STEVEN S. GENSLER*

Diversity Class Actions, Common Relief, and the Rule of Individual Valuation

The amount in controversy requirement has proved to be a formidable barrier to bringing state law class actions in federal court under diversity jurisdiction.[1] In the late 1960s and early 1970s, the Supreme Court dealt what has been described as a "crippling blow"[2] to the diversity class action when it interpreted the diversity statute to require that all class members individually satisfy the amount in controversy requirement, without regard to the aggregate value of the class claim.[3] As a result, vast numbers of multi-million dollar state law class actions—including virtually all state law consumer class actions—have been relegated to the state courts because the individual class members' claims amount to only a few hundred or thousand dollars each.[4]

* Associate Professor, University of Oklahoma College of Law. I would like to thank Tom Mengler, Jim Pfander, and Patrick Woolley for their comments on a previous draft. I also thank Stephanie Schadle and Nick Merkley for their research assistance.

[1] 28 U.S.C. § 1332 (2000).

[2] *See* Frank L. Maraist & T. Page Sharp, *After* Snyder v. Harris*: Whither Goes the Spurious Class Action?*, 41 MISS. L.J. 379, 379 (1970) (describing *Snyder* as a "crippling blow" to diversity class actions); Brian Mattis & James S. Mitchell, *The Trouble with* Zahn*: Progeny of* Snyder v. Harris *Further Cripples Class Actions*, 53 NEB. L. REV. 137, 194 (1974) ("The *Zahn* decision dealt a crippling blow to [the] use of class actions as a means for redress of small claims in the federal courts.").

[3] *See* Snyder v. Harris, 394 U.S. 332 (1969); Int'l Paper Co. v. Zahn, 414 U.S. 291 (1973); *see also infra* notes 71-78 and accompanying text (discussing in detail the collective jurisdictional impact of *Snyder* and *Zahn*).

[4] *See* Deborah R. Hensler et al., Class Action Dilemmas*:* Pursuing Public Goals for Private Gain 73 (2000) [hereinafter RAND/ICJ STUDY]. As one commentator explains, "as a general matter, class actions are brought when individual claims are so low that the likelihood of individual suits is small. Thus, prohibiting aggregation of claims in class actions effectively excludes the large majority of such actions from diversity jurisdiction." Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and "The Martian Chronicles*," 78 VA. L. REV. 1769, 1806-07 (1992); *see also* Lloyd C. Anderson, *The*

During the 1990s, creative litigants—usually defendants seeking a basis for removal[5]—began exploring new ways to argue that class claims satisfied the amount in controversy requirement. Initially, it looked like the diversity class action might find new life through a long-standing but little used exception to the rule against aggregate valuation. Specifically, while *Snyder* and *Zahn* rejected the idea of valuing class actions in the aggregate claims just because they were class actions, both decisions reaffirmed the traditional rule of valuing joined parties' claims in the aggregate when they "unite to enforce a single title or right in which they have a common and undivided interest."[6] Latching onto this concept, litigants began arguing that, while *Snyder* and *Zahn* precluded routine aggregate valuation of compensatory damages

American Law Institute Proposal to Bring Small-Claim State-Law Class Actions Within Federal Jurisdiction: An Affront to Federalism That Should Be Rejected, 35 CREIGHTON L. REV. 325, 331 (2002) ("The practical effect of the *Zahn* decision was to eliminate small-claim state-law class actions from federal court."); Gary Igal Strausberg, *Class Actions and Jurisdictional Amount: Access to a Federal Forum—A Post* Snyder v. Harris *Analysis*, 22 AM. U. L. REV. 79, 94 (1972) (asserting that *Snyder* "virtually closed the federal forum" to consumer class actions).

[5] *See* Christopher J. Willis, *Aggregation of Punitive Damages in Diversity Class Actions: Will the Real Amount in Controversy Please Stand Up?*, 30 LOY. L.A. L. REV. 775, 775 (1997) (noting that removal has generated most of the recent class action valuation litigation). This reflects an intriguing shift in litigant preference. When the Supreme Court issued *Snyder*, the plaintiffs' bar and consumer groups lamented the loss of the federal forum, reflecting the prevailing sentiment that state courts were inhospitable to class actions. *See* Mattis & Mitchell, *supra* note 2, at 172 (articulating the "inescapable conclusion that state courts have been hostile to [Rule 23(b)(3)] class actions"); *see also* Burt A. Leete, *The Right of Consumers to Bring Class Actions in the Federal Courts—An Analysis of Possible Approaches*, 33 U. PITT. L. REV. 39, 41 (1971) (describing ineffectiveness of state class action rules and remedies). To their surprise, however, state court class actions flourished as the states enacted new class action procedures and adopted class action friendly doctrines. *See* RAND/ICJ SURVEY, *supra* note 4, at 73; *see also* Anderson, *supra* note 4, at 355 ("Experience with state court class actions in the quarter century since *Zahn* demonstrates that state judges have proven quite receptive to class actions."); Note, *Multistate Plaintiff Class Actions: Jurisdiction and Certification*, 92 HARV. L. REV. 718, 718 (1979) ("[T]he nine years since *Snyder* have seen the widespread modernization of state class action practice."). Now, defendants view federal court as a haven from what they perceive as abusively lenient certification practices in state court. *See* Victor E. Schwartz et al., *Federal Courts Should Decide Interstate Class Actions: A Call for Federal Class Action Diversity Jurisdiction Reform*, 37 HARV. J. ON LEGIS. 483, 499 (2000) ("Unlike the scrupulous practice of federal judges, some state judges have taken laissez-faire attitudes toward class certification."). *But see* Linda S. Mullenix, *Abandoning the Federal Class Action Ship: Is There Smoother Sailing for Class Actions in Gulf Waters?*, 74 TUL. L. REV. 1709, 1778 (2000) (noting conservative approach developing in Texas, but not necessarily in the other gulf states).

[6] *See Zahn*, 414 U.S. at 294; *Snyder*, 394 U.S. at 335.

claims, they did not control the valuation of other forms of class claims or relief. Specifically, litigants argued that, when sought on behalf of a class, certain types of claims—punitive damages, attorneys' fees, injunctive relief, and restitution—inherently satisfied the common and undivided interest rule because the relief they sought would benefit the group as a whole, rather than individual class members.[7] Under this theory, the amount in controversy requirement would be satisfied whenever the class sought total punitive damages, attorneys' fees, injunctive relief, or restitution of more than $75,000. Needless to say, this would be a lot of cases.

It almost worked. A few early cases agreed that the common and undivided interest exception was met when the suit sought relief that would benefit the class as a group.[8] Almost immediately thereafter, though, the federal courts abandoned the relief-based approach in favor of the much narrower rights-based standard already in use for compensatory damage claims: Prior to the filing of the class action, did the class members hold jointly the substantive rights underlying the class claim for relief?[9] The difference in the result between a relief-based and a rights-based test is hard to overstate: Whereas many remedies will benefit a class as a group, few claims spring from jointly-held rights.[10]

Once a court concludes that the rights underlying a class claim are separate and distinct (and therefore non-aggregable), however, it then must calculate an amount in controversy for each class member.[11] But the same characteristics that make class claims for punitive damages, attorneys' fees, injunctive relief, and restitution appear "common and undivided" for aggregation purposes also make them difficult to value on a per class member basis. Class claims for injunctive relief, for example, yield a single benefit, but it is a benefit that inures to all class members. Class claims for punitive damages and restitutionary disgorge-

[7] *Snyder*, 394 U.S. at 335; *see also Zahn*, 414 U.S. at 294 ("[W]hen several plaintiffs unite to enforce a single title or right, in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount.") (quoting *Troy Bank v. G.A. Whitehead & Co.*, 222 U.S. 39, 40-41 (1911)).

[8] *See infra* notes 79-88 and accompanying text.

[9] *See infra* notes 89-102 and accompanying text.

[10] *See* 15 MARTIN H. REDISH, MOORE'S FEDERAL PRACTICE § 102.100 (3d ed. 2002) [hereinafter 15 MOORE'S FEDERAL PRACTICE] ("Because very few claims will be deemed joint, multiple plaintiffs will not often be permitted to aggregate their claims.").

[11] *See Zahn*, 414 U.S. at 301.

ment seek money, but the purpose of it is to deter and punish misconduct and to take away ill-gotten gains, not as loss compensation. Thus, they create a pool of money—based on characteristics of the defendant—in an amount that may be indifferent to the number of claimants who eventually will divide the spoils. Class claims for attorneys' fees exhibit the greatest range of common characteristics. Everybody benefits from the work of the class lawyers, but the cost of that work is not a linear multiple of the size of the class.

This Article addresses the valuation of class action claims that seek common relief. Part I provides a general foundation by setting forth the basic rules for calculating the amount in controversy in a diversity case, paying special attention to valuation in diversity class actions.[12] Part II recounts how the adoption of a strict rights-based definition of what constitutes a common and undivided interest has led the federal courts to reject aggregate valuation of most class claims for common relief.[13] Part III follows by detailing the various techniques courts have devised to calculate "per class member" values for those claims.[14]

Part IV provides a critical analysis of those valuation techniques. After re-examining the fundamentals of multi-party claim valuation, Part IV determines that the dominant principle is that the value of any plaintiff's claim, regardless of party structure, is what the value would have been had that plaintiff sued on his own—the rule of individual valuation.[15] From that reference point, Part IV returns to the existing common relief valuation techniques. As Part IV explains, many of the techniques courts currently use to value class claims for injunctive relief and restitution are best understood as applications of the rule of individual valuation.[16] However, the valuation techniques courts most commonly use to value class claims for punitive damages and attorneys' fees fail to honor the rule of individual valuation, and in doing so may be systematically undervaluing those claims.[17]

Part V attempts to identify what the rule of individual valua-

[12] *See infra* notes 18-78 and accompanying text.

[13] *See infra* notes 79-139 and accompanying text.

[14] *See infra* notes 140-98 and accompanying text.

[15] *See infra* notes 199-221 and accompanying text. Indeed, the so-called aggregation rules can be seen as an application of this principle, rather than an exception to it. *See infra* notes 206-14 and accompanying text.

[16] *See infra* notes 259-73 and accompanying text.

[17] *See infra* notes 230-58 and accompanying text.

tion might teach us about the current state of claim valuation. Viewed narrowly, the rule of individual valuation shows that the current valuation scheme denies a federal forum to otherwise deserving litigants. The larger lesson, however, is that the rule of individual valuation provides a valuable insight into many of the unresolved solo plaintiff valuation questions that lay concealed by existing class action valuation methods. In other words, a rule of individual valuation analysis reveals that many of the valuation problems believed to stem from improper aggregation in fact derive from even thornier—and much more fundamental—questions about how to value certain forms of relief generally.

Part VI then turns to the topic of jurisdictional reform. First, it considers how plaintiffs might use and adapt loopholes in removal practice to blunt the jurisdictional impact of the rule of individual valuation. Thus, meaningful implementation of the rule of individual valuation might require coordinated reform of the removal statute. Second, Part VI addresses the relationship between the rule of individual valuation and recurrent legislative efforts to comprehensively reform class action jurisdiction.

I

THE AMOUNT IN CONTROVERSY REQUIREMENT

Article III of the United States Constitution extends the federal judicial power to controversies between citizens of different states.[18] Article III power lies dormant, however, until Congress taps into it.[19] The First Congress did so almost immediately,[20] authorizing federal court diversity suits in the Judiciary Act of 1789 but limiting that jurisdiction to civil suits "where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars. . . ."[21] Since then, Congress has recodified the

[18] U.S. CONST. art. III, § l, cl. 2.

[19] Finley v. United States, 490 U.S. 545, 548 (1989); *see also* 13B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3601, at 343 (2d ed. 1984) [hereinafter 13B FEDERAL PRACTICE AND PROCEDURE] ("[C]ountless decisions recogniz[e] that the grant of jurisdiction is permissive rather than mandatory, and subject to the discretion of Congress rather than self-executing.").

[20] As noted in Charles Warren's influential history of the Judiciary Act of 1789, "it was recognized that the details of a judicial system under the Constitution as it then stood must be framed and put into operation, as a statute, by the First Congress, before the new Government could function at all." Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 57 (1923).

[21] Judiciary Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 73 (1789). It is generally accepted that the First Congress included an amount in controversy requirement for

diversity statute at 28 U.S.C. § 1332 and increased the amount in controversy requirement five times, most recently in 1996, by raising it to $75,000.[22] Proposals to further increase the amount in controversy requirement are relatively common, perhaps even an annual event.[23]

Although the statute sets a numerical target (i.e., $75,000), determining whether a case surpasses that target can be surprisingly troublesome.[24] While a full exposition of this nettlesome area is beyond the scope of this Article, the task of determining whether

diversity suits as a compromise to allay the fears of the Anti-Federalists who worried that the proposed federal judiciary would usurp the states' judicial authority. Thomas E. Baker, *The History and Tradition of the Amount in Controversy Requirement: A Proposal to "Up the Ante" in Diversity Jurisdiction*, 102 F.R.D. 299, 305-06 (1984). The fixing of the amount at $500, however, likely sprung from a baser motivation—a desire to keep claims by British creditors against American debtors out of the federal courts for fear that the federal courts might actually honor the Peace Treaty that ended the Revolutionary War and honor the claims. *See* William R. Casto, *The First Congress's Understanding of its Authority Over the Federal Courts' Jurisdiction*, 26 B.C. L. REV. 1101, 1112 (1985). Since the majority of the British claims were for less than $500, the claims would continue to be heard only in state courts, which were notorious for rejecting such claims despite the fact that the Peace Treaty ending the Revolutionary War forbade laws impeding their collection. *Id.* at 1111. Several commentators have noted as an example the $400 "quit rent" claims held by the assignees of Lord Fairfax against the State of Virginia arising from the confiscation of Lord Fairfax's estate. *See id.* at 1112 n.83; *see also* Baker, *supra*, at 305; Warren, *supra* note 20, at 78.

[22] The increases were as follows: to $2,000 in 1887, Act of Mar. 3, 1887, 49 Cong. Ch. 373, 24 Stat. 552; to $3,000 in 1911, Act of Mar. 3, 1911, Pub. L. No. 61-475, 36 Stat. 1091; to $10,000 in 1958, Act of July 25, 1958, Pub. L. No. 85-554, 72 Stat. 415; to $50,000 in 1988, Act of Nov. 19, 1988 Pub. L. No. 100-702, 102 Stat. 4646; and, finally, to $75,000 in 1996, Act of Oct. 19, 1996, Pub. L. No. 104-317, 110 Stat. 3850. For a discussion of the political circumstances surrounding many of these increases, as well as the short-lived decrease brought about in 1801 by the "Midnight Judges Act," see Baker, *supra* note 21, at 307-08.

[23] *See* 14B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3701, at 15 (3d ed. 1998) [hereinafter, 14B FEDERAL PRACTICE AND PROCEDURE]. If there has been any overriding theme to the increases, it is that while diversity jurisdiction exists to protect out-of-state litigants from local prejudice, *see* 13B FEDERAL PRACTICE AND PROCEDURE, *supra* note 19, § 3601, at 338; *see also* Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 492-93 (1927-28) (discussing the prejudice argument but noting the lack of any specific examples in the contemporaneous record), Congress should vest only so much diversity jurisdiction as it thinks is necessary out of respect for state sovereignty and to conserve federal funds. *See* Baker, *supra* note 21, at 305-06 (identifying judicial federalism, cost efficiency, and case load constraints as the dominant factors influencing amount in controversy debates); *see also* Horton v. Liberty Mutual Ins. Co., 367 U.S. 348, 351 (1961) (acknowledging that Congress raised the amount in controversy requirement to $10,000 in 1958 to reduce congestion in the district courts).

[24] *See* 15 MOORE'S FEDERAL PRACTICE, *supra* note 10, § 102.100 ("It has not al-

the federal courts are properly valuing class claims for common relief requires consideration of three foundational issues: (1) what items count towards the amount in controversy, (2) how to value the various claims, and (3) whether to aggregate the value of joined claims. Part I then examines how the courts historically have applied these general valuation rules in class actions.

A. What Items of Relief Count

Section 1332(a) grants jurisdiction in diversity cases "where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs."[25] The Supreme Court has construed this text to differentiate items of relief that the underlying substantive law affords in the way of damages from losses stemming from the general expense and delay associated with litigation.[26] Pursuant to this framework, the Supreme Court has defined the matter in controversy to include not just claims for compensatory damages, but also claims for punitive damages where they are recoverable at law,[27] and claims for attorneys' fees where a contract or statute creates a basis for their recovery.[28] It also it is well established that the matter in controversy includes the value of equitable remedies, such as the value of

ways been a simple task to determine whether a particular diversity case meets the jurisdictional minimum.").

[25] 28 U.S.C. § 1332(a) (2000).

[26] *See* 14B FEDERAL PRACTICE AND PROCEDURE, *supra* note 23, § 3712. By way of example, interest is included where it is an element of damages arising from the underlying claim, but is excluded when it is an incident of delay. *See* 15 MOORE'S FEDERAL PRACTICE, *supra* note 10, § 102.106[5][b]; *compare* St. Paul Reinsurance Co. v. Greenberg, 134 F.3d 1250, 1254-55 (5th Cir. 1998) (interest in insurance denial claim counts towards amount in controversy because statute provides for interest in such claims as a form of damages) *with* State Farm Mut. Auto. Ins. Co. v. Narvaez, 149 F.3d 1269, 1271 (10th Cir. 1998) (interest in insurance denial claims does not count towards amount in controversy where basis for interest is delay in payment of underlying claim). For a more thorough discussion of when the value of the matter in controversy includes interest and costs, see Roger M. Baron, Commentary, *The "Amount in Controversy" Controversy: Using Interest, Costs, and Attorneys' Fees in Computing Its Value*, 41 OKLA. L. REV. 257 (1988).

[27] Bell v. Preferred Life Assurance Soc'y, 320 U.S. 238, 240 (1943); *see also* 15 MOORE'S FEDERAL PRACTICE, *supra* note 10, § 102.106[4].

[28] *See* Mo. State Life Ins. Co. v. Jones, 290 U.S. 199, 202 (1933) (including attorneys' fees in amount in controversy calculation even where state authorizing statute denominated them as "costs"); *see also* 15 MOORE'S FEDERAL PRACTICE, *supra* note 10, § 102.106[6][a]. *But see* Hart v. Schering-Plough Corp., 253 F.3d 272, 274 (7th Cir. 2001) (holding that jurisdictional amount only includes attorneys' fees incurred prior to the filing of the suit, even when state fee-shifting statute would allow plaintiff to recover fees incurred during the course of litigation).

injunctive relief.[29]

B. The Basic Principles of Claim Valuation

Once a court determines which items of relief count towards the amount in controversy, the court must determine the value of those items.[30] The bedrock rule of claim valuation is that the value placed on the claim by the plaintiff controls unless "it is apparent, to a legal certainty, that the plaintiff cannot recover the amount claimed. . . ."[31] Whether the sum claimed by the plaintiff is beyond reach "to a legal certainty" depends on whatever boundaries the underlying substantive law sets for potential damages recovery.[32] Sometimes this showing is easy, such as where a statute caps the plaintiff's potential recovery at less than the jurisdictional amount,[33] or where the item of relief claimed is

[29] 14B FEDERAL PRACTICE AND PROCEDURE, *supra* note 23, § 3708; *see infra* notes 49-55 and accompanying text.

[30] The party invoking federal subject matter jurisdiction has the burden of showing that the claim values exceed the jurisdictional amount. 14B FEDERAL PRACTICE AND PROCEDURE, *supra* note 23, § 3702, at 33-34; *see also* McNutt v. Gen. Motors Acceptance Corp., 298 U.S. 178, 189 (1936) (stating that in a suit originally filed in federal court, the predicates for jurisdiction "must be met by the party who seeks the exercise of jurisdiction in his favor"). Thus, the plaintiff must establish the amount in controversy when he or she files the suit originally in federal court, whereas it is the defendant's burden when the defendant removes a case originally filed in state court. *See* 15 MOORE'S FEDERAL PRACTICE, *supra* note 10, § 102.107[1] (discussing which party bears the burden). The court must measure its value as of the date that one of the parties first invokes the federal court's jurisdiction, either by originally filing the action in federal court or by removing it from a state court. St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 290-93 (1938). While later developments can shed light on what the true amount in controversy was at the time federal jurisdiction was first invoked, subsequent events cannot oust jurisdiction once it has attached. *Id.* at 292-93; *see also* 15 MOORE'S FEDERAL PRACTICE, *supra* note 10, § 102.104[2] ("[C]ourts have distinguished between *subsequent events* that change the amount in controversy and *subsequent revelations* that show, in fact, that the required amount was or was not in controversy at the commencement of the suit." (emphasis added)).

[31] *St. Paul Mercury Indem. Co.*, 303 U.S. at 289.

[32] *See* 15 MOORE'S FEDERAL PRACTICE, *supra* note 10, § 102.101 ("[I]n a diversity case, the substantive questions surrounding the measure of damages are purely a matter of state law.").

[33] *See* Kopp v. Kopp, 280 F.3d 883, 885 (8th Cir. 2002) ("[T]he maximum amount of damages can often be determined with complete accuracy before trial, as in cases involving liquidated damages or statutory limits on damages."); *see*, *e.g.*, Sharrow v. Gen. Motors Acceptance Corp., 938 F. Supp. 518, 520 (C.D. Ill. 1996) (noting that even if punitive damages were available, they would be capped by statute at $25,000); *see generally* 15 MOORE'S FEDERAL PRACTICE, *supra* note 10, § 102.106[2] (discussing various kinds of objective limits on the amount recoverable).

wholly unavailable for the cause of action in question.[34] Other times, the legal certainty test requires the court to measure potential recovery against an imprecise boundary. For example, a court can find an uncapped and unliquidated damages claim to be jurisdictionally insufficient if, based on the evidence available, the court finds that no reasonable jury could legally award enough in damages to satisfy the amount in controversy requirement.[35] The Supreme Court, however, has cautioned the lower courts to be wary of making such conclusions at the beginning of the case, given the lack of a mathematical formula for determining unliquidated damages and the lack of a developed record at the pleadings stage.[36] Thus, under the legal certainty test, "courts must be very confident that a party cannot recover the jurisdictional amount before dismissing the case for want of jurisdiction."[37]

The legal certainty test also controls the valuation of punitive damage claims.[38] The first step in the analysis is to determine whether the cause of action asserted lawfully could ever support a punitive damages award.[39] The second step then addresses the plaintiff's particular claim and asks whether, despite their general availability, it is nevertheless clear to a legal certainty that the plaintiff could not recover enough in punitive damages to meet the jurisdictional minimum.[40] This step typically looks to see if the defendant's alleged conduct was sufficiently reprehensible to

---

[34] *See* Anthony v. Sec. Pac. Fin. Servs., Inc., 75 F.3d 311, 315 (7th Cir. 1996) (holding that a court cannot consider the value of a punitive damages claim where they are not recoverable as a matter of law).

