least one Third Circuit case indicating that compulsive counterclaims may be considered in determining the amount in controversy, but this case seems an aberration. *Home Life Ins. Co. v. Sipp*, 11 F.2d 474 (3d Cir. 1926).

An interesting application of the rule is seen in *State Farm Mutual Auto Ins. Co. v. Powell*, 87 F.3d 93 (3d Cir. 1996), where the court held that the amount in controversy was limited to the amount disputed between the parties; an amount that defendant agreed should be paid was not to be included in the calculation).

Punitive damages may be included in the jurisdictional amount if permitted for the claims asserted. *E.g., Packard v. Provident National Bank*, 994 F.2d 1039 (3d Cir. 1993)("colorable basis" required); *Garcia v. General Motors Corp.*, 910 F. Supp. 160 (D.N.J. 1995).

Attorneys fees (where permitted) also may be included in calculating the jurisdictional amount, to the extent not deemed "costs", but the amount claimed will be carefully scrutinized. *Suber v. Chrysler Corp.*, 104 F.3d 578 (3d Cir. 1997); *Bishop v. General Motors Corp.*, 925 F. Supp. 294 (D.N.J. 1996); *Weinberg v. Sprint Corp.*, 165 F.R.D. 431 (D.N.J. 1996). Arbitration costs have not been deemed included. *State Farm Mutual Auto Ins. Co. v. Powell*, 87 F.3d 93 (3d Cir. 1996).

Aggregating claims can present unusual challenges. Several recent cases in which aggregation failed include *In re Corestates Trust Fee Litigation, supra, Bishop v. General Motors. Corp., supra, Garcia v. General Motors Corp., supra*, and *Weinberg v. Sprint Corp., supra*. Separate and distinct claims cannot be aggregated as between one or more plaintiffs, *see Garfield Local Union v. Hetden Newport Chemical Corp.*, 172 F. Supp. 230 (D.N.J. 1959); *Birkins v. Seaboard Services*, 96 F. Supp. 245 (D.N.J. 1951). Nor can such claims be aggregated by a single plaintiff against multiple defendants. *Cottman Transmission Systems, Inc. v. Metro Distributing, Inc.*, 796 F. Supp. 838 (E.D. Pa. 1992), *judgment vacated on other grounds*, 36 F.3d 291 (3d Cir. 1994). Thus, in *Hatcher v. Emergency Medical Specialty Services, Inc.*, 643 F. Supp. 1124 (D.N.J. 1986), the court dismissed an additional defendant against whom a separate claim was asserted for less than the jurisdiction minimum, despite the plaintiff's "pendent party" arguments, before the enactment of 28 U.S.C. § 1367 concerning supplemental jurisdiction. Subsequent courts have held that, or question whether, section 1367 did not overrule *Zahn v.*

International Paper Co., 414 U.S. 291 (1973). *See Packard v. Provident National Bank*, 994 F.2d 1039 (3d Cir. 1993)(noting the issue); *Garcia v. General Motors Corp., supra* (holding *Zahn* not overruled).

However, the Third Circuit has allowed some claims to proceed in a class action for those plaintiffs who, individually, meet the jurisdictional minimum. *In re Asbestos School Litigation*, 921 F.2d 1310 (3d Cir. 1990).

The exclusion of "interest" from calculating the jurisdictional amount has been held to refer only to prejudgment interest rather than interest that is part of the basis of the suit. *See Brainin v. Melikian*, 396 F.2d 153 (3d Cir. 1968), *but see Voorhees v. Aetna Life Ins. Co.*, 250 F. 484 (D.N.J. 1918). Interest in the form of bond coupons has been described as being included. As when it is awarded as part of the cause of action as a penalty, i.e., an element of damages. Costs recoverable as part of an earlier award may be included. But attorneys fees recoverable as costs may not.