[35] *See Kopp*, 280 F.3d at 885 (upholding jurisdiction after concluding "that an award of damages of more than $75,000 would not have to be set aside as excessive" under Missouri law or the Due Process Clause).

[36] Bell v. Preferred Life Assurance Soc'y, 320 U.S. 238, 242-43 (1943).

[37] 15 MOORE'S FEDERAL PRACTICE, *supra* note 10, § 102.106[1].

[38] *See Bell*, 320 U.S. at 240 (While plaintiff had only $1,000 in actual damages, "the question remains whether it is apparent to a legal certainty from the complaint that he could not recover, in addition, sufficient punitive damages to make up the requisite $3,000").

[39] *See* Cadek v. Great Lakes Dragaway, Inc., 58 F.3d 1209, 1212 (7th Cir. 1995); Nwachukwu v. Karl, 223 F. Supp. 2d 60, 66 (D.D.C. 2002); *see also* 15 MOORE'S FEDERAL PRACTICE, *supra* note 10, § 102.106[4]. A plaintiff obviously fails the legal certainty test if punitive damages are never available under the applicable substantive law. *See*, *e.g.*, Packard v. Provident Nat'l Bank, 994 F.2d 1039, 1046 (3d Cir. 1993) (dismissing for insufficient amount in controversy because the punitive damages award necessary to attain the jurisdictional amount was not available for the type of claim alleged).

[40] *See Cadek*, 58 F.3d at 1212.

actually warrant punitive damages,[41] but it also can ask whether the amount needed is unavailable to a legal certainty because it would be excessive, either under state law or under the Due Process Clause.[42]

It is sometimes said that claims for punitive damages are subject to closer scrutiny than claims for actual damages.[43] This sentiment seems to reflect a fear that punitive damages claims, if not examined critically, might undermine the amount in controversy check on diversity jurisdiction.[44] One interpretation of this language is simply that courts should not assume that every punitive damages claim has the potential to yield $75,000; in other words, even where a type of claim generally can give rise to a punitive damages award, the court still must carefully consider whether the plaintiff actually asserts conduct that would warrant it, either at all or in the amount requested.[45] To the extent that is what is going on, it is an application of the legal certainty test, rather than an exception to it.[46] If, however, the "closer scrutiny" lan-

41 *See* Larkin v. Brown, 41 F.3d 387, 389 (8th Cir. 1994) (finding that while punitive damages could be had in a claim for assault and battery, the conduct alleged was not sufficiently willful or outrageous as to support an award of punitive damages under Missouri law).

42 *Compare* Kopp v. Kopp, 280 F.3d 883, 886 (8th Cir. 2002) (finding amount in controversy met by punitive damages claim because the required award "would not have to be set aside as excessive under Missouri law, nor would such an award be so 'grossly excessive' as to violate the Due Process Clause of the United States Constitution") *with* Anthony v. Sec. Pac. Fin. Servs., Inc., 75 F.3d 311, 317-18 (7th Cir. 1996) (finding that the $47,000 in punitive damages needed to meet the jurisdictional amount would be excessive as a matter of law and therefore "would face certain remittitur").

43 *See Anthony*, 75 F.3d at 315; Larkin, 41 F.3d at 389; Packard v. Provident Nat'l Bank, 994 F.2d 1039, 1046 (3d Cir. 1993). The Third Circuit's decision in *Packard* in turn cites *Zahn v. International Paper Co.*, 469 F.2d 1033 (2d Cir. 1972), *aff'd* 414 U.S. 291 (1973). While the Second Circuit in *Zahn* did assert that punitive damage claims merited closer scrutiny, 469 F.2d at 1033 n.1, the Supreme Court's decision does not address that issue.

44 *See* Del Vecchio v. Conseco Inc., 230 F.3d 974, 978-79 (7th Cir. 2000) (The value of punitive damage claims "must be assessed critically; otherwise, the statutory limits on federal court jurisdiction could be undermined").

45 *See*, *e.g.*, *Cadek*, 58 F.3d at 1212 (after finding that punitive damages were available for a claim of fraud, then scrutinizing plaintiff's allegations to see if the nature of the wrongdoing would in fact support punitive damages and, if so, in the needed amount); Nwachukwu v. Karl, 223 F. Supp. 2d 60, 68 (D.D.C. 2002) (finding that punitive damages were available for a claim of breach of fiduciary duty, then scrutinizing plaintiff's allegations to see if the conduct alleged was sufficiently willful and reckless).

46 As discussed above, the *Larkin* court rejected the punitive damages claim for lack of sufficiently culpable conduct—a legal ruling. 41 F.3d at 389. Similarly, the *Anthony* court rejected the punitive damages claim when it ruled that the amount

guage signals that courts hold punitive damages claims to something higher than the legal certainty standard,[47] it is difficult to square that result with the Supreme Court's decision in *Bell v. Preferred Life Assurance Society of Montgomery*.[48]

Claims seeking non-monetary relief, such as a request for an injunction or a declaratory judgment, must also be valued and included in the amount in controversy.[49] Here, too, the question is whether the court can say to a legal certainty that the value of the claims asserted is less than the jurisdictional amount.[50] However, there is no consensus in the federal courts on exactly *how* to measure the value of injunctive relief.[51] Although the Supreme Court has instructed that "[i]n actions seeking declaratory or injunctive relief . . . the amount in controversy is measured by

needed was unavailable as a matter of law. 75 F.3d at 317. Neither court suggested that it was altering its judgments about what the law would allow just because the cases straddled the border of the amount in controversy requirement. Rather, the opinions are best read as making customary legal rulings about the potential for and limits on damages and then applying those conclusions to the legal certainty analysis.

47 Salmi v. D.T. Mgmt., Inc., No. 02-C-2741, 2002 WL 31115581 (N.D. Ill. Sept. 23, 2002), might be one such case. The plaintiff in *Salmi*, a guest at the defendant's hotel, sustained minor injuries after being allegedly assaulted by one of the defendant's employees. *Id.* at *1. He based the jurisdictional amount on his combined claim for compensatory and punitive damages. However, in light of the plaintiff's minor injuries and the fact that he was intoxicated at the time of the alleged assault, the court dismissed for lack of subject matter jurisdiction, stating that the "[p]laintiff's mere hope for an extreme punitive award cannot be the sole basis for jurisdiction." *Id.* at *3. To the extent that the court rejected the potential punitive damages value just because it would be extreme—but not legally excessive—the court truly was valuing the punitive damages under a stricter standard than legal certainty. There is some evidence, however, that the court implicitly found that the extreme award would also be legally excessive, and therefore unavailable to a legal certainty. *Id.* (stating that the ratio of punitive damages to compensatory damages at issue "would face certain remittur" (quoting *Anthony*, 75 F.3d at 317-18)).

48 Bell v. Preferred Life Assurance Soc'y, 320 U.S. 238, 240-41 (1943) (invoking specifically the legal certainty test and concluding that the amount in controversy was met because "we are satisfied that under the law of Alabama as well as that of South Carolina petitioner's allegations of fraud if properly proved might justify an award exceeding $3,000").

49 *See*, *e.g.*, Hunt v. Wash. State Apple Advertising Comm., 432 U.S. 333, 347 (1977) (analyzing whether an action seeking declaratory and injunctive relief satisfied the amount in controversy requirement); McNutt v. General Motors Acceptance Corp. of Ind., Inc., 298 U.S. 178, 189-90 (1936) (dismissing suit seeking injunctive relief for failure to adequately establish amount in controversy); Brittain Shaw McInnis, Comment, *The $75,000.01 Question: What is the Value of Injunctive Relief*, 6 GEO. MASON L. REV. 1013, 1039-42 (1998) (discussing Supreme Court cases analyzing amount in controversy in equity cases).

50 *See Hunt*, 432 U.S. at 347 (sustaining jurisdiction where the facts "preclude our saying 'to a legal certainty'" that the amount in controversy was not satisfied).

51 *See generally* McInnis, *supra* note 49, at 1013, 1041.

the value of the object of the litigation,"[52] the Court has never stated whether this is measured from the perspective of the plaintiff or the defendant.[53] Currently, five circuits value injunctive relief solely from the plaintiff's perspective.[54] Six other circuits allow the court to value claims for injunctive relief from either the plaintiff's perspective or the defendant's perspective, whichever is greater.[55]

C. The Aggregation Rules

The rules regarding aggregation are both clear and liberal for simple claim joinder. Under Rule 18(a), a single plaintiff may join together in the same suit as many claims he or she has against any single defendant, even if those claims are entirely unrelated.[56] It is well-settled that, when a single plaintiff joins claims against a single defendant under Rule 18(a), the aggregate value of the joined claims determines whether the amount in controversy requirement is satisfied, regardless of whether the

---

[52] *Hunt*, 432 U.S. at 347.

[53] In 2002, the Supreme Court granted certiorari in *Ford Motor Co. v. McCauley*, to decide whether plaintiffs may satisfy the amount-in-controversy requirement of 28 U.S.C. § 1332 by showing that the defendant's costs of complying with the injunction the plaintiff class seeks would exceed $75,000 irrespective of whether the injunction covered merely one plaintiff or all members of the class. 534 U.S. 1126 (2002), *rev'g In re* Ford Motor Co./Citibank (S.D.), 264 F.3d 952 (9th Cir. 2001). On October 15, 2002, however, the Supreme Court dismissed the writ of certiorari as improvidently granted. Ford Motor Co. v. McCauley, 537 U.S. 1 (2002).

[54] *See* Ericsson GE Mobile Communications, Inc. v. Motorola Communications & Elecs., 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 Auth., 457 F.2d 46, 49 (2d Cir. 1972); Mass. State Pharm. Ass'n v. Federal Prescription Serv., Inc., 431 F.2d 130, 132 n.1 (8th Cir. 1970); Alfonso v. Hillsborough County Aviation Auth., 308 F.2d 724, 727 (5th Cir. 1962).

[55] *In re* Brand Name Prescription Drugs Antitrust Litig., 123 F.3d 599, 609 (7th Cir. 1997); Justice v. Atchison, Topeka & Santa Fe Ry., 927 F.2d 503, 505 (10th Cir. 1991); 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 Employees Ins. Co. v. Lally, 327 F.2d 568, 569 (4th Cir. 1964); Ridder Bros. v. Blethen, 142 F.2d 395, 399 (9th Cir. 1944).

[56] Fed. R. Civ. P. 18(a). Rule 18(a), however, is only a rule of pleading. The Court retains power to try unrelated claims separately. Fed. R. Civ. P. 42(b). More fundamentally, the fact that a rule allows joinder as a procedural device does not affect whether the court has subject matter jurisdiction to hear the joined claims. Fed. R. Civ. P. 82 ("These rules shall not be construed to extend or limit the jurisdiction of the United States district courts."); *see also* 6A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1588 (2d ed. 1990) (discussing relationship between joinder and jurisdiction, with illustrations).

claims are transactionally related.[57]

A much different situation is presented when separate parties join together as plaintiffs under Rule 20(a) and assert their respective claims in a single suit against a common defendant.[58] In contrast to the unlimited aggregation of the value of joined claims, the diversity statute rarely allows joined parties to aggregate the value of their claims to satisfy the amount in controversy requirement.[59] As the Supreme Court explains, "when several plaintiffs unite to enforce a single title or right, in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount."[60] On the other hand, "[w]hen two or more plaintiffs, having separate and distinct demands, unite for convenience and economy in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount."[61] Many commentators have criticized the Supreme Court's dichotomy between "common and undivided interests" and "separate and distinct demands" as confusing and inapt, at least outside of traditional property disputes.[62]

---

[57] *See* 15 MOORE'S FEDERAL PRACTICE, *supra* note 10, § 102.108[1]; 14B FEDERAL PRACTICE AND PROCEDURE, *supra* note 23, § 3704, at 130; *see also* Jeffrey L. Rensberger, *The Amount in Controversy: Understanding the Rules of Aggregation*, 26 ARIZ. ST. L.J. 925, 926-27 (1994).

[58] Rule 20(a) allows plaintiff party joinder where the different plaintiffs' claims are related transactionally and present common issues of law or fact. FED. R. CIV. P. 20(a). Similarly, Rule 20 authorizes a plaintiff to sue multiple defendants in the same suit if the claims against the various defendants are related transactionally and present common issues of law or fact. *Id.*

[59] *See* 15 MOORE'S FEDERAL PRACTICE, *supra* note 10, § 102.108[3][a]; 14B FEDERAL PRACTICE AND PROCEDURE, *supra* note 10, § 3704, at 146-48 (listing illustrative cases); *see also* 7 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1659 (3d ed. 2001) (discussing intersection between Rule 20 party joinder and subject matter jurisdiction).

[60] Troy Bank v. G.A. Whitehead & Co., 222 U.S. 39, 40-41 (1911).

[61] *Id.* at 40. The "non-aggregation" rule also applies when a single plaintiff asserts claims against joined defendants*:* No matter how related the plaintiff's claims against the two defendants might be, the plaintiff may not aggregate the value of those claims but instead must show that he has a jurisdictionally sufficient claim against each of them. *See* 15 MOORE'S FEDERAL PRACTICE, *supra* note 10, § 102.108[2]; 14B FEDERAL PRACTICE AND PROCEDURE, *supra* note 23, § 3704, at 141.

[62] 15 MOORE'S FEDERAL PRACTICE, *supra* note 10, § 102.108[3][b] ("Today, asking whether rights are properly characterized as joint or several rivals the question of how many angels dance on the head of a pin for both difficulty and practical significance."); 14B FEDERAL PRACTICE AND PROCEDURE, *supra* note 23, § 3704, at 150; *see also* Rensberger, *supra* note 57, at 925 ("The language of the test for [party] aggregation is mystifying and has perplexed many law students and practitioners.").

D. The Basic Principles of Valuing Class Actions

Rule 23 authorizes one or more persons to sue, as representative parties, on behalf of a class of similarly-situated persons.[63] Rule 23 includes various requirements designed to ensure that there really is a class of similarly-situated persons, that the plaintiff who seeks to lead the class is an appropriate representative, and that the parties' respective claims are well-suited to class-wide resolution.[64] But Rule 23 is still just a rule of joinder.[65] It does not create substantive liability, but instead creates a litigation package for the efficient resolution of separate but related claims.[66] Thus, while a class member's fate merges with that of the class, his claim does not.

With respect to the amount in controversy requirement for diversity jurisdiction, it is now well-settled that class actions follow the same aggregation rules as other forms of litigation.[67] The Supreme Court had applied the historical aggregation rules to class actions under the original Rule 23,[68] which differentiated "true" class action from "spurious" class actions based precisely on

---

[63] FED. R. CIV. P. 23.

[64] *Id.*; *see generally* 1 HERBERT NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS § 1.01 (3d ed. 1992) [hereinafter 1 NEWBERG ON CLASS ACTIONS] (discussing representative nature of class actions).

[65] For a competing view that classes can and should be viewed not as aggregations of individuals but as freestanding entities in their own right, see David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913 (1998). *But see* John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 385 (2000) (rejecting entity theory of class actions). Professor Shapiro's thesis highlights an intriguing circularity inherent to class actions and jurisdiction. On one hand, viewing the class based on its sum rather than its parts better accounts for the fact that class status fundamentally alters the dynamics of the dispute, in large part by greatly enhancing the viability of many types of claims and adding substantial settlement pressures. Shapiro, *supra*, at 924. On the other hand, under the current diversity statute, a federal court must have jurisdiction over the "parts" before it can turn them into a group. *See* Zahn v. Int'l Paper Co., 414 U.S. 291, 301 (1973) (holding that regardless of what federal court does with the jurisdictionally sufficient plaintiffs, federal court must dismiss the jurisdictionally insufficient ones).

[66] *See* 1 NEWBERG ON CLASS ACTIONS, *supra* note 64, at § 1.02; *see also* 15 MOORE'S FEDERAL PRACTICE, *supra* note 10, § 23.02 (discussing purposes of Rule 23 class action rule).

[67] In curious contrast, class actions follow a different rule from other forms of litigation for purposes of determining diversity of citizenship, as only the citizenship of the named plaintiffs is considered. *See* Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356, 367 (1921).

[68] *See* Clark v. Paul Gray, Inc., 306 U.S. 583, 588-89 (1939) (finding that the class members claims were separate and distinct, dismissing the jurisdictionally insufficient plaintiffs).

whether the class members held their rights in common or separately.[69] The 1966 amendments to Rule 23 abandoned those rights-based categories and replaced them with the modern functional categories.[70] In *Snyder v. Harris*, the Supreme Court considered whether, since Rule 23 no longer categorized class actions based on whether the class members held their rights jointly or separately, the courts should similarly abandon the traditional aggregation rules and value all class actions based on the total amount in controversy.[71] The Supreme Court rejected the argument, holding that it was up to Congress to change the valuation rules for diversity jurisdiction, and that the Rule 23 changes did not signal any such intent.[72] Accordingly, *Snyder* reaffirmed that, when the claims of the class members are "separate and distinct," all class members—including absent class members—must satisfy the amount in controversy requirement.[73] But by leaving the traditional valuation rules in place, the Supreme Court also reaffirmed that aggregate valuation is appropriate "in cases in which two or more plaintiffs unite to enforce a single title or right in which they have a common and undivided interest."[74]

One issue that is currently unresolved is whether federal courts may take supplemental jurisdiction over absent class members who cannot satisfy the amount in controversy requirement. Four years after *Snyder*, the Supreme Court addressed this issue in *Zahn v. International Paper Co.*.[75] The Supreme Court unequiv-

---

[69] *See* 5 JEROLD S. SOLOVY ET AL., MOORE'S FEDERAL PRACTICE, § 23 App. 01 (3d ed. 2003) [hereinafter 5 MOORE'S FEDERAL PRACTICE] (containing text of the original Rule 23).

[70] *See* FED. R. CIV. P. 23 advisory committee's note (1966) (discussing problems under the old Rule 23 categories and stating that "*[t]he amended rule* describes in more practical terms the occasions for maintaining class actions") (emphasis added).

[71] Snyder v. Harris, 394 U.S. 332, 335-36 (1969).

[72] *Id.* at 339-42; *see also* Redish, *supra* note 4, at 1807-08 (explaining *Snyder*'s approach to the relationship between Rule 23 and diversity); *see generally* 15 MOORE'S FEDERAL PRACTICE, *supra* note 10, § 102.108[4][a] (discussing theory of *Snyder*]. The Supreme Court confirmed this understanding in *Zahn:* "The [*Snyder*] Court unmistakably rejected the notion that the 1966 amendments to Rule 23 were intended to effect, or effected, any change in the meaning and application of the jurisdictional amount requirement insofar as class actions were concerned." Zahn v. Int'l Paper Co., 414 U.S. 291, 299 (1973).

[73] *Snyder*, 394 U.S. at 340-41.

[74] *Id.* at 335; *see also* 5 MOORE'S FEDERAL PRACTICE, *supra* note 69, § 23.07[3][b][i] (discussing availability of aggregate valuation of class actions where class members have a common and undivided interest).

[75] 414 U.S. at 292.

ocally rejected the argument and made clear that, under the existing valuation rules, all class members must meet the jurisdictional amount, and thus may not "piggyback" on the jurisdictionally-sufficient claims of the lead plaintiffs.[76] To date, however, five circuits have held that the supplemental jurisdiction statute overruled *Zahn* and now confers federal subject matter jurisdiction over the monetarily-insufficient class members provided the lead plaintiff satisfies the amount in controversy requirement.[77] While this issue does not alter the *operation* of the valuation rules, it does have important consequences for them. Specifically, it is now even more important to properly calculate the per class member value of common relief, since it may take only one jurisdictionally sufficient class member to anchor federal subject matter jurisdiction for the entire class.[78]

II

How the Courts Considered but Ultimately Rejected Valuing Class Action Common Relief Claims in the Aggregate

It was just a matter of time before litigants began testing the limits of common and undivided interest aggregation in the context of class actions. One of the hottest issues in the mid-to late 1990s was whether a class claim for punitive damages presented a common and undivided interest, such that the full amount of the class-wide punitive damages claim established the jurisdictional amount for the entire class. The rationale for that assertion was that punitive damages, which are awarded to punish and deter

[76] *Id*. at 301.

[77] *See* Allapattah Servs. Inc. v. Exxon Corp., 333 F.3d 1248, 1253-56 (11th Cir. 2003); Rosmer v. Pfizer, Inc., 263 F.3d 110, 114 (4th Cir. 2001); Gibson v. Chrysler Corp., 261 F.3d 927, 933-34 (9th Cir. 2001); *In re* Brand Name Prescription Drugs Antitrust Litig., 123 F.3d 599, 607 (7th Cir. 1997); *In re* Abbott Labs., 51 F.3d 524, 528-29 (5th Cir. 1995). Other circuits hold that the rule of *Zahn* survives. *See* Trimble v. Asarco, Inc., 232 F.3d 946, 962 (8th Cir. 2000); Meritcare, Inc. v. St. Paul Mercury Ins. Co., 166 F.3d 214, 222 (3d Cir. 1999); Leonhardt v. Western Sugar Co., 160 F.3d 631, 640 (10th Cir. 1998). The Supreme Court had an opportunity to resolve this issue in *Abbott Laboratories* but affirmed by an evenly divided court. *See* Free v. Abbott Labs., Inc., 529 U.S. 333 (2000). For a recent discussion of this ongoing split, including an argument in support of the Tenth Circuit's approach in *Leonhardt*, see James E. Pfander, *The Simmering Debate Over Supplemental Jurisdiction*, 2002 U. Ill. L. Rev. 1209 (2002).

[78] *See*, *e.g.*, Louque v. Allstate Ins. Co., 314 F.3d 776, 782 (5th Cir. 2002) (taking diversity jurisdiction over class representative based on value of attorneys' fees and then exercising supplemental jurisdiction over absent class members).

rather than to compensate, constituted a pool of relief that was common to the class members. At roughly the same time, creative litigants were exploring whether they could invoke common and undivided interest theory for other forms of relief that provided a common benefit to the class, such as attorneys' fees, injunctive relief, and restitution.

The argument nearly succeeded, but it failed in the end. Although a few early cases adopted (or appeared to adopt) an expansive view of what constitutes a common and undivided interest, those decisions have either been repudiated or dramatically narrowed.[79] Currently, courts will value class claims in the aggregate only where the class members held the underlying substantive rights jointly prior to the class suit, and reject aggregate valuation that is predicated solely on the fact that the class action will yield relief that accrues to the class members collectively.

A. Punitive Damages

The aggregation issue with the greatest potential impact on the federal docket is whether class claims for punitive damages constitute a common and undivided interest. The issue necessarily affects a large number of cases because punitive damages are so widely available as a matter of state substantive law.[80] Moreover, in the class action context involving numerous injured parties, the total amount of punitive damages is virtually assured to exceed $75,000. Thus, as a practical matter, if class claims for punitive damages are common and undivided interests to be valued in the aggregate, almost any state law class action in which punitive damages are sought would satisfy the amount in controversy requirement for diversity jurisdiction.

---

[79] *See infra* notes 80-109 and accompanying text (discussing rejection of aggregation of class claims for punitive damages).

[80] Almost every jurisdiction authorizes punitive damages of one sort or another. 1 JOHN J. KIRCHER & CHRISTINE M. WISEMAN, PUNITIVE DAMAGES: LAW AND PRACTICE § 4.01 (2d ed. 2003). Most jurisdictions define punitive damages as those damages that are awarded above and beyond what is needed to fully compensate the plaintiff for his or her injuries. *Id.*; *see also* RESTATEMENT (SECOND) OF TORTS § 908(1) (1979) (defining punitive damages as being "other than compensatory or nominal damages"); MODEL PUNITIVE DAMAGES ACT § 1 (1996) (adopting express dichotomy between compensatory and punitive damages). A few states, however, award additional damages denominated as punitive damages but disclaim that they exist to punish or deter, but rather exist to reimburse plaintiffs for losses not otherwise compensable under applicable law. *See* 1 GERALD W. BOSTON, STEIN ON PERSONAL INJURY DAMAGES § 4:5 (3d ed. 1997).

At one point, it appeared that the courts might find class claims for punitive damages to constitute a common and undivided interest based on the collective nature of the punitive damage award. In the leading case, *Tapscott v. MS Dealer Service Corp.*, the Eleventh Circuit held that the class claim for punitive damages sought under Alabama law in that case constituted "a single collective right in which the putative class has a common and undivided interest."[81] The court first noted that the purpose of punitive damages under Alabama law was not to compensate victims for loss but rather to punish defendants for past wrongful conduct and to deter future wrongful conduct.[82] As such, the court explained, they are akin to a collective good awarded for the benefit of the public.[83] Second, and relatedly, the court noted that a defendant's liability for punitive damages is determined by its course of conduct as a whole, rather than its acts towards any particular individual.[84] Finally, the court emphasized that, in the event the class were to succeed in its punitive damage claim, the award would be split evenly by the class members such that "the failure of one plaintiff's claim will increase the share of successful plaintiffs."[85]

In finding the class claim for punitive damages to be a common and undivided interest, the *Tapscott* court focused on the collective aspects of obtaining and distributing an *award* of punitive damages. Because the purpose of punitive damages is to punish defendants for egregious conduct and deter similar behavior in the future,[86] the typical punitive damages analysis focuses predominantly on characteristics of the defendant, such as the

[81] Tapscott v. MS Dealer Serv. Corp., 77 F.3d 1353, 1359 (11th Cir. 1996). The plaintiffs in *Tapscott* asserted various state law claims arising from the defendants' sales of service contracts. *Id.* at 1355. The case was filed as a putative class action in Alabama state court and sought unspecified monetary damages, including punitive damages and injunctive relief. *Id.* The defendants invoked diversity and removed, arguing that the amount in controversy was satisfied because the class sought an aggregate punitive damages award that was undisputed to be in excess of $50,000, the jurisdictional amount prevailing at the time. *Id.* at 1357 n.10.

[82] *Id.* at 1358.

[83] *Id.* at 1358.

[84] *Id.* at 1358-59.

[85] *Id.* at 1359.

[86] *See* Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 432 (2001); *see also* 1 Kircher & Wiseman, *supra*, note 80, § 4.12-4.13; Cass R. Sunstein et al., *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071, 2081 (1998) ("The traditional view is that punitive awards serve deterrent and retributive goals.").

nature of the defendant's wrongful conduct, the nature and extent of harm the defendant has caused, and the defendant's financial condition.[87] Historically, the characteristics of the plaintiff have played a minor role at best.[88] Indeed, in the class action context, a claim for punitive damages might not vary at all—either in the evidence that was presented or in the size of the award—based on the absence or presence of any individual class member. From this vantage point, the claim appears to be collective because the award yields relief to the group, based on the defendant's conduct to the group, rather than to any particular individual.

In *Gilman v. BHC Securities, Inc.,* however, the Second Circuit emphatically rejected the "collective relief" approach taken by *Tapscott* and held that the New York law claim for punitive damages at issue in that case did not constitute a common and undivided interest.[89] The *Gilman* court began by attempting to define generally what constitutes an aggregable common and undivided interest. After canvassing the Supreme Court precedent and various cases that had allowed aggregation under the common and undivided interest exception, the Second Circuit found the organizing principle to be whether the plaintiffs' claims involved a "single indivisible res," such that the rights of one plaintiff could not be adjudicated without implicating the rights of the other plaintiffs.[90] Thus, the court held that *Snyder* and *Zahn* barred it from considering the aggregate value of the class claim for punitive damages "absent a prior determination that the un-

[87] *See* RESTATEMENT (SECOND) OF TORTS, *supra* note 80, § 908(2) (listing factors); Model Punitive Damages Act, *supra* note 80, § 7(a) (same). Additional factors might include: whether the defendant profited from his egregious conduct, *id.* § 7(a)(5); whether the defendant has taken—or not taken—any remedial measures, *id*. § 7(a)(7); or whether the defendant attempted to conceal its wrongdoing. 1 DAN B. DOBBS, LAW OF REMEDIES § 3.11(14) (2d ed. 1993).

[88] *See* 1 Kircher & Wiseman, *supra*, note 80, § 5.18. The Supreme Court's recent decision in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 123 S. Ct. 1513 (2003), may alter this practice considerably. *See infra* notes 233-243 and accompanying text.

[89] Gilman v. BHC Secs., Inc., 104 F.3d 1418, 1422 (2nd Cir. 1997). The putative class plaintiffs were clients of BHC Securities, Inc. (BHC) who alleged that BHC failed to inform them that it was receiving so-called "order flow payments" when it placed securities orders for execution with certain companies. *Id.* at 1420. Characterizing the order flow payments as kickbacks, the class sued in New York state court, asserting state law claims for breach of contract and breach of fiduciary duty and seeking compensatory damages, injunctive relief, and an unspecified amount of punitive damages. *Id.* BHC invoked diversity jurisdiction and removed. *Id.*

[90] *Id.* at 1423.

derlying claim—the basis on which such damages are sought—asserts a single title or right."[91]

Applying this standard, the Second Circuit held that it could not consider the total value of the class claim for punitive damages because, prior to the lawsuit, the class members never claimed to have any shared rights or title with respect to BHC Securities, Inc. (BHC).[92] Rather, the only thing the class members shared, according to the Second Circuit, was a desire to create a "pool of recovery."[93] Moreover, that pool of recovery—the punitive damages award—was available to all of the class members regardless of whether they sued as a group or sued individually.[94] Thus, the court concluded, the plaintiffs were joined as a class not because they held indivisible claims against BHC, but because joining forces against BHC was more convenient (and, presumably, more effective) than suing separately.[95]

Since *Gilman*, the federal courts have overwhelmingly determined aggregation based on the class members' underlying substantive rights, and not on the collective nature of the relief generated by a class claim for punitive damages.[96] While a handful of district courts continue to value punitive damages in the aggregate,[97] the Seventh,[98] Eighth,[99] Ninth,[100] and Tenth[101] Circuits have all followed *Gilman* in holding that class claims for

---

91 *Id.* at 1430.

92 *Id.* at 1424. Rather, the class members' individual client-broker dealings with BHC formed the basis for their claims for both compensatory and punitive damages. *Id.* at 1424, 1430.

93 *Id.* at 1430. Earlier in the opinion, when explaining why the plaintiffs' compensatory claims could not be aggregated, the court expressed a similar sentiment, saying that the only interest the plaintiffs had was a "shared appetite for a money judgment." *Id.* at 1424.

94 *Id.*

95 *Id.*

96 *See* 15 MOORE'S FEDERAL PRACTICE, *supra* note 10, § 102.108[4][b] ("All of the circuits that have considered the issue have concluded that punitive damages cannot be aggregated . . . for purposes of satisfying the amount in controversy requirement.").

97 *See* Durant v. Servicemaster Co., 147 F. Supp. 2d 744, 751 (E.D. Mich. 2001); *see also* Knauer v. Ohio St. Life Ins. Co., 102 F. Supp. 2d 443, 449 (N.D. Ohio 2000) (holding that punitive damages are common and undivided when complaint asserts them as a collective claim).

98 *In re* Brand Name Prescription Drugs Antitrust Litig., 123 F.3d 599, 608 (7th Cir. 1997) (noting that the statute authorized individual "per violation" penalties, rather than conferring a punitive claim to a group or to a representative member).

99 Crawford v. F. Hoffman-La Roche Ltd., 267 F.3d 760 (8th Cir. 2001).

100 Gibson v. Chrysler Corp., 261 F.3d 927 (9th Cir. 2001).

101 Martin v. Franklin Capital Corp., 251 F.3d 1284 (10th Cir. 2001).

punitive damages may be valued in the aggregate only where, prior to being joined in a class action, the class members shared a common title or right created by the underlying substantive law. Indeed, even the Eleventh Circuit no longer follows the *Tapscott* rule, having found that it conflicted with a prior, binding decision from the "Old Fifth Circuit."[102]

The only other circuit to have considered punitive damages aggregation is the Fifth Circuit. In fact, it was the first to do so, deciding *Allen v. R&H Oil & Gas Co.*[103] in 1995. *Allen* involved a 512-plaintiff, state court, tort action against the owners and operators of an oil and gas well that had exploded.[104] Although the state court complaint pleaded no specific damages amount, the defendants were able to successfully remove based on the fact that the full amount of punitive damages being sought in the 512-plaintiff case exceeded $50,000.[105]

Allen is often cited as precedent for aggregating punitive damages as a common and undivided interest.[106] Certainly, one of the arguments urged by the removing defendants in *Allen* was that the court apply the common and undivided interest exception and aggregate their individual punitive damages claims.[107] The removing defendants' primary argument, however, was that "the alleged punitive damage award could be assessed against

---

[102] Cohen v. Office Depot, Inc., 204 F.3d 1069, 1075-76 (11th Cir. 2000) (holding that *Tapscott* irreconcilably conflicted with *Lindsey v. Alabama Telephone Co.*, 576 F.2d 593 (5th Cir. 1978)). At this time, it is not clear that the Eleventh Circuit allows aggregate valuation of punitive damages under any circumstances, even where the class members held their underlying substantive rights in common. *See* Leonard v. Enter. Rent A Car, 279 F.3d 967, 973 (11th Cir. 2002) (*Lindsey* "requir[es] us to consider the punitive damages on a pro rata basis"); Morrison v. Allstate Indem. Co., 228 F.3d 1255, 1264 (11th Cir. 2000) ("[T]he *Cohen* Court held that prior binding precedent prohibited the aggregation of a class claim for punitive damages.").

[103] Allen v. R&H Oil & Gas Co., 63 F.3d 1326 (5th Cir. 1995).

[104] *Id.* at 1329. The plaintiffs were all joined litigants, rather than class members being represented by a lead plaintiff, because Mississippi does not have a class action rule and allows "common law" class actions only in very limited circumstances. *See* Am. Bankers Ins. Co. v. Booth, 830 So. 2d 1205, 1209-12 (Miss. 2002) (discussing Mississippi's class action law).

[105] *Allen*, 63 F.3d at 1337. Congress did not raise the jurisdictional amount to $75,000 until 1996, well after the *Allen* plaintiffs had filed suit. *See supra* note 22 and accompanying text.

[106] *See* 15 MOORE'S FEDERAL PRACTICE, *supra* note 10, § 102.108[3][c]; Willis, *supra* note 5, at 776 n.5. *But see* Gilman v. BHC Secs., Inc., 104 F.3d 1418, 1429 n.11 (2d Cir. 1997) ("Significantly, the [*Allen*] opinion never holds that plaintiffs share a common and undivided interest in punitive damages.").

[107] *Allen*, 63 F.3d at 1329.

each individual plaintiff."[108] Ultimately, the court seems to have settled on the latter, as evidenced by the following passage:

> [U]nder the accepted view of punitive damages as a public good, no aggregation—meaning the addition of separate claims—is necessary, as each plaintiff's share of an award is not added up to exceed $50,000—just as one award does not subtract from a future claimant's entitlement. Instead, the claims, while jointly tried, are treated as belonging to each plaintiff for jurisdictional purposes. In sum, because of the collective scope of punitive damages and their nature as individual claims under Mississippi law, we hold that under Mississippi law the amount of such an alleged award is counted against each plaintiff's required jurisdictional amount.[109]

Thus, fairly read, *Allen* does not establish precedent for aggregation at all, but instead holds only that, under Mississippi punitive damages law, each individual is allowed to claim the full value of the punitive damages that might conceivably be imposed on the defendant.

B. Attorneys' Fees

As with punitive damages, creative litigants have attempted to use class claims for attorneys' fees to satisfy the amount in controversy requirement. Specifically, they have argued that attorneys' fee awards constitute a common and undivided interest when sought in a class action, such that courts should consider the total class-wide fee award when determining whether the amount in controversy exceeds $75,000. To date, however, the courts have rejected these efforts. Their reasons for doing so, however, vary depending on the source of the fees.

In some cases, the attorneys' fees are recoverable under so-called "fee-shifting" statutes, which award attorneys' fees to plaintiffs who bring (and, usually, prevail upon) particular types of claims. In these cases, the courts hold that *Snyder* requires them to look to whether the fee-shifting statute creates joint rights to the fee award or whether it creates separate and distinct fee rights for the individual claimants.[110] Invariably, these fee

---

[108] *Id.*

[109] *Id.* at 1334-35.

[110] *See* Crawford v. F. Hoffman-La Roche Ltd., 267 F.3d 760, 766 (8th Cir. 2001); Morrison v. Allstate Indem. Co., 228 F.3d 1255, 1265-66 (11th Cir. 2000); Cohen v. Office Depot, Inc., 204 F.3d 1069, 1080-81 (11th Cir. 2000); Darden v. Ford Consumer Fin. Co., 200 F.3d 753, 759 (11th Cir. 2000); Goldberg v. CPC Int'l, Inc., 678 F.2d 1365, 1367 (9th Cir. 1982). The Ninth Circuit has long viewed fee aggregation

statutes confer a claim for fees on any person who brings that type of suit, such that every individual class member could have asserted a claim for fees had they sued on their own.[111] As such, the courts have held that the fee claim is a separate and distinct right held by each class member and therefore cannot be aggregated.[112]

In other cases, the source of the fee is a common law rule that awards attorneys' fees to class counsel because the class action has conferred a recovery or other benefit upon the absent class members.[113] In this situation, the court determines the size of the fee—usually by awarding a percentage of the recovery, but sometimes by making a lodestar calculation[114]—and then deducts that amount from the class recovery.[115] Because the fee comes out of the fund, the courts hold that the fee award can be valued in the aggregate only if the class members had a common and undivided interest in the damages claim that generated the fund.[116] In other words, if the class claim for substantive liability

arguments as an end run around the Supreme Court's aggregation rules. *See Goldberg*, 678 F.2d at 1367 (asserting that aggregation argument "would seriously undermine and [is] contrary to the rule expressed by the Supreme Court in [*Zahn*]").

111 *See Crawford*, 267 F.3d at 767 (Arkansas deceptive trade practices fee statute creates separate and distinct fee rights); *Morrison*, 228 F.3d at 1266-67 (Florida insurance beneficiary litigation fee statute creates separate and distinct fee rights); *Cohen*, 204 F.3d at 1081 (Florida deceptive trade practices fee statute creates separate and distinct fee rights); *Darden*, 200 F.3d at 758 (Georgia RICO statute creates separate and distinct fee rights).

112 *See* 15 MOORE'S FEDERAL PRACTICE, *supra* note 10, § 102.108[4][c]; *see*, *e.g.*, Mattingly v. Hughes Elecs. Corp., 107 F. Supp. 2d 694, 698 (D. Md. 2000) ("[E]ach member of the class, as a person who brought an action to recover for loss under the Act, would be eligible to recover attorneys' fees. The holding of *Abbott*, therefore, is inapposite, and the rule against aggregation applies to the request for attorneys' fees.").

113 *See* RAND/ICJ STUDY, *supra* note 4, at 77 ("The underlying principle is that all who share in the fund should share in paying the class attorney, even though they have not entered into any prior agreement to hire and pay [the] attorney.").

114 *See* 3 HERBERT NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS APP. § 14.01 (3d ed. 1992 & Supp. 2002) [hereinafter 3 NEWBERG ON CLASS ACTIONS] (listing circuit-by-circuit calculation methods) ; *see also* Judith Resnik et al., *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296, 339-345 (1996) (discussing critically common fund fee calculation methods).

115 *See* 3 NEWBERG ON CLASS ACTIONS, *supra* note 114, § 14.02; *see generally* 7A C.J.S. *Attorney and Client* § 334 (1980) (discussing basis for and operation of common fund fee awards).

116 *See* Leonard v. Enter. Rent A Car, 279 F.3d 967, 974 (11th Cir. 2002); Smith v. GTE, Corp., 236 F.3d 1292, 1306 (11th Cir. 2001); Davis v. Carl Cannon Chevrolet-Olds, Inc., 182 F.3d 792, 796 (11th Cir. 1999).

was a collection of separate and distinct claims, then any fee taken out of the damages fund generated by it must also be valued as a separate and distinct claim.[117] For all practical purposes, this makes the common fund fee award useless for jurisdictional purposes because, if the underlying award—which by definition is much larger than the percentage-based fee award—is aggregable, the underlying award would already have satisfied the jurisdictional amount.

Finally, some cases involve a statute that grants a fee right to class counsel who generate a fund or other benefit to the class as a whole.[118] In these cases, the courts have focused almost exclusively on whether the statute requires that the fee be attributed to the lead plaintiff only, rather than to all of the class members.[119] Implicitly, this means that the courts have rejected aggregate valuation, since attribution would be irrelevant if the court were to consider the total value of the fee award under a common and undivided interest rationale.[120] As with the common law "common fund" cases, however, it appears that the fee is taken out of the class's recovery.[121] Thus, it would make sense to give such fee awards common and undivided interest status

[117] *See Davis*, 182 F.3d at 796; *see also Leonard*, 279 F.3d at 974. Alternatively, some litigants have argued that "common benefit" fee awards, which are paid by the defendant in addition to other damages when the litigation has conferred a public benefit, constitute an aggregable common and undivided interest. *See Smith*, 236 F.3d at 1306; *Davis*, 182 F.3d at 795. In both such cases, however, the court did not reach the aggregation issue because it first found that common benefit fees were not warranted.

[118] *See*, *e.g.*, Grant v. Chevron Phillips Chem. Co., 309 F.3d 864, 871-72 (5th Cir. 2002) (discussing LA. CODE CIV. PROC. art. 595(A)). In *Grant*, the Fifth Circuit also explained that, in addition to being a source of class counsel fees, article 595(A) also acts to attribute the full amount of such fees to the lead plaintiff, including situations where there is a separate statute that generally authorizes fees in that type of case in single-plaintiff suits. *Id.* at 876; *see also In re* Abbott Labs., Inc., 51 F.3d 524, 526-27 (5th Cir. 1995) (attributing full amount of fees recoverable under LA. REV. STAT. § 51.137 to lead plaintiff because of operation of Article 595(A)).

[119] *See Grant*, 309 F.3d at 872-73; Gibson v. Chrysler Corp., 261 F.3d 927, 942 (9th Cir. 2001) (discussing CAL. CIV. PROC. CODE § 1021.5).

[120] Although the Ninth Circuit did not discuss whether the fee at issue was separate and distinct or common and undivided, it explicitly rejected aggregate valuation in *Gibson* by holding that the statutory class counsel fee had to be prorated among all members of the class. *See Gibson*, 261 F.3d at 943.

[121] *See Grant*, 309 F.3d at 872 ("[W]e assume *arguendo* that art. 595(A) does not authorize the court to assess attorneys' fees to the class action defendant; rather, that only the common "fund" or the other "benefits" made available to the class by the class representatives' litigation are eligible sources of such fees." (emphasis added)).

only where the underlying substantive claims would so qualify.[122]

C. Injunctive Relief

Litigants also have argued that class claims for injunctive relief should be valued in the aggregate. The intersection of the aggregation rules and the valuation of injunctive relief can be particularly tricky. First, class claims for injunctive relief have an inherent commonality to them. When a defendant's bad behavior affects many people—as it presumably did in the context of a class action—all of them have a common interest in altering that behavior, and "the granting of equitable relief to one or more class members is bound to affect the group as a whole."[123] Second, the federal courts are split on whether to value injunctive relief based on the benefit to the plaintiff or on the cost to the defendant.[124] The courts that value injunctive relief based on the cost to the defendant have struggled with whether "defendant viewpoint" valuation in class actions constitutes a de facto form of aggregation.

The aggregation analysis is simplest when the court values the claim for injunctive relief according to the benefit that the desired injunction would confer on the plaintiff.[125] When the plaintiff is a class, the courts have consistently held that they may look to the total class-wide benefit only if the substantive rights giving rise to the injunctive remedy are common and undivided.[126] Thus, as with class claims for punitive damages, the courts look past both the joinder mechanism and the nature of the remedy and focus on whether the underlying substantive rights satisfy the common and undivided interest exception for claim aggregation. Where they do not, each individual member must show that the desired injunction would yield a benefit to him of more than

---

[122] *See supra* notes 113-17 and accompanying text.

[123] Shapiro, *supra* note 65, at 925.

[124] *See supra* notes 51-55 and accompanying text.

[125] According to one leading treatise, "[t]he majority of federal courts have chosen to use the plaintiff viewpoint rule." 15 MOORE'S FEDERAL PRACTICE, *supra* note 10, § 102.109[3]. Even within this framework, however, the courts sometimes disagree over how to calculate the value of particular types of benefits that the injunction might confer. *See* 14B FEDERAL PRACTICE AND PROCEDURE, *supra* note 23, § 3708.

[126] *See* Smith v. GTE Corp., 236 F.3d 1292, 1309-10 (11th Cir. 2001) (no aggregation of injunctive relief where underlying fraud claims were separate and distinct); Morrison v. Allstate Indem. Co., 228 F.3d 1255, 1271 (11th Cir. 2000) (no aggregation of injunctive relief where underlying insurance claims were separate and distinct); Burns v. Mass. Mut. Life Ins. Co., 820 F.2d 246, 250 (8th Cir. 1987) (same).

$75,000.[127]

The aggregation analysis is much trickier in jurisdictions that recognize the "either viewpoint" rule, which measures the amount in controversy by either the benefit to the plaintiff or the harm to the defendant.[128] Obviously, the either viewpoint rule is more liberal, since it would grant diversity jurisdiction based on the value of the harm to the defendant in cases where the value of the benefit to the plaintiff would not satisfy the amount in controversy requirement. While the either viewpoint approach may better implement diversity jurisdiction in general,[129] it is problematic in the class action context because, strictly followed, the harm to the defendant equals the cost of complying with an injunction running to each and every class member. As one treatise puts it, "[t]o view the jurisdictional amount from the viewpoint of the cost to the defendant in these cases would be to open the back door to the federal courthouse to claims that are otherwise barred by the nonaggregation rule."[130]

The federal circuits started to address this potentially gaping end run around the non-aggregation rule almost immediately after *Snyder*. In 1970, the Tenth Circuit held that a "total detriment" value could be used only where the court first determined that the plaintiffs had a common and undivided interest leading them to seek the same injunctive relief, lest "[t]he doctrine of *Snyder* . . . be so easily evaded."[131] In 1977, the Ninth Circuit followed *Lonnquist* and refused to allow defendant viewpoint valuation of a class claim for injunctive relief where the class members' rights were separate and distinct on the basis that, in

127 *See Smith*, 236 F.3d at 1310.

128 *See* 15 MOORE'S FEDERAL PRACTICE, *supra* note 10, § 102.109[4].

129 *See* McInnis, *supra* note 49, at 1033-34 (arguing that the either viewpoint rule better implements the purposes underlying diversity jurisdiction); *see also* 15 MOORE'S FEDERAL PRACTICE, *supra* note 10, § 102. 109[3] ("One may reasonably question whether the plaintiff viewpoint rule legitimately fosters the purposes served by the jurisdictional minimum.").

130 15 MOORE'S FEDERAL PRACTICE, *supra* note 10, § 102.109[6]; *see generally* 2 HERBERT NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS § 6.11 (3d ed. 1992) (discussing defendant viewpoint valuation under section entitled "Ways to Avoid *Snyder* and *Zahn*").

131 Lonnquist v. J.C. Penney Co., 421 F.2d 597, 599 (10th Cir. 1970). That same year, the Eighth Circuit rejected defendant viewpoint valuation in class actions altogether, also to preserve *Snyder*'s rule of non-aggregation. *See* Mass. State Pharmaceutical Ass'n v. Fed. Prescription Serv., Inc., 431 F.2d 130, 132 n.1 (8th Cir. 1970). *See generally* Note, *Closing the Courthouse Door: The Aftermath of* Snyder v. Harris, 68 NW. U. L. REV. 1011, 1017-18 (1974) (discussing defendant viewpoint valuation as possible mitigation of *Snyder*).

that context, "'[t]otal detriment' is basically the same [thing] as aggregation."[132] Since then, every circuit court to have addressed the issue has agreed that, in class actions, defendant viewpoint valuation is a de facto form of aggregation.[133] Accordingly, the defendant-viewpoint courts will consider the total cost to the defendant only where the class members' underlying claims giving rise to the injunction request are aggregable under *Snyder* and the common and undivided interest test.[134]

D. Restitution

Finally, litigants have argued that courts should employ aggregate valuation in equitable suits for restitution, typically where the class alleges unjust enrichment and seeks an order requiring the defendant to disgorge the ill-gotten gains.[135] The federal

[132] Snow v. Ford Motor Co., 561 F.2d 787, 790 (9th Cir. 1977).

[133] *See* Kanter v. Warner-Lambert Co., 265 F.3d 853, 859-60 (9th Cir. 2001); *In re* Ford Motor Co./Citibank (S.D.), 264 F.3d 952, 958-59 (9th Cir. 2001); *In re* Brand Name Prescription Drugs Antitrust Litig., 123 F.3d 599, 610 (7th Cir. 1997); Packard v. Provident Nat'l Bank, 994 F.2d 1039, 1050 (3d Cir. 1993) ("[A]llowing the amount in controversy to be measured by the defendant's cost would eviscerate [*Snyder*'s] holding that the claims of class members may not be aggregated in order to meet the jurisdictional threshold.").

[134] *See In re Ford*, 264 F.3d at 959; *Packard*, 994 F.2d at 1050 & n.14. The Ninth Circuit, however, has suggested that *Snow* articulated a rule to prevent end runs around *Snyder* in cases seeking money damages, such that it might allow total detriment valuation of class claims seeking genuine injunctive relief under Rule 23(b)(2). *See Kanter*, 265 F.3d at 860.

[135] There is a rich literature arguing that the current "law of restitution" conflates the concepts of restitution, unjust enrichment, and disgorgement. *See* Symposium, *Restitution and Unjust Enrichment*, 79 TEX. L. REV. 1763 (2001). The debate coincides with the American Law Institute's efforts to draft an updated restatement of the law in this area. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT (Discussion Draft, Mar. 31, 2000). One of the issues that intersects with diversity jurisdiction is whether current restitution law properly differentiates situations where the plaintiff's recovery should be based on the defendant's gains (disgorgement) versus the plaintiff's own losses (restoration). *See* James J. Edelman, *Unjust Enrichment, Restitution, and Wrongs*, 79 TEX. L. REV. 1869, 1870 (2001) (arguing that failure to differentiate between unjust enrichment and restitution leads courts to conflate disgorgement and restoration remedies); Andrew Kull, *Disgorgement for Breach, the "Restitution Interest," and the Restatement of Contracts*, 79 TEX. L. REV. 2021, 2022-23 (2001) (discussing the problem of conflating restoration and disgorgement in breach of contract context); *see also* Colleen P. Murphy, *Misclassifying Monetary Restitution*, 55 SMU. L. REV. 1577, 1580 (2002) (arguing that misunderstanding of restitution has led courts to categorize restoration damages as restitutionary). In the context of claim valuation, however, the federal courts are—or at least ought to be—agnostic bystanders to that debate. Diversity jurisdiction takes state law as it finds it. *See* Horton v. Liberty Mut. Ins. Co., 367 U.S. 348, 352-53 (1961) (in diversity, federal courts "look to state law to determine the nature and

courts have demonstrated a certain skepticism regarding these claims, oftentimes viewing them as an attempt to evade *Snyder* by recasting a "separate and distinct" monetary damages claim into a "common and undivided" equitable claim.[136] As with claims for punitive damages, one of the most influential decisions has been the Second Circuit's opinion in *Gilman*, wherein the court rejected aggregation of a class restitution claim based on its overarching rule that "what controls is the nature of the right asserted, not whether successful vindication of the right will lead to a single pool of money that will be allocated among the plaintiffs."[137] Many courts follow the *Gilman* test and value a class action based on the total amount of monies to be disgorged only if the class members held their underlying substantive rights in common.[138] Several district courts, however, have rejected *Gilman* and instead view class claims for disgorgement as inherently common and undivided.[139]

III

THE CURRENT METHODS FOR VALUING COMMON RELIEF CLAIMS WHEN THE UNDERLYING RIGHTS ARE SEPARATE AND DISTINCT

Once the federal courts rejected—or, more accurately, se-

extent of the right to be enforced"). Thus, whether state law is making normative errors in choosing between plaintiff loss or defendant gain as the measure of damages is immaterial. Whatever rule the state employs, the federal court must accept it as the "correct" and controlling rule.

136 *See* Crawford v. F. Hoffman-La Roche Ltd., 267 F.3d 760, 766 n.3 (8th Cir. 2001); Del Vecchio v. Conseco, Inc. 230 F.3d 974, 977-78 (7th Cir. 2000).

137 Gilman v. BHC Sec., Inc., 104 F.3d 1418, 1427 (2d Cir. 1997).

138 *See Crawford*, 267 F.3d at 766; *In re Ford*, 264 F.3d at 961; Gibson v. Chrysler Corp., 261 F.3d 927, 945-46 (9th Cir. 2001); *Del Vecchio*, 230 F.3d at 978; *see also* McCoy v. Erie Ins. Co., 147 F. Supp. 2d 481, 491 (S.D. W. Va. 2001); Aetna U.S. Healthcare, Inc. v. Hoechst Aktiengesellschaft, 54 F. Supp. 2d 1042, 1050 (D. Kan. 1999).

139 *See* Durant v. Servicemaster Co., 147 F. Supp. 2d 744, 750 (E.D. Mich. 2001); *In re* Cardizem CD Antitrust Litig., 90 F. Supp. 2d 819, 828-29 (E.D. Mich. 1999); Aetna U.S. Healthcare, Inc. v. Hoechst Aktiengesellschaft, 48 F. Supp. 2d 37, 42 (D.C. Cir. 1999). There is a parallel line of demarcation based on whether the underlying substantive restitution law allows an individual plaintiff to obtain disgorgement of the defendant's entire ill-gotten gains or instead limits the plaintiff to seeking only the amounts he unjustly paid to the defendant. *See infra* notes 193-98 and accompanying text. In general, where an individual plaintiff may only recover his own overpayments, the courts have not found the class to have a common and undivided interest in restitution. *See*, *e.g.*, Pope v. Indep. Order of Foresters, No. 3:01CV-626-S, 2001 WL 1733606 (W.D. Ky. July 23, 2002) (no common and undivided interest where plaintiff can only recover his own overpayments).

verely limited—aggregation of class claims for common relief, they found that their valuation job was only beginning. To be precise, once a court rejects aggregate valuation of any particular claim brought by the class, it must then determine the value of that claim for each class member separately. Moreover, when there are multiple non-aggregable class claims, the court must calculate a separate class member value for each of those claims. Thus, when a class action presents a variety of non-aggregable claims, the court must conduct a series of separate valuations to yield "per class member" values for each claim, which are then added to each class member's individual compensatory damages claim to determine each class member's total amount in controversy.[140] This Part describes the methods the courts have developed to value the various common relief claims when they are separate and distinct, and therefore non-aggregable.

A. Punitive Damages

The most common method of calculating the per class member value of a class claim for punitive damages predicated on separate and distinct individual rights is to divide the value of the class-wide punitive damages by the number of class members. While only the Eleventh Circuit has explicitly adopted pro rata valuation as its customary method of individually valuing class claims for punitive damages,[141] at least two other circuits—the Fifth and the Ninth—have implicitly adopted pro rata valuation.[142] Moreover, district courts in at least five other circuits

[140] *See* Morrison v. Allstate Indem. Co., 228 F.3d 1255, 1271 (11th Cir. 2000) (adding individual class members' claims for compensatory damages with their prorated share of attorneys' fees and their prorated share of punitive damages); Spann v. Style Crest Prods., Inc., 171 F. Supp. 2d 605, 611 (D.S.C. 2001) ("The amount in controversy includes each individual plaintiff's claim for compensatory damages, any punitive damages award divided pro rata per plaintiff, and the cost of injunctive relief for each plaintiff.").

[141] *See* Leonard v. Enter. Rent a Car, 279 F.3d 967, 972 (11th Cir. 2002) ("[F]or amount in controversy purposes a class punitive damages claim must be allocated *pro rata* to each class member."). Indeed, the Eleventh Circuit seems to conclude that pro rata valuation is the natural and inexorable consequence of a court's belief that the class members' underlying claims are non-aggregable. *See* Cohen v. Office Depot, Inc., 204 F.3d 1069, 1073 (11th Cir. 2000) ("If the single punitive damages claim cannot be attributed as a whole to each class member, it must be allocated or divided *pro rata* among the class members"); *see also Morrison*, 228 F.3d at 1264 ("Instead of being aggregated . . . the amount of punitive damages must be divided equally among all of the class members to determine the proper amount in controversy for each member.").

[142] *See Gibson*, 261 F.3d at 945 (rejecting defendants request that the court value

have employed pro rata valuation on at least one occasion to value class punitive damage claims.[143]

Pro rata valuation operates most clearly and visibly when the court knows both the value of the class claim and the number of plaintiffs in the class. In those cases, the court can actually "do the math" and determine a precise figure to allocate to each class member. In *Cohen v. Office Depot, Inc.*, for example, the complaint sought class-wide punitive damages in the amount of ten million dollars.[144] Dividing this amount by the 39,000 class members, the Eleventh Circuit concluded that the prorated per class member value of the punitive damages claim was just $256.[145]

In many cases, though, the court lacks a precise figure—or even an estimate—for either the numerator (the total value of the class claim for punitive damages) or the denominator (the size of the class). In those cases, the courts often extrapolate a prorated per class member amount in controversy.[146] In *Smith v. GTE Corp.*, for example, the class complaint did not seek a spe-

---

the case based on "the totality of punitive damages, rather than the per-plaintiff share"); Ard v. Transcon. Gas Pipe Line Corp., 138 F.3d 596, 602 (5th Cir. 1998) (following *Lindsey v. Alabama Telephone Co.*, 576 F.2d 593 (5th Cir. 1978), which itself implicitly adopted pro rata valuation). The district courts in both the Fifth and Ninth Circuits certainly have understood these decisions as requiring them to prorate the value of class claims for punitive damages. *See*, *e.g.*, Ecker v. Ford Motor Co., No. 02-CV-6833, 2002 WL 31654558, at *2 (C.D. Cal. Nov. 12, 2002) (finding no basis to conclude that the pro rata value of class punitive damages satisfied the jurisdictional amount).

143 *See* Freitas v. First N.H. Mortgage Corp., No. 98-211ML, 1998 WL 657606, at *6 (D.R.I. July 23, 1992) (First Circuit); McIntyre v. Nationwide Mut. Fire Ins. Co., No. CIV. A. 01-3476, 2001 WL 893697, at *1 (E.D. Pa. Aug. 6, 2001) (Third Circuit); *Spann*, 171 F. Supp. 2d at 609; Garbie v. Chrysler Corp., 8 F. Supp. 2d 814, 819 (N.D. Ill. 1998) (Seventh Circuit); Radmer v. Aid Ass'n for Lutherans, No. 99-0961-CV-W-9-4, 2000 WL 33910093, at *5 (W.D. Mo. April 7, 2000) (Eighth Circuit).

144 204 F.3d at 1077.

145 *Id.*

146 Occasionally, the courts do not even bother to perform the extrapolations on the basis that the prorated amounts necessary to meet the jurisdictional amount are so far-fetched that it is not necessary to perform precise calculations. *See Leonard*, 279 F.3d at 973, noting:

> Although both the size of the class and the amount of damages sought were left undefined by the defendants, making it impossible for us to perform the precise calculation, we can conclude that without the benefit of aggregation, defendants would be unable to carry their burden of proof that the punitive damages are likely to exceed $75,000.

See also Smith v. GTE Corp., 236 F.3d 1292, 1306 (11th Cir. 2001) (concluding, without calculations, that an attorney's fee award prorated "to each of the more than 36,000 class members would be well under $75,000").

cific amount of class-wide punitive damages.[147] The court was able to estimate the size of the class at approximately 36,000 class members, however, and it knew that the average class members had less than $2,000 in compensatory damages.[148] Calculating that each class member would need to recover $73,000 in prorated punitive damages to satisfy the jurisdictional amount, the court found that the required total punitive damages award of $2.6 billion would violate the Due Process Clause and therefore was "not possible as a matter of law."[149] The most graphic example is perhaps *Morrison v. Allstate Indemnity Co.*, in which the plaintiff's complaint sought punitive damages against Allstate based on Allstate's practice of not compensating policyholders for the diminished resale value of a repaired vehicle.[150] Estimating the size of the class at over one million persons, the court noted that a "good faith" punitive damages claim of 100 million dollars would still prorate to just $100 per class member.[151]

A second method courts have used to calculate per class member values for class punitive damages claims is to attribute to each class member the full amount of damages claimed by the class as a whole. The leading—and perhaps only[152]—example of this is the Fifth Circuit's decision in *Allen v. R&H Oil & Gas Co.*[153] The *Allen* case is often cited as the first case allowing the aggregation of claims for punitive damages, since it did find that all 512 joined plaintiffs satisfied the amount in controversy re-

147 236 F.3d at 1300.

148 *Id.* at 1304.

149 *Id.* (citing BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996)).

150 Morrison v. Allstate Indem. Co., 228 F.3d 1255, 1265 (11th Cir. 2000).

151 *Id.* The court added: "Even a one billion dollar punitive damages claim, which could hardly be asserted in good faith, would amount to less than [$1,000] for each class member." *Id.* For another extrapolation, see *Kirkland v. Midland Mortgage Co.*, in which the court held that the $700 million punitive damages claim it would take for the 9,400 class members to each reach $75,000 was "inconceivable under the circumstances." 243 F.3d 1277, 1281 (11th Cir. 2001). *See also* Garbie v. Chrysler Corp., 8 F. Supp. 2d 814, 819 (N.D. Ill. 1998) (holding that forty-five million dollars in punitive damages required to yield sufficient prorated damages would be excessive as a matter of law).

152 One district court has held that the full amount of punitive damages may be attributed to each putative class member when the complaint phrases the demand for punitive damages as a collective right. *See* Knauer v. Ohio State Life Ins. Co., 102 F. Supp. 2d 443, 449 (N.D. Ohio 2000). This test differs from the *Allen* test, however, which looks to the nature of punitive damages under the applicable state law, rather than the plaintiff's style of pleading.

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

quirement based on the class claim for punitive damages.[154] But, as discussed earlier, *Allen* did not arrive at that result through aggregation.[155] Rather, the Fifth Circuit held that, under Mississippi law, "each plaintiff has an integrated right to the full amount of [a punitive damages] award."[156] Thus, "no aggregation—meaning the addition of separate claims—is necessary."[157] The Fifth Circuit, however, has essentially limited the rule of full individual attribution to punitive damage claims under Mississippi law.[158]

B. Attorneys' Fees

As with punitive damages, courts rarely find that attorneys' fees are a common and undivided interest that can be aggregated to satisfy the jurisdictional amount.[159] Thus, the class members may rely only on the value of attorneys' fees individually attributable to them. In turn, this requires courts to calculate a per class member value for attorneys' fees when they are sought on behalf of a plaintiff class. Two methods have emerged.

The most common method is for courts to prorate the value of the class-wide fee claim among all members of the class. This method is particularly prevalent where each class member could have sued individually under a statute that also allowed them to recover attorneys' fees if they won.[160] Courts also prorate the

154 *See supra* notes 103-06 and accompanying text.

155 *See supra* notes 108-09 and accompanying text.

156 *Allen*, 63 F.3d at 1333-34.

157 *Id.* at 1334-35.

158 *See*, *e.g.*, H&D Tire & Automotive-Hardware Inc. v. Pitney Bowes, Inc., 250 F.3d 302, 304-05 (5th Cir. 2001) ("*Allen* was limited—by the panel that decided it—to the unique circumstances of Mississippi law."); Ard v. Transcon. Gas Pipe Line Corp., 138 F.3d 596, 602 (5th Cir. 1998) ("*Allen* departs from *Lindsey* solely because of the peculiar nature of punitive damages under Mississippi law").

159 *See supra* notes 110-22 and accompanying text.

160 *See* Crawford v. F. Hoffman-La Roche Ltd., 267 F.3d 760, 766-67 (8th Cir. 2001) (deceptive trade practices act allowing individual suit and awarding fees to "any person who suffers actual damage or injury"); Kanter v. Warner-Lambert Co., 265 F.3d 853, 859 (9th Cir. 2001) (consumer fraud act allowing individual suit and awarding fees to "prevailing party"); Spielman v. Genzyme Corp., 251 F.3d 1, 8-9 (1st Cir. 2001) (consumer fraud act allowing individual suit and awarding fees to the "petitioner"); Cohen v. Office Depot, Inc., 204 F.3d 1069, 1080 (11th Cir. 2000) (consumer fraud act allowing individual suit and awarding fees to "prevailing party"); Darden v. Ford Consumer Fin. Co., 200 F.3d 753, 758 (11th Cir. 2000) (state RICO act allowing individual suit and awarding fees to "any person who is injured"); Talalai v. Cooper Tire & Rubber Co., No. 00CV5694AJL, 2001 WL 1877265, at *3 (D.N.J. Jan. 8, 2001) (consumer fraud act allowing individual suit and awarding fees to "prevailing party").

value of "common fund" attorneys' fee awards,[161] which necessarily belong to the class as a whole—and not to named plaintiffs alone—because they are deducted from the class-wide damages recovery.[162]

Because class actions involve large numbers of plaintiffs, the per class member value of prorated attorneys' fees will almost certainly be too small to push any class members over the $75,000 jurisdictional threshold.[163] As with punitive damages, courts sometimes use extrapolations to demonstrate this point. In *Cohen v. Office Depot, Inc.*, for example, the Eleventh Circuit noted that, since each plaintiff had on average only $260 in compensatory damages, each would need to identify almost $75,000 in individually-attributable attorneys' fees to meet the amount in controversy requirement.[164] But, because the class contained 39,000 members, it would take $2.9 billion in attorneys' fees to give each plaintiff a prorated $75,000, a result the court understatedly characterized as "not possible."[165]

The other method courts have used is to attribute the full amount of the class-wide fees to the named plaintiff, but attribute no amount to the absent class members. The courts have employed this valuation method where the claim for attorneys' fees is based on a statute that authorizes an award of fees to "the representative parties" in a class action that generates a common recovery or benefit.[166] Under Louisiana law, this includes cases where the class members individually would have had a right to fees.[167] In general, though, the courts seem to disfavor this

161 *See* Smith v. GTE Corp., 236 F.3d 1292, 1306 (11th Cir. 2001).

162 *See* Davis v. Carl Cannon Chevrolet-Olds, Inc., 182 F.3d 792, 795 (11th Cir. 1999).

163 *See* Morrison v. Allstate Indem. Co., 228 F.3d 1255, 1268 (11th Cir. 2000) ("[G]iven the plaintiffs' allegations regarding the size of the subclass, the portion attributed to each member would be minimal."); Perotti v. Black & Decker (U.S.), Inc., 205 F. Supp. 2d 813, 819 (N.D. Ohio 2002) (prorated fees would be at most $1,000 per class member).

164 *Cohen*, 204 F.3d at 1083 & n.16.

165 *Id.*

166 *See In re* Abbott Labs., 51 F.3d 524, 526 (5th Cir. 1995) (Louisiana fee statute); *see also* Martin v. Franklin Capital Corp., 251 F.3d 1284, 1293 n.7 (10th Cir. 2001) (acknowledging that full amount of attorneys' fees might be allocated to named plaintiffs if fee statute expressly awards them to the class representatives); 15 MOORE'S FEDERAL PRACTICE, *supra* note 10, § 102.108[4][c] ("[I]f the statute awards attorney's fees to the named plaintiff in a class action, the fees are attributable solely to the class representative.").

167 *See* Grant v. Chevron Phillips Chem. Co., 309 F.3d 864, 876 (5th Cir. 2002) ("When a separate, specific Louisiana law provides for the award of attorney's

method, and instead have prorated the class fee—even when the right to fees existed solely because the action sought class relief—where the fee statute did not specifically identify the class representative as the recipient of those fees.[168]

C. Injunctive Relief

As discussed above, the circuits strictly limit aggregate valuation of class claims for injunctive relief to those cases where the class members derived their individual claims from the same right or title.[169] Thus, in most class actions seeking injunctive relief, the *Snyder* rule prevents the individual class members from relying on the total value of class-wide injunctive relief sought. Instead, the class members must show that their own separate claims—including their claims entitling them to injunctive relief—meet the amount in controversy requirement. As a result, courts must calculate a per class member value for non-aggregable class claims for injunctive relief.

Calculating a per plaintiff value for class-wide injunctive relief is easiest—and most straightforward—in those jurisdictions that value injunctive relief solely from the viewpoint of the plaintiff.[170] Under the plaintiff viewpoint rule, the value of the claim is based on "what the plaintiff will recover or avoid losing if the suit is successful."[171] Stated otherwise, the value of injunctive relief is "the monetary value of the benefit that would flow to the plaintiff if the injunction were granted."[172]

Where the benefit flowing from the requested injunction seems sufficiently concrete, courts have calculated specific present values of that relief for the class members. In *Smith v. GTE Corp.*, for example, the court calculated that the maximum

fees . . . art. 595(A) requires all such fees to be . . . aggregated and attributed to the class representatives").

168 *See* Gibson v. Chrysler Corp., 261 F.3d 927, 942-43 (9th Cir. 2001) (common fund fee statute that awarded fees to the "successful party" did not direct that they be attributed in full to the named plaintiffs); H&D Tire & Automotive-Hardware, Inc. v. Pitney Bowes, Inc., 227 F.3d 326, 330 (5th Cir. 2000) (where statute allowed class fees "to the plaintiff," the "use of the word 'plaintiff' . . . does not dictate that any fee award must be attributed solely to the representative party in a class action").

169 *See supra* notes 123-34 and accompanying text.

170 For a discussion of how the various circuits value injunctive relief, see *supra* notes 51-55 and accompanying text.

171 15 MOORE'S FEDERAL PRACTICE, *supra* note 10, § 102.109[3].

172 Cohen v. Office Depot, Inc., 204 F.3d 1069, 1077 (11th Cir. 2000).

amount of money any class member might hope to save as a result of an injunction that would order the phone company to cease imposing excessive lease charges was $7,200, reduced to present value.[173] More commonly, however, the courts have declared the value to be zero for all class members on the basis that the benefits were either too speculative or simply had no monetary value.[174]

What is perhaps most significant about these cases, however, is what the courts are not doing—they are not prorating. In *Smith*, the court did not take the total monetary benefit of the injunction and divide it, but instead it determined per class member value by calculating the maximum monthly benefit "[a]s to any individual class member" over the life of the injunction.[175] The absence of prorating is most pronounced in *Morrison v. Allstate Indemnity Co.*[176] In that case, the plaintiff class claimed that Allstate's policy language required it to compensate policy holders for the diminished value of repaired cars, and the class sought an injunction that would obligate Allstate to pay such claims in the future.[177] The court concluded that the per class member value was zero because it was "simply impossible to know which class members will be involved in automobile accidents" in the future and that the value of any such claims was "equally uncertain."[178] When discussing (and rejecting) aggregate valuation, though, the court acknowledged that, given a class of over one million policyholders, the present value of all future diminished value claims would exceed $75,000.[179] Thus, had the court used pro rata valuation, it could have estimated the value of the future benefits that would accrue to the class as a whole and then divided that amount by the number of class members, yielding a small but positive number for all class members.

Individual valuation of class claims for injunctive relief is trickier in those jurisdictions where the courts can value injunctive relief from the viewpoint of the defendant. In the context of a class action, pure defendant viewpoint valuation would mean

---

[173] Smith v. GTE Corp., 236 F.3d 1292, 1309 (11th Cir. 2001).

[174] *See* Leonard v. Enter. Rent a Car, 279 F.3d 967, 973 (11th Cir. 2002); *Cohen*, 204 F.3d at 1077.

[175] 236 F.3d at 1309.

[176] Morrison v. Allstate Indem. Co., 228 F.3d 1255, 1270 (11th Cir. 2000).

[177] *Id.* at 1268.

[178] *Id.* at 1269.

[179] *Id.* at 1270.

that the value of the case would be the cost to the defendant of complying with an injunction running to the entire class. As discussed above, all of the circuit courts in the defendant viewpoint jurisdictions that have addressed the issue have held that pure defendant viewpoint valuation in class actions would be a form of de facto aggregation,[180] and therefore do not allow it except where the underlying substantive claims are common and undivided such that they could be aggregated under *Snyder*.[181]

Having concluded that they could not value the case based on the cost of complying with class-wide injunctive relief, these courts then had to find an alternative method of valuation. One approach has been to simply reject defendant viewpoint valuation in class actions and require that class claims for injunctive relief be valued from the plaintiff's perspective only.[182] More commonly, however, the courts have allowed defendant viewpoint valuation but adjusted it to account for the de facto aggregation effect. Some courts adjust by prorating the defendant's costs among the class members.[183] The Seventh and Ninth Circuits, however, take a fundamentally different approach, and calculate the individual value of the case based on the cost to the defendant of an injunction running to a single plaintiff.[184] In other words, the jurisdictional value is determined by hypothesiz-

---

[180] *See supra* notes 131-34 and accompanying text.

[181] *Compare In re* Cardizem CD Antitrust Litig., 90 F. Supp. 2d 819, 836 (E.D. Mich. 1999) (valuing injunctive relief in aggregate based on finding that plaintiffs had common and undivided interest); Edge v. Blockbuster Video, Inc., 10 F. Supp. 2d 1248, 1253 (N.D. Ala. 1997) (same), *with In re* Ford Motor Co./Citibank (S.D.), 264 F.3d 952, 959 (9th Cir. 2001); *In re* Brand Name Prescription Drugs Antitrust Litig., 123 F.3d 599, 610 (7th Cir. 1997) (finding that class members had individual rights to relief rather than an undivided right); Packard v. Provident Nat'l Bank, 994 F.2d 1039, 1050 n.14 (3d Cir. 1993) (discussing and rejecting common and undivided interest aggregation).

[182] *See* Mass. State Pharm. Ass'n v. Fed. Prescription Serv., Inc., 431 F.2d 130, 132 n.1 (8th Cir. 1970) (finding that plaintiff viewpoint is "the only valid rule" in class actions in light of *Snyder*); Nelson v. Assocs. Fin. Servs. Co., 79 F. Supp. 2d 813, 818 (W.D. Mich. 2000).

[183] *See* Mattingly v. Hughes Elecs. Corp., 107 F. Supp. 2d 694, 698 (D. Md. 2000); Aetna U.S. Healthcare, Inc. v. Hoechst Aktiengesellschaft, 54 F. Supp. 2d 1042, 1051 (D. Kan. 1999); *see also* McIntire v. Ford Motor Co., 142 F. Supp. 2d 911, 925 (S.D. Ohio 2001) (although finding itself limited to plaintiff viewpoint, stating that in the alternative it would prorate defendant viewpoint costs).

[184] *See In re Ford*, 264 F.3d at 959; *In re Brand Name Drugs*, 123 F.3d at 610; *see also* Spann v. Style Crest Prods., Inc., 171 F. Supp. 2d 605, 611 (D.S.C. 2001) ("[T]he amount in controversy with respect to the injunctive relief is the cost to defendants of providing notification to each plaintiff."); *In re* Microsoft Corp. Antitrust Litig., 127 F. Supp. 2d 702, 719 & n.16 (D. Md. 2001).

ing how much the proposed injunction would cost the defendant *if sought by an individual class member*.

For the courts that value class claims according to the cost to the defendant of a hypothetical single-plaintiff injunction, a troublesome question remains regarding what items to include when calculating the cost to the defendant. In the Ninth Circuit's *In re Ford* case, for example, the plaintiff class sought an injunction ordering Ford and Citibank to reinstate a credit card rebate program.[185] Ford and Citibank, who were opposing a remand motion, argued that the jurisdictional amount was satisfied, even when valued as the cost to the defendant of an injunction running to a single plaintiff, because "the fixed costs to Ford and Citibank of reinstating and maintaining the [rebate] program would be the same whether it is done for one plaintiff or for six million."[186] The court rejected this argument, explaining that if "the administrative costs of complying with an injunction were permitted to count as the amount in controversy, 'then every case, however trivial, against a large company would cross the threshold.'"[187] In an opinion issued just four days later, a different panel of the Ninth Circuit also rejected valuation based on the defendant's compliance costs, holding that they simply were not a proper element of the amount in controversy when the primary object of the case was to secure monetary damages rather than injunctive relief.[188]

In both *Ford* and *Kanter*, the decision to not count internal compliance costs as part of the amount in controversy was critical to the conclusion that the value of a "single plaintiff injunction" was below the jurisdictional amount. One need only look to the District of Maryland's decision in *In re Microsoft Corp. Antitrust Litigation* to see the impact of including those types of costs in

---

185 *See In re Ford*, 264 F.3d at 958.

186 *Id.* at 960.

187 *Id.* at 961 (*quoting In re Brand Name Drugs*, 123 F.3d at 610). The Seventh Circuit reached the same conclusion, but in dicta. *See In re Brand Name Drugs*, 123 F.3d at 610 (suggesting it would not count "a defendant's clerical or ministerial costs of compliance" but adding that it "needn't bite this bullet" because the defendants failed to create a record for such a calculation).

188 *See* Kanter v. Warner-Lambert Co., 265 F.3d 853, 858 (9th Cir. 2001); *see also* Post v. Gen. Motors Corp., No. 01 CIV.9410 TPG, 2002 WL 1203847, at *3 (S.D.N.Y. June 3, 2002) (rejecting GM's argument that the cost to comply with an injunction to stop committing fraud included GM's internal cost to redesign that particular vehicle in a suit alleging fraud based on sale of car with defective brakes).

the amount in controversy.[189] In that case, the class sought a mandatory injunction ordering Microsoft to offer unbundled operating software.[190] Following *Gilman* and *Brand Name Drugs*, the court valued each class member's injunctive relief separately based on the cost of an injunction running in favor of one plaintiff to avoid running afoul of the non-aggregation rule of *Snyder*.[191] Even so, the court found the value of each single plaintiff's injunctive relief to exceed $75,000 because "the immense cost to Microsoft of accomplishing this untying would be the same whether it is done for one plaintiff or for millions."[192]

D. Restitution

While a few decisions hold that restitution claims are inherently aggregable because the class members have a common and undivided interest in the defendant's ill-gotten gains, most courts follow *Gilman* and allow aggregate valuation only in the rare situations where the class members held the substantive rights underlying the restitution claim in common prior to the lawsuit.[193] Thus, in most cases, the court must calculate a per class member value for the class-wide restitution claim. Unfortunately, none of the circuit court decisions has then proceeded to actually calculate a per class member value for the class restitution claim at issue.

In the district courts, the operative rule seems to be that the per class member value of a class claim for restitution is the amount each class member could have obtained had he or she litigated separately. This amount can vary drastically depending on the underlying state substantive law. In some circumstances, the substantive law would permit a plaintiff suing individually to recover all of the defendant's ill-gotten gains.[194] In this situation,

189 127 F. Supp. 2d at 719.

190 *Id.* at 718.

191 *Id.* at 719.

192 *Id.* The court previously had found that redesigning its operating software to comply with the requested injunction "would cost millions of dollars." *Id.* at 718. *See also* Jackson v. Johnson & Johnson, Inc., No. 01-2113 DA, 2001 WL 34048067, at *5 (W.D. Tenn. April 3, 2001) (finding, in suit seeking injunction for medical monitoring, jurisdictional amount met because "the clerical and administrative costs of such a program alone would certainly exceed $75,000").

193 *See supra* notes 135-39 and accompanying text.

194 According to one treatise, one of the defining characteristics of restitution is that it "measures the remedy by the defendant's gain and seeks to force disgorgement of that gain." 1 DAN B. DOBBS, LAW OF REMEDIES § 4.1(1) (2d ed. 1993).

the per class member value of the restitution claim would be the entire amount of the unjust benefit obtained by the defendant.[195] At other times, the applicable state substantive law might limit a plaintiff's recovery to those sums that the defendant unlawfully obtained from him personally.[196] In that situation, the per class member value of the restitution claim is limited to what that plaintiff personally overpaid to the defendant.[197] Some of the circuit court opinions also hint at valuing restitution based on what each class member personally overpaid.[198]

IV

THE RULE OF INDIVIDUAL VALUATION

Taken together, Parts II and III of this Article demonstrate that while the valuation of class claims for common relief appears uniform on the surface, it is turbulent underneath. On the surface, the circuit courts now uniformly limit common and undivided interest aggregation to situations where the class members hold the rights underlying the class claim jointly. As a result, most class action common relief claims are ultimately valued on a class member by class member basis. But when the time comes for the courts to actually calculate per class member values, they adopt vastly divergent ways of doing it.

This Part considers how these divergent valuation methods compare with the established principles of claim valuation. The dominant principle underlying multi-party claim valuation—including most examples of so-called "aggregate" valuation—is

---

195 *See In re Microsoft*, 127 F. Supp. 2d at 720.

196 *See* McCoy v. Erie Ins. Co., 147 F. Supp. 2d 481, 491 (S.D. W. Va. 2001) ("The class members . . . stand to recover only the amount of excessive premiums each paid under his or her own policy.").

197 *See id.*; Aetna U.S. Healthcare, Inc. v. Hoechst Aktiengesellschaft, 54 F. Supp. 2d 1042, 1050 (D. Kan. 1999); *see also* Pope v. Indep. Order of Foresters, No. 3:01CV-626-S, 2002 WL 1733606, at *2 (W.D. Ky. July 23, 2002) (class members seeking only those unearned premiums he or she paid, rather than comprehensive disgorgement of all profits).

198 *See*, *e.g.*, Gibson v. Chrysler Corp., 261 F.3d 927, 945 (9th Cir. 2001) (referencing the $6 to $16 of profit per vehicle Chrysler obtained by using a substandard electrocoating technique because "[t]hat sum can be traced to particular transactions involving individual plaintiffs, each of whom can sue Chrysler for *disgorgement of this per-vehicle profit*") (emphasis added); Gilman v. BHC Secs., Inc., 104 F.3d 1418, 1426 (2d Cir. 1997) (interpreting the class complaint as seeking a "collective demand by class members for the disgorgement of order flow payments received in respect of *their individual transactions*, as accurately as that amount can be calculated") (emphasis added).

that the value of any particular plaintiff's case against any particular defendant is measured by what that plaintiff could have obtained had he or she sued the defendant alone.[199] This Article refers to this principle as the "rule of individual valuation." Upon reexamination, it can be seen that some of the existing forms of separate and distinct claim valuation already follow the rule of individual valuation. Others do not, however, with "pro rata" valuation being the method that departs most drastically.

A. The Rule of Individual Valuation

It is hornbook law that when parties join as co-plaintiffs, they may aggregate the value of their claims if the claims are "common and undivided," but they may not do so if their claims are "separate and distinct."[200] The near universal opinion is that this valuation scheme is a relic from the 1800s that has little relevance to modern pleading and practice.[201] The Supreme Court, however, has been quite clear in its view that, because Congress legislates against the Court's interpretation of the diversity statute, it is up to Congress to make any change.[202] Until Congress exercises that power, it seems appropriate to scrutinize the existing scheme—however flawed it may be—to see if it imparts any principles that might inform the valuation of new categories of claims. As a whole, the existing valuation scheme evidences one dominant principle—that the courts assess the value of any one plaintiff's claims against any one defendant based on what rights that plaintiff has vis-a-vis that defendant, without regard to the related rights of others. This Article refers to this principle as the rule of individual valuation.

The rule of individual valuation operates openly and clearly in cases where the joined plaintiffs' claims are deemed to be separate and distinct. Most commonly, this principle is stated as a negative: "It is a familiar rule that when several plaintiffs assert

199 *See infra* notes 200-21 and accompanying text.

200 *See* CHARLES A. WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS § 36, at 213 (6th ed. 2002).

201 *See* 15 MOORE'S FEDERAL PRACTICE, *supra* note 10, § 102.108[3][b]; *see also* 14B FEDERAL PRACTICE AND PROCEDURE, *supra* note 23, § 3704, at 127 (referring to the valuation rules as "unsatisfactory," "haphazard[ ]," and "mystifying."). Even those commentators who have found rational explanations for these rules in the history of federal pleading and practice agree that the dichotomy between "separate" and "common" claims is a difficult one to apply in modern times. *See* Rensberger, *supra* note 57, at 927.

202 *See* Snyder v. Harris, 394 U.S. 332, 339 (1969).

separate and distinct demands in a single suit . . . those amounts cannot be added together to satisfy jurisdictional requirements."[203] Stated positively, the principle holds that when the interests of joined plaintiffs are separate and distinct, the court must value them individually.[204] Any plaintiff who individually does not possess rights against the defendant in the requisite amount must be dismissed from the suit.[205]

On the surface, the courts appear to act contrary to the rule of individual valuation when they value common and undivided claims in the aggregate to satisfy the jurisdictional amount requirement.[206] As the Supreme Court put it most recently in *Zahn*, "when several plaintiffs unite to enforce a single title or right, in which they have a common and undivided interest, it is enough if their interests *collectively* equal the jurisdictional amount."[207] This language implies that the court is adding the value of their individual claims to see if their sum exceeds the jurisdictional amount.[208] Thus, according to the standard account, when the claims of joined plaintiffs spring from a common and undivided interest, the total value of that interest controls because it is the *sum* of their individual interests.

A rule that values each plaintiff's claim based on the "total" value of the interest at stake, however, is not inherently inconsistent with the rule of individual valuation. Indeed, when parties truly hold their rights in common, it is the term "aggregation" that seems to be the misnomer. Traditionally, the terms "common" and "undivided" have referred to property interests in which several parties have joint and equal but not exclusive

---

203 Clark v. Paul Gray, Inc., 306 U.S. 583, 589 (1939).

204 *See id.* (concluding that the plaintiffs claims were separate and distinct and then examining the record to determine how much each plaintiff separately could recover from the defendant).

205 *See id.* at 590; *see also* Zahn v. Int'l Paper Co., 414 U.S. 291, 300 (1973) ("[A]ny plaintiff without the jurisdictional amount must be dismissed from the case, even though others allege jurisdictionally sufficient claims.").

206 *See Snyder*, 394 U.S. at 335 ("Aggregation has been permitted only . . . in cases in which two or more plaintiffs unite to enforce a single title or right in which they have a common and undivided interest."); *see also* 15 MOORE'S FEDERAL PRACTICE, *supra* note 10, § 102.108[3][b]; 14B FEDERAL PRACTICE AND PROCEDURE, *supra* note 23, § 3704, at 128.

207 414 U.S. at 294 (emphasis added).

208 *See* 14B FEDERAL PRACTICE AND PROCEDURE, *supra* note 23, § 3704, at 145 ("the claims of the coparties have been added together in determining whether the statutory amount in controversy requirement has been satisfied").

rights to the whole.[209] The paradigm examples come from the law of real property; one of the defining characteristics of "tenancy in common" and "joint tenancy" is unity of possession, whereby the co-owners "share a single right to possession of the entire interest."[210] Thus, as Professor Rensberger noted, "when the substantive law gives multiple plaintiffs joint ownership, the plaintiffs do not need aggregation" because each plaintiff individually has a claim to the whole vis-a-vis the outsider-defendant.[211] Accordingly, when courts use the total value of jointly-held rights, they do so not by adding the value of each plaintiff's claim, but by giving each plaintiff full credit for his claims and not dividing that amount just because other persons independently can assert the same rights.

The same dynamic is evident when a single plaintiff sues multiple defendants. Under the standard account, a plaintiff cannot aggregate the value of his claims against multiple defendants when the claims are separate and distinct, but may do so when "the plaintiff's claims against the defendants are common and undivided so that the defendant's liability is properly characterized as joint and not several."[212] The defining characteristic of

---

[209] The Supreme Court first applied the aggregation doctrine in the context of district court jurisdiction in 1911. *See* Troy Bank v. G.A. Whitehead & Co., 222 U.S. 39 (1911). At that time, Black's Law Dictionary defined the word common as "shared amongst several; owned by several jointly." BLACK'S LAW DICTIONARY 226 (2d ed. 1910). It defined the word undivided as follows: "An undivided right or title, or a title to an undivided portion of an estate, is that owned by one of two or more tenants in common or joint tenants before partition." *Id.* at 1185. Those definitions survive to this day. *See* BLACK'S LAW DICTIONARY 275 (6th ed. 1990) (defining common to include "shared among several; owned by several jointly"); *id.* at 1527 (defining undivided right as "that owned by one of two or more tenants in common or joint tenants before partition").

[210] *See* 7 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 50.01[1] (Michael Allan Wolf ed., 2000) [hereinafter 7 POWELL] (tenancy in common); *id.* § 51.03[2] (joint tenancy).

[211] *See* Rensberger, *supra* note 57, at 960. While the rights of co-tenants as to third parties are clear, the ability of a single co-tenant to bring an action against an outsider is not. Most jurisdictions, for example, allow a single tenant in common to sue for the entire estate in an action for ejectment or possession. 7 POWELL, *supra* note 210, § 50.06[1]. In other contexts, however, courts may not allow a single tenant to proceed alone, or may only allow the single tenant to recover his or her proportionate share of damages. *See id.*

[212] *See* 15 MOORE'S FEDERAL PRACTICE, *supra* note 10, § 102.108[2]. In extending aggregation principles to joined defendants, the Supreme Court stated that "when two or more defendants are sued by the same plaintiff in one suit, the test of jurisdiction is the joint or several character of the liability to the plaintiff." Walter v. Northeastern R.R. Co., 147 U.S. 370, 373 (1893). *Compare* Morrison v. Am. Online, Inc., 153 F. Supp. 2d 930, 935 (N.D. Ind. 2001) ("When liability among defendants is

joint and several liability, however, is that the plaintiff may look to any of the tortfeasors for the entire amount of damages.[213] Thus, here too, in suits against joined defendants who are jointly and severally liable, valuing the case based on the total liability is not a rule of addition but a rule of non-division.[214] Specifically, the court does not divide the total liability by the number of defendants present because, vis-a-vis the plaintiff, each of them remains liable for the entire amount.

The principle of individual valuation also helps to explain cases that value "in the aggregate" when the law vests the rights of several in a single plaintiff. Shareholder derivative suits, for example, are valued based on the damage asserted to have been sustained by the corporation, rather than the potential recovery of the shareholder who initiated the suit.[215] This result seems consistent with the rule of individual valuation, however, since the initiating shareholder is vindicating the rights of *the company itself*, and not its own or those of the other shareholders.[216] Similarly, the Supreme Court has valued cases according to the total amount of a trust or estate, rather than the amounts held by individual beneficiaries or distributees, when the claim was against the trust or estate itself.[217] At its furthest extreme, the Supreme Court has used "aggregate" valuation where the underlying sub-

several, a plaintiff cannot aggregate its claims against individual defendants in order to satisfy the jurisdictional amount.") *and* Bajowski v. Sysco Corp., 115 F. Supp. 2d 133, 139 (D. Mass. 2000) ("Plaintiff also may not aggregate her claim regarding the automobile with those against other defendants in order to reach the required diversity amount, because the claims are separate, and not joint and several."), *with* Hayfield v. Home Depot U.S.A., 168 F. Supp. 2d 436, 447, 452 (E.D. Pa. 2001) (using aggregate value after finding that negligence claim against one defendant and intentional tort claim against other defendant created joint and several liability under applicable state law) *and* Winner's Circle of Las Vegas, Inc. v. AMI Franchising, Inc., 916 F. Supp. 1024, 1028 (D. Nev. 1996) (using aggregate value after finding that defendants were acting in concert, so that liability for fraud/conversion was joint and several).

213 *See* RESTATEMENT (SECOND) OF TORTS § 875 (1979) ("Each of two or more persons whose tortious conduct is a legal cause of a single and indivisible harm to the injured party is subject to liability to the injured party for the entire harm.").

214 *See* Rensberger, *supra* note 57, at 960 ("Because each defendant under the substantive law of torts is liable for the whole amount, the plaintiff does not need to resort to aggregation.").

215 *See* Koster v. (Am.) Lumbermens Mut. Cas. Co., 330 U.S. 518, 523-24 (1947).

216 *Id.* at 522; *see also* Franklin A. Gevurtz, Corporation Law § 4.3.1 (2000) (discussing the nature of derivative suits).

217 *See* Bullard v. City of Cisco, 290 U.S. 179, 188-89 (1933) (using total value in suit to recover on bonds where claim resided in 'trust' of which the individuals were secondary beneficiaries); Shields v. Thomas, 58 U.S. 3, 4-5 (1855) (using total value

stantive law prescribed a single action that could be "brought by all of the parties interested, or by any one of them for the benefit of all."[218]

The purpose of this discussion, however, is not to rewrite the law of aggregation, nor is it to claim that every case involving "aggregate" valuation is actually a disguised case of the individual valuation of joint and several rights. While the Supreme Court certainly has emphasized the difference between joint rights and several rights as the fundamental factor underlying the aggregation rules,[219] it has never explicitly stated that it was "non-dividing" instead of adding. Indeed, in many cases, it is impossible to determine whether the Supreme Court thought it was dealing with a truly joint right—that is, one in which each plaintiff could recover the whole—or just one that it deemed aggregable due to its common origin.[220] Moreover, most of the

of loss to estate rather than amounts that individual might receive upon its distribution in a suit against estate administrator for conversion).

[218] *See* Texas & Pac. Ry. Co. v. Gentry, 163 U.S. 353, 361 (1896). *But see* William H. Theis, Zahn v. Int'l Paper Co.*: The Non-Aggregation Rule in Jurisdictional Amount Cases*, 35 LA. L. REV. 89, 106 (1974) (reading *Gentry* as an application of compulsory joinder rather than as a case involving joint substantive rights).

[219] *See* Gibson v. Shufeldt, 122 U.S. 27 (1887) (reviewing its past decisions in various contexts and emphasizing the distinction in each application between joint rights and several rights). *Compare* Green County v. John Thomas's Executor, 211 U.S. 598, 600 (1909) (where plaintiffs held bonds "jointly," "each plaintiff owned an undivided interest in all the bonds and coupons in suit"), *with* Pinel v. Pinel, 240 U.S. 594, 596 (1916) (plaintiffs "severally entitled to the same shares" in an estate did not have common and undivided interest).

[220] *See*, *e.g.,* Troy Bank v. G.A. Whitehead & Co., 222 U.S. 39 (1911). In that case, a man named Eigenmann sold land to Whitehead for a total of $6,000, of which $2,400 would be paid later. Troy Bank v. Whitehead, 184 F. 932, 933 (W.D. Ky. 1910). Whitehead gave Eigenmann one promissory note in the amount of $1,200 payable in 12 months, and another promissory note in the amount of $1,200 payable in 24 months. *Id.* Under the law of Kentucky, however, Eigenmann also obtained an equitable vendor's lien in the full amount of the unpaid portion—$2,400. *Troy Bank*, 222 U.S. at 40. *See generally* 2 LEONARD A. JONES, THE LAW OF LIENS § 1061 (3rd ed. 1914) (discussing nature of vendor's lien); *id.* § 1074 (lien exists even when buyer gives promissory note). Eigenmann later transferred those notes to two different parties, who later joined together to sue Whitehead when he failed to pay on the notes. *Troy Bank*, 222 U.S. at 40. Importantly, the current holders did not sue at law on the notes themselves, but instead sued in equity to enforce the vendor's lien that passed to them with the notes. *Id.* at 40-41. The Supreme Court acknowledged that, had they sued on the notes, their claims would not have been aggregable. *Id.* at 41. But the Supreme Court held that "their *claim* under the vendor's lien was single and undivided" such that the full $2,400 value of the lien satisfied the jurisdictional amount. *Id.* (emphasis added). At the time, the law was clear that, as between themselves, concurrent note holders shared the value of an assigned vendor's lien *pro rata*, but that the note holders otherwise received a *pro tanto* as-

Supreme Court cases that used an "aggregate" value were decided at a time when the pleading rules generally required joint interest holders to sue together,[221] rendering any attempt to understand them according to the individual value of the plaintiffs' claims at best a hypothetical exercise.

Rather, the far more modest purpose of this discussion is to see if the existing valuation scheme—as a whole—yields an organizing principle that might guide us when valuing the claims of individual class members when the aggregation rules say we cannot use the total value of the suit. In other words, how should courts value the individual claims of class members when those claims are non-aggregable but nevertheless seek substantially overlapping relief? In this regard, I think the evidence is sufficient to conclude that the dominant principle—applied explicitly with separate and distinct claims and implicitly with most common and undivided interest claims—is that the amount in controversy is the value of the claims that any single plaintiff could assert against any single defendant in a suit in which they were the only parties.

B. Re-Examining the Current Methods for Valuing Common Relief Claims

In Part III, this Article detailed the various methods the federal courts have used to calculate a "per plaintiff" value when a class asserts separate and distinct claims for common relief.[222] Here, this Article reexamines those methods in the light of the rule of individual valuation.

1. Punitive Damages

Predominantly, courts prorate class punitive damages claims.[223] In other words, the class members only receive amount in controversy credit for a prorated share of the total

signment of the vendor's lien. *See* JONES, *supra* at § 1097. In the end, though, neither the text of *Troy Bank* nor the contemporary authorities provide conclusive evidence as to whether the assignees to the vendor's lien held their interests jointly in the sense that each had an undivided right to pursue the whole amount of the lien, subject to an accounting to the other.

221 *See* Rensberger, *supra* note 57, at 934. Indeed, one of the primary criticisms of the current valuation scheme is that it is a vestige of common law pleading. *See* 15 MOORE*APOS;S FEDERAL PRACTICE, *supra* note 10, § 102.108[3][b]; 14B FEDERAL PRACTICE AND PROCEDURE, *supra* note 23, § 3704, at 150.

222 *See supra* notes 140-98 and accompanying text.

223 *See supra* notes 141-51 and accompanying text.

punitive damages claim.[224] The question, then, is how prorating compares to a punitive damages claim valuation based on what the individual class members might have claimed in punitive damages had they sued on their own. While the law of punitive damages is not sufficiently definite to allow any blanket conclusions, in general it appears that prorating undervalues punitive damages relative to the rule of individual valuation.

We begin by revisiting the law of punitive damages. Punitive damages are not compensation for harm but serve instead to punish reprehensible conduct and to deter its recurrence.[225] The focus is on the defendant, not the plaintiff. Thus, typically, courts first look to characteristics of the defendant, such as the nature of the misconduct and the defendant's wealth, when determining how large of an award is necessary to achieve the goals of punishment and deterrence.[226] Moreover, details regarding the defendant's wrongdoing play a critical role in determining whether a punitive damages award is consistent with due process.[227] As the Supreme Court recently stated, "[t]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct."[228] However, punitive damages awards are not wholly divorced from characteristics of the plaintiff. In particular, a punitive damages award must be "proportionate to the amount of harm to the plaintiff and to the general damages recovered."[229] Thus, while the focus of a punitive damages analysis is decidedly on the defendant and the

224 *See* Morrison v. Allstate Indem. Co., 228 F.3d 1255, 1271 (11th Cir. 2000) (adding individual class members' claims for compensatory damages with their prorated share of attorneys' fees and their prorated share of punitive damages); Spann v. Style Crest Prods., Inc., 171 F. Supp. 2d 605, 611 (D.S.C. 2001) ("The amount in controversy includes each individual plaintiff's claim for compensatory damages, any punitive damages award divided pro rata per plaintiff, and the cost of injunctive relief for each plaintiff.").

225 *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 123 S. Ct. 1513, 1519 (2003).

226 *See* RESTATEMENT (SECOND) OF TORTS § 908(2) (1979) (listing factors relevant to size of punitive damages award); MODEL PUNITIVE DAMAGES ACT § 7(a) (1996), (same); *see also supra* notes 86-88 and accompanying text (discussing punitive damage factors).

227 The Supreme Court now recognizes both procedural and substantive due process constraints on the imposition of punitive damages. *See State Farm*, 123 S. Ct. at 1519; Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 432-33 (2001); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 562 (1996); TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 462 (1993).

228 *State Farm*, 123 S. Ct. at 1521.

229 *Id.* at 1524.

details of its wrongdoing, the characteristics of the plaintiff, such as the nature and severity of his injuries, cannot be ignored.

We can now turn to comparing prorated punitive damages, which entail calculating a punitive damages claim on behalf of the class and then dividing, with a punitive damages award valued from the perspective of a single plaintiff. The first thing to note is that the punitive damages factors that are based on the defendant's characteristics should not vary. In particular, the reprehensibility of the defendant's conduct will be the same whether the plaintiff is a class or a single plaintiff, as will the defendant's wealth. And, since our scenario is predicated on the possibility of a class action, it is likely that the defendant's conduct was not an isolated event but rather involved a larger course of conduct and affected many people, thereby placing it higher on the "reprehensibility" scale.[230] While the Supreme Court has held that courts may consider only related acts of wrongdoing when considering reprehensibility,[231] that is likely to be satisfied in a proposed class action. Thus, a potential class member suing separately should be able to make the same case for reprehensibility and wealth as a lead plaintiff suing on behalf of a class.

The situation starts to show variance, however, when it comes to the ratio of punitive to compensatory damages. Since the beginning of its foray into due process limitations on punitive damages, the Supreme Court has refused to identify any mathematical formula for when a punitive damages award violates due process.[232] While the Supreme Court again declined to fix a bright-line ratio in its most recent punitive damages case, *State Farm Mutual Automobile Insurance Co. v. Campbell*, it did

---

[230] *See id.* at 1521 (listing as a factor whether the conduct involved repeated actions or was an isolated incident); *Gore*, 517 U.S. at 576-77 ("Certainly, evidence that a defendant has repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful would provide relevant support for an argument that strong medicine is required to cure the defendant's disrespect for the law."); *see generally* RESTATEMENT (SECOND) OF TORTS § 908(2) (1979) (listing factors relevant to size of punitive damages award); MODEL PUNITIVE DAMAGES ACT § 7(a) (1996) (same).

[231] *See State Farm*, 123 S. Ct. at 1523.

[232] *See Gore*, 517 U.S. at 582 ("[W]e have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula"); Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991) ("We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case."). The states similarly eschew any bright-line ratios for excessiveness. *See* 2 KIRCHER & WISEMAN, *supra* note 80, § 18.6.

chalk a single-digit ratio of punitive to compensatory damages as a presumptive boundary.[233] It then reflected on what effect the size of the denominator—compensatory damages—has on the permissible ratio. On the one hand, a small denominator might justify exceeding the presumptively-bounded single-digit ratio.[234] But, conversely, a large denominator—i.e., "[w]hen compensatory damages are substantial"—might cap the ratio at one-to-one.[235] In short, the constitutional ratio of punitive to compensatory damages rests on a sliding scale that tends towards one-to-one when compensatory damages are large, but may exceed single-digits when compensatory damages are small.[236]

The size of compensatory damages, as the denominator, can cause a disparity between individually-valued punitive damages and prorated punitive damages in two ways. First, a court might calculate excessiveness based on the ratio of punitive damages to the *total harm* the defendant caused or intended to cause,[237] or

---

233 *State Farm*, 123 S. Ct. at 1524 ("[I]n practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process."). Several courts had rather presciently predicted a presumptive ten-to-one limit. *See* Cont'l Trend Res., Inc. v. OXY USA Inc., 101 F.3d 634, 639 (10th Cir. 1996) (adopting presumptive limit of ten-to-one ratio); *see also In re* Simon II Litig., 211 F.R.D. 86, 165 (E.D.N.Y. 2002) (discussing de facto ten-to-one ration "where compensatory damages are generous"); *In re* Exxon Valdez, 236 F. Supp. 2d 1043, 1063 (D. Alaska 2002) (reading *TXO* and prior Ninth Circuit precedent as accepting ten-to-one ratio as general limit); Tyson Foods, Inc. v. Stevens, 783 So. 2d 804, 811 (Ala. 2000) (remitting punitive damages award from thirty-to-one ratio to ten-to-one).

234 *See State Farm*, 123 S. Ct. at 1524. This language suggests the continued permissibility of ratios in the area of twenty-to-one, at least when compensatory damages are small. *See* Schaffer v. Edward D. Jones & Co., 552 N.W.2d 801, 811 (S.D. 1996) (upholding thirty-to-one ratio of $25,000 in compensatory damages and $750,000 in punitive damages); Lister v. Nationsbank of Del., N.A., 494 S.E.2d 449, 459 (S.C. Ct. App. 1997) (upholding twenty-three-to-one ratio of $8,600 in compensatory damages and $200,000 in punitive damages). It may signal the demise, however, of decisions that permitted punitive damage ratios exceeding fifty-to-one. *See* Parrott v. Carr Chevrolet, Inc., 17 P.3d 473, 489 (Or. 2001) (upholding eighty-seven-to-one ratio of $12,000 in compensatory damages and $1,000,000 in punitive damages); Union Sec. Life Ins. Co. v. Crocker, 709 So. 2d 1118, 1122 (Ala. 1997) (upholding sixty-two-to-one ratio of $16,000 in compensatory damages and $1,000,000 in punitive damages).

235 *State Farm*, 123 S. Ct. at 1524.

236 *See also Gore*, 517 U.S. at 582. As one commentator explains, "there appears to be kind of a 'sliding-scale' approach to ratio in [post-*Gore*] cases" based on individual loss, potential loss, and overall reprehensibility. Mark A. Klugheit, *"Where the Rubber Meets the Road": Theoretical Justifications vs. Practical Outcomes in Punitive Damages Litigation*, 52 SYRACUSE L. REV. 803, 834 (2002).

237 *See Gore*, 517 U.S. at 581 (comparing punitive damage award to the single plaintiff's damages *and* to the damages sustained by all of the Alabama victims);

the defendant's *total gain* from a course of misconduct.[238] That prospect seems less likely after *State Farm*; when discussing reprehensibility the Court expressed concerns about considering harm to others, specifically noting the risk of multiple punishment.[239] More directly, the Court's discussion of the ratio prong consistently referred to the harm to the plaintiff and the compensatory damages recovered by the plaintiff.[240] Nevertheless, *State Farm*, like the previous decisions, does not specifically identify what figure is to be the denominator in the ratio calculation. To the extent total harm theory remains viable, it is hard to imagine a class-action-type situation where the total harm caused by the defendant (or the total gain reaped by the defendant) could not support a punitive damages recovery of more than $75,000.[241]

TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 460 (1993) ("It is appropriate to consider the magnitude of the *potential* harm that the defendant's conduct would have caused to its intended victim . . . as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred."); *see also* Elizabeth J. Cabraser & Thomas M. Sobol, *Equity for the Victims, Equity for the Transgressor: The Classwide Treatment of Punitive Damages Claims*, 74 TUL. L. REV. 2005, 2020 (2000) ("Taken in context, [*Haslip*, *TXO*, and *Gore*] imply a due process limitation on the ultimate quantum of punitive damages awarded against a party for one cause of wrongdoing, but not in the form of a precise relationship between an individual plaintiff's actual damages and a punitive damages award."); Laura J. Hines, *Obstacles to Determining Punitive Damages in Class Actions*, 36 WAKE FOREST L. REV. 889, 935-36 (2001) (discussing Supreme Court's failure "to hold definitively which measure should be used"). For a recent criticism of total harm punitive damages, see Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 MINN. L. REV. 583, 650-57 (2003) (arguing that total harm punitive damages are unconstitutional).

238 *See* Davis v. Mid-Century Ins. Co., No. CIV-96-2070-T, 2000 WL 1140302 (W.D. Okla. June 2, 2000) (comparing $17 million punitive damage award to defendant's total $17 million gain, rather than the plaintiff's $439 in economic damages); *see generally* Amanda L. Maxfield, *Punitive Damages:* Cooper Industries v. Leatherman Tool Group*: Will a Constitutional Objection to the Excessiveness of a Punitive Damages Award Save Defendants from Oklahoma's Punitive Damages Statute?*, 55 OKLA. L. REV. 449, 478 & n.232 (discussing the Oklahoma statute at issue in *Davis* and citing to similar statutes in other states).

239 *State Farm*, 123 S. Ct. at 1523.

240 *Id.* at 1524.

241 It is true that, even if any *single* plaintiff could predicate punitive damages on total harm, due process might preclude *all* of them from doing so. *See* 1 KIRCHER & WISEMAN, *supra* note 80, §§ 5.26-5.27 (discussing problem of multiple awards). Thus, some might argue that each class member's individually-valued claim would have to be discounted by the fact that punitive damage awards may be reduced to avoid cumulative awards. *See* MODEL PUNITIVE DAMAGES ACT § 10 (1996) ("Multiple Awards for Same Act or Course of Conduct"); *see also* RESTATEMENT (SECOND) OF TORTS §§ 908 cmt. e (1979) (acknowledging need to factor in prior awards, and possibly anticipated future awards). Certainly, to the extent that prior awards

What remains a more realistic source of disparity is the effect of the size of compensatory damages on the ratio. In a class action, the amount of compensatory damages is likely to be substantial, suggesting that the class-wide punitive damages will tend towards the one-to-one ratio. Since that award is prorated, each plaintiff stands to receive punitive damages in an amount roughly equal to his compensatory damages. If one of those class members were to sue separately, however, the amount of his individual compensatory damages is likely to be small. This would suggest that the permissible ratio of punitive to compensatory damages would tend towards, or potentially exceed, the ten-to-one ratio. That plaintiff would then stand to receive punitive damages in an amount ten times his compensatory damages. In sum, pro rata valuation undervalues class member punitive damages claims because it assumes that the same ratio applicable to the group claim would apply to a single plaintiff claim.

To illustrate the problem, imagine a case in which a phone company overcharges 100,000 customers $10 per month for a year. Each class member will have incurred $120 in compensatory damages, with total class-wide damages of $12,000,000. Further assume that, in valuing this claim, a court concludes that punitive damages of up to $24 million would be warranted (based on the nature of the wrongdoing and the defendant's wealth) and would not be excessive (representing only a two-to-one ratio of punitive to total compensatory damages). Under a pro rata valuation scheme, each plaintiff's share of that claim would be $240.

How would that compare to a suit by a single plaintiff? If excessiveness is measured by each plaintiff's own compensatory damages,[242] then the full $24 million punitive damage award is clearly excessive. But would $240—the prorated amount—accu-

exist, the court should factor them in the same as if the individual class member were an individual plaintiff. When determining jurisdictional value, however, the court should not discount the value of each class member's punitive damages claims by the fact that other class members exist. The operating principle is to hypothesize a single-plaintiff suit for every class member and then apply the prevailing valuation rules. Until other potential claimants obtain a judgment—which the other class members obviously have not yet done—one cannot say to a "legal certainty" that the value of any one class member's claim is subject to discount for being cumulative.

[242] If excessiveness is measured against the total harm caused by the defendant, then each plaintiff, suing on his own, could have obtained the full $24,000,000 and still show a due process-friendly two-to-one ratio. For the reasons discussed earlier, however, the "total harm" punitive damages award may be foreclosed by *State Farm*. *See supra* notes 237-40 and accompanying text.

rately reflect the upper limit of a punitive damages claim brought by a single victim? At the very least, we might think that a court would deem a $2,400 punitive damage claim (ten-to-one ratio) to be legally plausible under these circumstances. In that case, the pro rata rule would have undervalued the class member's punitive damage claim by 900%. To drive the point further, if the single plaintiff sought just $10,000 in punitive damages as punishment for the phone company's widespread fraud—an amount that at best would just begin to achieve meaningful punishment or deterrence—would a court say that it was unavailable as a legal certainty because the ratio would be eighty-three to one?

In the end, prorating is likely to depart from the rule of individual valuation because it is based on questionable math. It uses simple division to calculate class member punitive damage values despite the absence of any clear linear relationship between the size of a punitive damages award and the number of plaintiffs in a suit.[243] As a result, it undervalues each class member's separate claim for punitive damages relative to what that class member could have claimed if he were a solo plaintiff. This discrepancy—in which punitive damages claims count for less in class actions than they do in single plaintiff suits—constitutes a jurisdictional penalty on class action joinder.

Ironically, the only method of valuing punitive damages that conforms to the rule of individual valuation is the Fifth Circuit's much-maligned method of valuing punitive damages under Mississippi law.[244] In *Allen v. R&H Oil & Gas Co.*, the court held

[243] Indeed, it is precisely this overlap that has led to the development of the so-called "limited punishment" or "limited generosity" class action, under which a court would certify a limited fund class action under Rule 23(b)(1) not because the prospect of successive punitive damage awards would bankrupt the defendant, but because state law or due process limits on successive punitive damage awards externally define the maximum total amount of punitive damages that a defendant would have to pay for any particular event or transaction. *See* Elizabeth J. Cabraser, *Unfinished Business: Reaching the Due Process Limits of Punitive Damages in Tobacco Litigation Through Unitary Classwide Adjudication*, 36 Wake Forest L. Rev. 979, 1030 (2001); Joan Steinman, *Managing Punitive Damages: A Role for Mandatory "Limited Generosity" Classes and Anti-Suit Injunctions?*, 36 WAKE FOREST L. REV. 1043, 1075 (2001); *see*, *e.g.*, *In re* Simon II Litig., 211 F.R.D. 86, 184-86 (E.D.N.Y. 2002) (certifying "limited punishment" punitive damages class action against tobacco companies). If individual plaintiffs' punitive damage awards did not overlap with the potential awards of others similarly-situated, then there would be no basis for a "limited punishment" class action because the constitutional maximum would not be reached until the last plaintiff prevailed.

[244] At least one group of plaintiffs has unsuccessfully advanced the argument. In *Smith v. GTE Corp.*, the Eleventh Circuit held that, given the class size of 36,000,

that, "because of the collective scope of punitive damages and their nature as individual claims under Mississippi law," each plaintiff could invoke the full amount of the group's punitive damages claim in satisfaction of the amount in controversy requirement.[245] One possible reading of this case is that it values the punitive damages claim in the aggregate. The better reading of *Allen*, however, is that the court interpreted Mississippi law to provide that the amount that any individual could obtain in punitive damages was identical to the amount that the group could obtain.[246] In other words, the court followed the rule of individual valuation by attributing the total value of the group's punitive damages claim to each plaintiff because that is what it believed each would have had in controversy had they brought separate actions.

2. Attorneys' Fees

In many class action fee cases, the source of the fee award is a fee-shifting statute that allows prevailing plaintiffs to recover their fees from the defendant. When a statute requires the defendant to pay the plaintiff's fees, the size of the fee typically is calculated according to the "lodestar" method, which sets fees by multiplying the number of hours the attorney reasonably expended on the case by the attorney's reasonable hourly rate.[247] Thus, the class fee award that the defendant pays is a function of

---

prorated punitive damages would be too small to satisfy the jurisdictional amount. 236 F.3d 1292, 1304 (11th Cir. 2001). The plaintiffs responded by arguing that, had the class members proceeded separately, they could have recovered a large enough sum to satisfy the amount in controversy requirement. *Id.* at 1304 n.12. The court, however, refused to consider the value of their "hypothetical" individual suits: "Perhaps, but this suit was filed as a class action and until the class certification is denied, we must treat it as a class action." *Id.*

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

246 *See supra* notes 103-109 and accompanying text. To the extent *Allen* properly construes Mississippi punitive damages law to allow single victims to recover punitive damages irrespective of their personal injuries, however, it seems unlikely that result would withstand scrutiny under *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1524 (2003) (imposing presumption ten-to-one ratio for punitive damages award).

247 *See* 7 Am. Jur. 2d *Attorneys at Law* § 306 (1997). The lodestar method is the dominant approach to determining a reasonable fee under fee-shifting statutes. *See* 1 DAN B. DOBBS, LAW OF REMEDIES § 3.10(10(1) (2d ed. 1993). Indeed, the Supreme Court proclaims the lodestar method as "the guiding light of [its] fee-shifting jurisprudence." City of Burlington v. Dague, 505 U.S. 557, 562 (1992). While state practices can and will differ, they generally track the developments in the federal case law. Russell E. Lovell, II, Court-Awarded Attorneys' Fees 2 (1999).

the number of hours class counsel works on the case. In this situation, the courts consistently prorate the class fee.[248] In so doing, however, the courts make the same math error they make when prorating punitive damage awards.

While it almost certainly takes more time to represent a class than it does to represent a single plaintiff, the difference is not a direct multiple of the number of plaintiffs.[249] Stated otherwise, because of economies of scale, there is no linear relationship between the hours needed to litigate a class action and the number of plaintiffs in the class. For example, just because 100 hours would be reasonable in a single plaintiff suit does not mean that 100,000 hours would be reasonable in an otherwise identical class action with 1000 plaintiffs. But it is just as absurd to conclude—as pro rata fee valuation implicitly does—that, because 500 hours might represent the reasonable hours limit in a class action with 1000 plaintiffs, a single plaintiff bringing an otherwise identical action could reasonably recover for only one-half hour of attorney time. As a result, when a court prorates fees available to the class members under a substantive fee-shifting statute, it almost certainly attributes to each class member an amount in fees much smaller than what would have been a reasonable lodestar fee award had that class member sued separately.[250]

---

[248] *See supra* notes 119-20 and accompanying text. In theory, a court would accomplish this by determining how much in fees would be reasonable were the case to proceed as a class action and then dividing that amount by the number of class members. In practice, however, the courts do not bother to actually calculate the pro rata fees, instead concluding that there is no point doing so because each class member's share is bound to be minimal. *See* Kirkland v. Midland Mortgage Co., 243 F.3d 1277, 1281 n.7 (11th Cir. 2001) (agreeing with plaintiffs that it could disregard fees because, when prorated, they could not "significantly contribute to satisfaction of the jurisdictional amount"); Cohen v. Office Depot, Inc., 204 F.3d 1069, 1083 (11th Cir. 2000) (not calculating actual pro rata fees because it would take the "astronomical" total of $2.9 billion in fees to yield prorated amounts sufficient to satisfy the jurisdictional amount for each class member); *see also* Morrison v. Allstate Indem. Co., 228 F.3d 1255, 1274 (11th Cir. 2000) (remanding for fee calculation, but noting that fees will not affect the jurisdictional amount because they will be very small after being prorated).

[249] Indeed, the Supreme Court has suggested that there might be no difference at all. *See* Blum v. Stenson, 465 U.S. 886, 900 & n.16 (1984) (noting lodestar calculation in class action would not be increased by fifty percent due to the fact that outcome benefitted a large number of people because "[p]resumably, counsel will spend as much time and will be as diligent in litigating a case that benefits a small class of people, or, indeed, in protecting the . . . rights of a single individual").

[250] In *Darden v. Ford Consumer Fin. Co.*, for example, the court and parties assumed that the class members could get claim a pro rata share of attorneys' fees, and that the pro rata amount would be insignificant. 200 F.3d 753, 756 (11th Cir. 2000).

Applying the rule of individual valuation to common fund fees is also problematic. A common fund fee is really just an equitable transfer by which absent class members pay lawyers they did not hire themselves but who nonetheless secured them a recovery.[251] As such, it is a byproduct of group litigation. Thus, it makes little sense to ask what the common fund fee would have been in a single-plaintiff suit because that hypothetical does not exist.

Nevertheless, it is worth comparing some of the case results. In the large majority of cases, the common fund fee is taken out of the class recovery.[252] The general rule is that fee awards are not a part of the amount in controversy when they are paid by the plaintiff rather than recovered from the defendant.[253] In this vein, the Eleventh Circuit does not count common fund fee awards as part of the amount in controversy at all since, coming out of the class's damages recovery, they "[do] not enhance any class member's claim against the defendants."[254] In contrast, the Fifth Circuit has held that, under Louisiana's common fund fee statute, fees that are deducted from the class recovery do count towards the amount in controversy and are then attributable solely to the representative plaintiffs for amount in controversy purposes.[255] While the Fifth Circuit relies on the text of the Lou-

---

In so doing, they overlooked the fact that the state RICO statute that provided for fees in that case allows a prevailing plaintiff to recover lodestar fees regardless of the size of the RICO judgment. *See* Dee v. Sweet, 460 S.E.2d 110, 113 (Ga. Ct. App. 1995) (finding damages award of one dollar sufficient to sustain lodestar fees of $258,000 because the fee award "is not contingent upon the amount of damages awarded").

[251] *See* RAND/ICJ STUDY, *supra* note 4, at 77. In this respect, a common fund fee award is analogous to "the way a plaintiff's attorney may be compensated by a contingent fee [in that] a plaintiff class pays its attorneys by sharing its recovery with them." Skelton v. Gen. Motors Corp., 860 F.2d 250, 252 (7th Cir. 1988).

[252] *See supra* notes 114-17 and accompanying text. Some statutes, however, create a fee recovery based on the creation of a common fund *and* shift the payment of the fee to the defendant. *See*, *e.g.*, CAL. CIV. PROC. CODE § 1021.5; Edgerton v. State Pers. Bd., 100 Cal. Rptr. 2d 491, 499 (Ct. App. 2000) (discussing operation of § 1021.5, including fee shifting and use of lodestar to calculate size of fee). In *Gibson v. Chrysler Corp.*, the Ninth Circuit held that the value of these "private attorney general" fees must be prorated among the class members. 261 F.3d 927, 942 (9th Cir. 2001). In that situation, it does make sense to count the fees towards the amount in controversy, since they add to rather than are subtracted from the class recovery. Still, the rule of individual valuation fails as a comparator because no class member, on his own, could be in a position to seek such a fee award.

[253] *See* 15 MOORE'S FEDERAL PRACTICE, *supra* note 10, § 102.106[6][a].

[254] Leonard v. Enter. Rent a Car, 279 F.3d 967, 974 (11th Cir. 2002).

[255] *See* Grant v. Chevron Phillips Chem. Co., 309 F.3d 864, 872-73 (5th Cir. 2002).

isiana fee statute to explain why it would allocate the value of the fees solely to the representative plaintiff, it fails to explain why it counts such fees towards the amount in controversy at all, since the source of the fees is not the defendant but the benefitted class members or co-plaintiffs.[256]

While the decision whether to count fees towards the amount in controversy at all does not, by itself, concern the difference between pro rata and individual valuation, it does overlap in one respect. Under the Eleventh Circuit's approach, it does not matter whether a claim is brought by an individual or a group—lawyers' fees ultimately borne by the plaintiffs do not count towards the amount in controversy. Under the Fifth Circuit's approach, however, suit structure does matter: Single plaintiffs cannot count the fees they pay towards the amount in controversy, but group plaintiffs can—and they are attributed solely to the lead plaintiff. In conjunction with the Fifth Circuit's ruling that the supplemental jurisdiction statute overruled *Zahn*,[257] this turns plaintiff-paid fees under the Louisiana statute into a significant vehicle for class-wide federal subject matter jurisdiction.[258]

3. Injunctive Relief

Most federal courts actually *conform* to the rule of individual valuation when determining per plaintiff values for class claims for injunctive relief. The Seventh and Ninth Circuits, for example, generally permit defendant viewpoint valuation but disavow it in class actions as a form of de facto aggregation.[259] Accordingly, when the class members claims are separate and distinct such that they are not aggregable under *Snyder*, the Seventh and Ninth Circuits value the individual class members' claims at the cost to the defendant of an injunction running in favor of one plaintiff.[260] This valuation method has highlighted other valua-

---

The Louisiana statute provides as follows: "The court may allow the representative parties their reasonable expenses of litigation, including attorney's fees, when as a result of the class action a fund is made available, or a recovery or compromise is had which is beneficial, to the class." LA. CODE CIV. PROC. ANN. art. 595(A) (West 2002). As the Fifth Circuit noted, this statute is not restricted to common fund cases, and can serve to force benefitted plaintiffs to use their own damages recoveries to compensate the representative parties for their efforts. *See Grant*, 309 F.3d at 873.

256 *See Grant*, 309 F.3d at 872-73.

257 *See In re* Abbott Labs., 51 F.3d 524, 528-29 (5th Cir. 1995).

258 *See*, *e.g.*, *Grant*, 309 F.3d at 873.

259 *See, e.g., id.*

260 *See In re* Ford Motor Co./Citibank (S.D.), 264 F.3d 952, 959 (9th Cir. 2001); *In*

tion problems attendant to injunctions, such as whether to include various compliance costs that the defendant will incur internally.[261] But once the courts determine which of the defendant's costs to include, they are performing plaintiff-specific valuations; in other words, the courts are not adding up the defendant's "countable" costs then dividing by the number of class members, but instead appear to be asking how much it will cost the defendant to comply with the injunction that any one of them might pursue individually.[262]

The courts that value class claims for injunctive relief from the plaintiff's viewpoint also appear to be following the rule of individual valuation. In one case, the court valued a class claim to enjoin a phone company's fraudulent leasing practices at "the present value of the future lease charges that the class members could avoid" if the injunction were issued.[263] The court then concluded that the amount would be well below $75,000 "[a]s to any individual class member" because the highest amount of charges that any of the plaintiffs could incur—and therefore avoid via an injunction—was still just $7,200.[264] While the court was not explicit, it appeared to be using that calculation as a maximum figure to estimate and then deem insufficient the leasing charges that any of the class members might have avoided through an individual injunction.

Perhaps more telling, though, are the cases from the plaintiff-viewpoint jurisdictions that refuse to attribute *any* value of the class claim for injunctive relief to individual class members on the grounds that the court cannot know in advance whether any particular class member would be in a position to reap the benefits of the injunction at issue. In *Morrison v. Allstate Indemnity Co.*, for example, the plaintiff class sought an injunction that would require Allstate to compensate class members for the diminished value on any future damaged vehicle claims.[265] Apply-

re Brand Name Prescription Drugs Antitrust Litig., 123 F.3d 599, 611 (7th Cir. 1997).

[261] *See supra* notes 185-92 and accompanying text.

[262] *See* Kanter v. Warner-Lambert Co., 265 F.3d 853, 859 (9th Cir. 2001) (defendant's cost of complying with order preventing them from selling an ineffective drug was the $9-$17 that any plaintiff had paid for it); *In re Ford*, 264 F.3d at 960 (defendant's cost of complying with specific performance of rebate program could be worth "no more than $3,500" per individual program participant).

[263] *See* Smith v. GTE Corp., 236 F.3d 1292, 1309 (11th Cir. 2001).

[264] *Id.*

[265] Morrison v. Allstate Indem. Co., 228 F.3d 1255, 1268 (11th Cir. 2000). The

ing the plaintiff-viewpoint rule, the court stated that the benefit to the class members would be "the payment of any future claims for diminished value, at least for as long as the policies at issue remain in effect. . . ."[266] Furthermore, the court acknowledged that, across the class of policyholders, enough class members would have accidents in the future such that the aggregate value of their diminished value claims would exceed $75,000.[267] However, the court concluded that the individual value of any particular class member's claim was zero because it would be mere speculation as to whether any particular member would have such a claim in the future and, if so, for how much.[268] This can only be the result of true individual valuation; if the court were prorating, it would have determined the total expected benefit based on actuarial tables and divided that amount by the number of class members, yielding a small—but positive—number for everyone.

4. Restitution

Finally, although the circuit courts have not been clear in how they value class claims for restitution when the underlying rights are separate and distinct, the district courts appear to follow the rule of individual valuation, even when reaching vastly different outcomes. One of the most striking examples of this is the District of Maryland's decision in *In re Microsoft Corp. Antitrust Litigation*.[269] In this case, the court found the amount in controversy requirement satisfied based on the full amount of ill-gotten gains that the defendant would have to disgorge because, under applicable state restitution law, any "individual plaintiff, regardless of the particular damages he has suffered, might recover the entire unjust benefit obtained by the defendant."[270] The court distinguished attributing the full value of restitution available to any single plaintiff from aggregation:

> If that is so as a matter of the applicable substantive law, it is not clear to me why federal jurisdiction must be based upon

substance of the suit involved Allstate's refusal to compensate policyholders for the reduced resale value of repaired vehicles. *Id.* at 1259.

[266] *Id.* at 1268.

[267] *Id.* at 1270.

[268] *Id.* at 1269.

[269] *See In re* Microsoft Corp. Antitrust Litig., 127 F. Supp. 2d 702, 720 (D. Md. 2001).

[270] *Id.*

> the common and undivided interest exception to the non-aggregation rule of *Zahn* and *Snyder*. Jurisdiction would then be founded not upon the aggregation of the claims of different plaintiffs but the single claim of any one of them.[271]

Thus, the district court explicitly recognized that it was not valuing the claim as a "common and undivided" interest, but instead was determining the individual value of "separate and distinct" class restitution claims by asking how much each plaintiff could get if he had litigated on his own.

While most of the district courts have attributed to each plaintiff much less than the full disgorgement value of the class restitution claim, they too appear to be conducting a form of individual valuation. In some jurisdictions, for example, a restitution plaintiff may not receive the full amount of the defendant's ill-gotten gains, but rather is limited to receiving disgorgement of his own overpayments.[272] Where this damage limitation applies, several district courts have held that the value of each class member's claim is the amount of his own overpayments.[273] In other words, the value of a restitution class member's claim is not the value of class-wide relief, nor a pro rata share of the profits to be disgorged, but the amount of money he would have received had he sued on his own.

V

Observations About the Current State of Claim Valuation, as Viewed from the Rule of Individual Valuation

The previous three Parts of this Article described and analyzed three specific aspects of class action common relief claim valuation. Part II showed how federal courts have rejected aggregate valuation based on the group nature of relief. Part III set forth the various methods courts have developed to calculate "per class member" values for common relief claims. And Part IV tested those methods to see if they attributed to individual class members the same amount in controversy they would have been able to claim as solo litigants. Part IV ultimately concluded that

---

[271] *Id.* at 720 n.19.

[272] *See supra* notes 196-98 and accompanying text.

[273] *See* McCoy v. Erie Ins. Co., 147 F. Supp. 2d 481, 491 (S.D. W. Va. 2001); Aetna U.S. Healthcare, Inc. v. Hoechst Aktiengesellschaft, 54 F. Supp. 2d 1042, 1050 (D. Kan. 1999).

some of the current valuation methods satisfied the rule of individual valuation while others—most notably pro rata valuation—did not.

In this Part, the Article shifts focus and asks what, if anything, the rule of individual valuation teaches us about the current state of claim valuation. I suggest that the rule of individual valuation approach offers two main lessons. First, it demonstrates that the courts are making some mistakes that almost certainly are depriving some litigants of at least the choice of the federal forum. How great that impact is, however, we cannot state precisely because of uncertainties regarding claim valuation for single plaintiffs. That is the second, and perhaps more important, insight from the rule of individual valuation—that some of the most vexing class action common relief valuation issues ultimately stem not from the class action structure but from more fundamental unresolved valuation questions. In other words, strip away the class context and you find single plaintiff valuation problems bubbling underneath.

A. The Jurisdictional Penalty Imposed by Pro Rata Valuation

The most significant mistake courts make when valuing class claims for common relief is to prorate punitive damages and attorneys' fees. Courts that prorate common relief claims commit the cardinal sin of claim valuation: They allow joinder to affect jurisdiction.[274] The fundamental principle expressed in *Snyder* is that jurisdiction is determined independently of joinder.[275] In *Snyder*, the Court applied that principle to hold that a collection of "small" cases did not add up to one "big" group case. When a court prorates, however, it conflates joinder and jurisdiction in the opposite direction—it concludes that the individual cases are "small" by dividing the value of the "big" group case. As discussed previously, however, there is no linear relationship between the number of plaintiffs in a suit and the size of punitive damage awards[276] or attorneys' fee awards.[277] The net effect, then, is that prorating imposes a jurisdictional penalty on class actions.

---

[274] *See* FED. R. CIV. P. 82 ("These rules shall not be construed to extend or limit the jurisdiction of the United States district courts.").

[275] Snyder v. Harris, 394 U.S. 332, 338-39 (1969).

[276] *See supra* notes 241-43 and accompanying text.

[277] *See supra* notes 249-50 and accompanying text.

The pro rata penalty might manifest itself in several different ways. First, and most simply, all of the class members may be found—under the rule of individual valuation—to individually satisfy the amount in controversy requirement.[278] Alternatively, the rule of individual valuation might lead to the result that some of the class members satisfy the amount in controversy while others do not. Under the rule established in *Zahn*, the federal courts would accept jurisdiction over the plaintiffs who met the jurisdictional amount and dismiss the others.[279] At that point, the court would proceed to determine whether the rule-based requirements for class adjudication—including numerosity—were met.[280]

The rule of individual valuation could have its most dramatic impact, however, in jurisdictions that deem the supplemental jurisdiction statute to have overruled *Zahn*. In those circuits, a single jurisdictionally-sufficient class member can serve as the jurisdictional anchor for the entire class.[281] The natural, perhaps unavoidable, consequence of a valuation scheme that focuses on individuals rather than averages is that it will identify the extremes. In other words, whereas a pro rata valuation scheme might bury the one class member whose individual entitlements to common relief forms would meet the jurisdictional amount, an individual valuation scheme will expose him.[282] In this regard,

---

[278] Many prominent federal court class actions involving mass torts have predicated diversity jurisdiction on the value of each class member's individual damages. The trial court in the *Amchen* case, for example, found that each class member's individual compensatory and punitive damages exceeded the jurisdictional amount—even those class members who had been exposed to asbestos but were not yet injured. *See* Carlough v. Amchen Prods., Inc., 834 F. Supp. 1437, 1457-62 (E.D. Pa. 1993). While the Supreme Court expressed some doubt about this finding as to the "exposure only" class members, it did not reach the issue. *See* Amchen Prods., Inc. v. Windsor, 521 U.S. 591, 613 n.15 (1997). Individual damages have satisfied the amount in controversy requirement in non-tort contexts as well. *See*, *e.g.*, Hawkins v. Aid Ass'n for Lutherans, 338 F.3d 801, 805 (7th Cir. 2003) (policy values in insurance class action exceeded the requisite amount in controversy).

[279] *See* Zahn v. Int'l Paper Co., 414 U.S. 291, 301 (1973).

[280] *See* FED. R. CIV. P. 23 (setting forth class codification requirements).

[281] *See*, *e.g.*, Louque v. Allstate Ins. Co., 314 F.3d 776, 782 (5th Cir. 2002) (finding that lead plaintiff stated a claim in excess of $75,000 and asserting supplemental jurisdiction over the rest of the class members).

[282] It bears noting, however, that the existence of a high dollar *unnamed* class member will not support supplemental jurisdiction, since courts look only to the lead plaintiffs in applying § 1367. *See* 5 MOORE'S FEDERAL PRACTICE, *supra* note 69, § 23.07[3][c][ii] ("[T]he statute does not permit supplemental jurisdiction over a class action in which *unnamed* class members meet the amount in controversy requirement, but the named plaintiff does not."); *see*, *e.g.*, Gibson v. Chrysler Corp.,

the rule of individual valuation may appear to some as a stalking horse for supplemental jurisdiction.

Very little can be said, however, about how substantially the rule of individual valuation would actually impact the federal class action docket.[283] Ironically, the source of the uncertainty is that individual valuation itself is plagued by vexing valuation questions. The valuation of punitive damages, for example, remains a quagmire. In *State Farm*, the Supreme Court purported to presumptively cap the ratio of punitive to compensatory damages at ten to one.[284] Thus, it could be that individually-valued punitive damages might exceed prorated punitive damages by a factor of ten.[285] But because the ratio cap is not firm, courts can only guess at when the Supreme Court might permit higher ratios. To the extent that the legal certainty test still controls the valuation of an individual plaintiff's punitive damages claim, courts still face a daunting task of determining just how much a plaintiff could recover within the limits of state law and due process. If that was not enough, unanswered questions remain regarding the viability of "total harm" punitive damages—which

261 F.3d 927, 940-41 (9th Cir. 2001) (rejecting argument that court may use supplemental jurisdiction based on jurisdictionally-sufficient claim of class member who as not designated as a named plaintiff); *In re* Brand Name Prescription Drugs Antitrust Litig., 123 F.3d 599, 607 (7th Cir. 1997) ("At least one named plaintiff must satisfy the jurisdictional minimum.").

283 The rule of individual valuation, of course, also would impact the process by which federal judges value class actions. One salutary effect is that it would standardize claim valuation, since federal courts already value compensatory damages for individual class members separately. *See* Clark v. Paul Gray, Inc., 306 U.S. 583, 590 (1939) (dismissing "for want of the jurisdictional amount as to all of the appellees except Paul Gray, Inc.," which established that it sought a sufficient amount in controversy); *see also* Snyder v. Harris, 394 U.S. 332, 334 (1969) (non-aggregated value of class members compensatory claims was their personal losses of $8,740 in one case and $7.81 in the other). Indeed, for compensatory damages, pro rata valuing is dismissed as "simplistic averaging." Agre v. Rain & Hall LLC, 196 F. Supp. 2d 905, 908 (D. Minn. 2002) (proffering "aggregated-sum-divided-by-the-number-of-plaintiffs theory does not establish . . . that each individual plaintiff's insurable contract losses were in excess of $75,000"). Understandably, one might be concerned that replacing pro rata valuation with individual valuation would increase the court's workload. In most cases, however, the courts should be able to use wholesale estimates to determine whether a more detailed analysis is required, as a few calculations may quickly rule out the ability of the class members to individually meet the amount in controversy or establish that they do meet it. Where the outcome is in doubt, courts will face a tougher task, though, as shown above, it is one they already bear for compensatory damages.

284 State Farm Mut. Auto. Ins. Co. v. Campbell, 123 S. Ct. 1513, 1524 (2003).

285 *See supra* notes 241-53 and accompanying text.

State Farm does not explicitly foreclose—and how cumulative punitive damages awards impact future claimants.

Similar uncertainties bedevil attorneys' fee awards (where they still count[286]). Courts face no easy task in determining how much a reasonable fee would be in any particular case. If courts take the legal certainty test seriously, individually-valued fee awards could be far greater than prorated fee awards, owing to the economies of scale of group litigation.[287] Again, however, questions regarding single-plaintiff claim valuation prevent us from knowing more about the actual disparity, which in turn preclude specific conclusions regarding how many cases that fail the jurisdictional amount when prorated would satisfy it under the rule of individual valuation.

B. The Real Problem with Valuing Class Claims for Injunctive Relief and Restitution

One of the more surprising findings of this Article is that, for the most part, courts already conform to the rule of individual valuation for injunctive relief and restitution. Whether they value injunctive relief from the plaintiff's perspective or the defendant's perspective, the end result is that courts try to value the injunction based on benefit to or cost associated with individual class members.[288] And, when courts value restitution claims that seek disgorgement, they do so based on what class members could obtain individually.[289] Nevertheless, the case law evidences considerable turmoil because of unsettled questions that relate to single-plaintiff equitable claim valuation.

First, the rule of individual valuation highlights some fundamental questions regarding the value of injunctive relief. The question that has received the most attention lately has been whether injunctive relief may be valued based on the cost to the defendant, rather than just the benefit to the plaintiff. The Supreme Court had taken certiorari on that issue, but dismissed the writ as improvidently granted.[290] What makes that question so important, however, is a subsidiary unresolved valuation issue—

286 *See* Hart v. Schering-Plough Corp., 253 F.3d 272, 274 (7th Cir. 2001) (counting only fees incurred prior to suit towards the amount in controversy).

287 *See supra* notes 249-50 and accompanying text.

288 See *supra* notes 169-92 and accompanying text.

289 *See supra* notes 193-98 and accompanying text.

290 *See supra* note 53 (discussing dismissal of writ of certiorari as improvidently granted in *Ford Motor Co. v. McCauley*).

whether the defendant's costs include the oftentimes enormous internal costs it incurrs in order to comply externally with the injunction.

The existing class action cases demonstrate that the courts do not fully appreciate the source of the problem. To date, the courts have viewed the enormity of the defendant's compliance costs as a de facto aggregation problem. In response, a few courts have prorated the defendant's costs.[291] The Seventh and Ninth Circuits, however, responded by implicitly adopting the rule of individual valuation: They calculate the amount in controversy based not on the defendant's cost to comply with a class-wide injunction, but on what it would cost to comply with an injunction running to a single plaintiff.[292] In so doing, however, they created a potentially gaping entry into federal court because the defendants argued that, given the nature of the injunctions requested, it would cost them millions to comply with the injunction even if it ran only to a single plaintiff. The Seventh and Ninth Circuits both responded by excluding what they termed the defendant's internal compliance costs from the amount in controversy calculation.[293]

Were these courts to explicitly approach the problem from the rule of individual valuation, they would see that there is only one relevant question: Does the amount in controversy under § 1332 *ever* include the indirect costs a defendant incurs in order to put itself in a position to give *any* plaintiff what he wants? To the extent that internal costs count in a single plaintiff suit, then the rule of individual valuation would include those same costs in the value of each class member's claim. It goes without saying that, under the rule of individual valuation, a great number of class actions would qualify for diversity jurisdiction were the Supreme Court to allow defendant-viewpoint valuation and define costs in a way that includes internal compliance costs. The amount in controversy would be met for each class member any time a defendant could show that it would incur more than $75,000 of internal expense in order to put itself in a position to begin complying with the requested court order, even if the subsequent

---

[291] *See supra* cases cited in note 183.

[292] *See In re* Ford Motor Co./Citibank (S.D.), 264 F.3d 952, 959 (9th Cir. 2001); *In re* Brand Name Prescription Drugs Antitrust Litig., 123 F.3d 599, 610 (7th Cir. 1997).

[293] *See In re Ford*, 264 F.3d at 961; *In re Brand Name Drugs*, 123 F.3d at 610 (asserting in dicta).

cost that it incurred each time it actually complied with the order to benefit a class member was minimal.

Class action restitution claims also harbor crucial and unresolved single-plaintiff valuation questions. Many class actions seek restitution—at least in the sense that they ask the court to order that a defendant who has unjustly profited from wrongdoing will be made to disgorge the ill-gotten gains.[294] Some states appear not only to permit this remedy, but to allow a single plaintiff to recover the full amount of the defendant's ill-gotten gains.[295] In this situation, the rule of individual valuation would attribute the full value of the restitution claim to each class member. And since a defendant who is the target of a class suit is likely to have pocketed more than $75,000 in overall ill-gotten gains, the practical result is that when a class invokes this type of restitution claim, each class member will satisfy the amount in controversy requirement based on the restitution claim alone.

All of this assumes, however, that the applicable state law allows a single victim to receive a disgorgement of the full amount of the defendant's ill-gotten gains. This type of remedy is common in federal securities cases prosecuted by the federal government.[296] According to one commentator, however, full disgorgement orders are available only to public enforcement agencies rather than as a private remedy for civil litigants.[297] Thus, it may be that most states limit a single plaintiff to a "disgorgement" of his own losses. While a court might call that remedy restitution, it is in reality nothing more than compensatory damages[298] and ought to be valued as such.

---

294 While many might argue that the courts are conflating restitution, unjust enrichment, and disgorgement, *see supra* footnote 135 and materials cited therein, a federal court may not disregard a state remedy because it thinks it is misguided or mistaken.

295 *See supra* notes 270-71 and accompanying text.

296 "In the exercise of its equity powers, a district court may order the disgorgement of profits acquired through securities fraud." S.E.C. v. Patel, 61 F.3d 137, 139 (2d Cir. 1995). Because the purpose of the disgorgement order is to deter securities fraud by depriving violators of their ill-gotten gains, the violator must disgorge the full amount of those gains. *See* S.E.C. v. Fischbach Corp., 133 F.3d 170, 175-76 (2d Cir. 1997). While the SEC may allocate disgorged profits to victim compensation, the disgorgement power itself is not tied to or limited by the victim's actual losses. *Id.* at 176.

297 *See* JAMES M. FISCHER, UNDERSTANDING REMEDIES 334 (1999).

298 *See* Douglas Laycock, *The Scope and Significance of Restitution*, 67 TEX. L. REV. 1277, 1282 (1989).

VI

Class Action Valuation and Jurisdictional Reform

The rule of individual valuation would change the number of class actions that, through the pursuit of common relief, could satisfy the amount in controversy requirement for diversity jurisdiction. As discussed above, thorny questions about how those common relief claims are valued even when brought by single plaintiffs make it very hard to say what the extent of that change might be. Two other considerations—both pertaining to jurisdictional reform—further cloud the situation. First, loopholes in the existing removal framework have the potential to severely blunt the impact of the rule of individual valuation. Second, Congress is actively considering comprehensive class action reform that would explicitly displace the *Snyder* non-aggregation rule and value class actions based on the total amount of relief claimed by the class.

A. Amount in Controversy and the Special Problems of Removal

The rule of individual valuation would likely increase the number of class actions that *could be brought* under diversity jurisdiction. Thus, to the extent that plaintiffs wish to pursue state law class actions in federal court, the rule of individual valuation facilitates that goal. The modern trend, however, is that plaintiffs prefer the state court forum. Thus, in most cases it will be the defendant who seeks the federal forum by removing a class action from state court. As discussed below, removal presents special problems for class action valuation.

The most basic problem results when plaintiffs' counsel simply omits all of the "high-dollar" claims from the state court complaint, instead including only those that fall demonstrably short of the jurisdictional amount on a per class member basis. In many cases, plaintiffs' counsel may truly intend to forego the omitted claims for strategic reasons, perhaps to ensure a state forum or perhaps to facilitate class certification.[299] In other

[299] One practice guide, for example, recommends that plaintiffs in consumer cases omit common law fraud claims because of the negative impact the issue of reliance has on the predominance requirement under Rule 23(b)(2). *See* National Consumer Law Ctr., Consumer Class Actions: A Practical Litigation Guide § 1.5.3, at 16 (5th ed. 2002).

cases, however, the omission is not a genuine waiver. First, the state in which the class action is pending may follow Rule 54(c)[300] and allow the plaintiff to recover more in damages than he or she asks for in the complaint.[301] Thus, the omission does not compromise ultimate recovery. Second, plaintiffs' counsel may intend to amend his state law complaint after 365 days, when the one-year period[302] for removing diversity cases expires.[303]

When class counsel omits claims entirely there is little a federal court can do regarding the amount in controversy. Nothing requires a plaintiff to sue at all, let alone assert all of the claims he might have. And until potential claims are actually asserted, they carry no jurisdictional consequence.[304] Thus, claim omission—particularly with the intent to amend after the removal period expires—is something that at least some federal judges acknowledge to be a problem but feel powerless to address directly.[305] One judge addressed the problem indirectly, however, by granting remand but threatening sanctions if the plaintiffs later added

300 Rule 54(c) provides, in pertinent part, that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, *even if the party has not demanded such relief in the party's pleadings*." FED. R. CIV. P. 54(c) (emphasis added).

301 14C CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE, § 3725, 96 (2d ed. 1984) [hereinafter 14C FEDERAL PRACTICE AND PROCEDURE]; Russell P. Jessee, Note, *Pleading to Stay in State Court: Forum Control, Federal Removal Jurisdiction, and the Amount in Controversy Requirement*, 56 WASH. & LEE L. REV. 651, 664 (1999).

302 *See* 28 U.S.C. § 1446(b) (2000).

303 See Alice Noble-Allgire, *Removal of Diversity Actions When the Amount in Controversy Cannot Be Determined from the Face of Plaintiff's Complaint: The Need for Judicial and Statutory Reform to Preserve Defendant's Equal Access to Federal Courts*, 62 MO. L. REV. 681, 732 (1997) (stating that one-year limit "can put the defendant's right to remove at the mercy of a dilatory or unscrupulous plaintiff"); Jack E. Karns, *Removal to Federal Court and the Jurisdictional Amount in Controversy Pursuant to State Statutory Limitations on Pleading Damage Claims*, 29 CREIGHTON L. REV. 1091, 1096 (1996) (noting that "a plaintiff could plead less than the jurisdictional amount, wait for the one year period to expire, and amend the complaint to include an amount in excess of the jurisdictional amount").

304 *Cf.* Merrell Dow Pharm., Inc. v. Thompson, 478 U.S. 804, 810 n.6 (1986) (finding no federal question jurisdiction despite existence of potential federal cause of action because "[j]urisdiction may not be sustained on a theory that the plaintiff has not advanced").

305 Davis v. Carl Cannon Chevrolet-Olds, Inc., 182 F.3d 792, 799 (11th Cir. 1999) (Nangle, J. concurring) (noting that while the lead plaintiffs were purporting to waive all punitive damages, "the reality of the situation is that plaintiffs will likely seek to amend their complaint and seek greater amounts of damages after the one year removal window has closed").

the omitted claims.[306]

Class counsel who permanently waive class claims to stay under the amount in controversy, however, may encounter different problems. In one recent case, the Fifth Circuit simply disregarded the purported class claim waiver as ineffective, based in part on the conclusion that class counsel lacked authority to do so from the absent class members who owned the claim.[307] Similarly, there is good cause to question whether a class action that omits the class members' most valuable claims can satisfy the adequacy of representation prerequisite to class certification.[308]

A similar problem arises when class counsel asserts the potentially "high-dollar" claims in state court but affirmatively values them in the state court complaint at less than the jurisdictional amount. While the longstanding rule is that the plaintiff, as master of his complaint, is free to seek less than the jurisdictional amount in order to ensure a state court forum,[309] many federal courts give the defendant an opportunity to challenge the plaintiff's state court ad damnum as a non-binding undervaluation.[310]

---

306 *See* Mitchell v. Geico, 115 F. Supp. 2d 1322 (M.D. Ala. 2000). This case involved the value to place on punitive damages that the class could have sought but did not. The court accorded no jurisdictional value to potential punitive damages based on class counsel's assertion that the class would not later seek—or even accept—punitive damages upon remand to state court. *Id.* at 1329. It then stated that, if the plaintiff's counsel subsequently asserted a claim for punitive damages or accepted them even if not requested, sanctions against the lawyer would be "swift in coming . . . and painful upon arrival." *Id.* at 1330.

307 *See* Manguno v. Prudential Prop. & Cas. Ins., Co., 276 F.3d 720, 724 (5th Cir. 2002) (including value of attorneys' fee claim after finding that purported waiver of claim was ineffective). Other courts uphold unilateral claim waivers on the basis that individual class members who wish to assert those claims may opt out and pursue them individually. *See* Cowan v. Combined Ins. Co. of Am., 67 F. Supp. 2d 1312, 1317 (M.D. Ala. 1999) (excluding value of waived punitive damages claim based on absent class members' opt out rights).

308 *See* FED. R. CIV. P. 23(a).

309 St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 294 (1938) (finding that a plaintiff who "does not desire to try his case in federal court . . . may resort to the expedient of suing for less than the jurisdictional amount.").

310 *See* 15 MOORE'S FEDERAL PRACTICE, *supra* note 10, § 102.107[3]. In many states, the plaintiff need not plead—and, in some states, may not plead—a specific ad damnum (request for damages). *See* Noble-Allgire, *supra* note 303, at 686-87 (1997) (listing practices from various states); *see generally* Karns, *supra* note 303, at 1091. In this situation, the prevailing rule in most federal courts is that, in order to remove, the defendant must show by "a preponderance of the evidence" that the value of the plaintiff's claims exceeds the jurisdictional amount. Martin v. Franklin Capital Corp., 251 F.3d 1284, 1290 (10th Cir. 2001) (listing jurisdictions that had adopted the preponderance test but holding that it need not decide); *see also* 14C Federal Practice and Procedure, *supra* note 301, § 3725, at 80-81 (discussing prepon-

In the Fifth Circuit, for example, a defendant may remove a so-called "lowball"[311] state court complaint by showing by a preponderance of the evidence that the claim is large enough to surpass the jurisdictional amount.[312] If the defendant makes this showing, the plaintiff can defeat removal only by showing that his recovery is legally certain to be less than the jurisdictional amount, such as by filing a pre-removal binding waiver or by showing that the state court ad damnum is both binding and not subject to amendment.[313]

Recently, class counsel seeking to removal-proof their state court class actions have started using a new tactic. Instead of omitting their high-dollar claims altogether, plaintiffs are asserting them but positioning themselves below the jurisdictional amount by "waiving" each class member's potential relief above $75,000.[314] In doing so, they rely directly on *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, in which the Supreme Court stated that a plaintiff who wants to remain in state court "may

derance standard); Noble-Allgire, *supra* note 303, at 695-96 (discussing appellate court decisions, and equating the preponderance standard with the "more likely than not" standard adopted in several circuits); *see generally* Jesse, *supra* note 301, at 679 (discussing the preponderance of the evidence standard).

311 *See* Noble-Allgire, *supra* note 303, at 697 (adopting this terminology).

312 *See* De Aguilar v. Boeing Co., 47 F.3d 1404, 1411 (5th Cir. 1995). Other courts have adopted a preponderance standard or its equivalent. *See*, *e.g.*, Rogers v. Wal-Mart Stores, Inc., 230 F.3d 868, 871 (6th Cir. 2000) (holding that where state law does not limit plaintiff to the damages prayed for in the state law complaint, defendant may remove by showing that it is "'more likely than not that the plaintiff's claims meet the amount in controversy requirement"); *In re* Diet Drugs Prods. Liab. Litig., 2000 WL 556602, at *3 (E.D. Pa. Apr. 25, 2000) (adopting preponderance standard and denying remand motion in Phen-Fen litigation). In contrast, the Eleventh Circuit imposes a much higher standard, requiring the defendant to show that it is legally certain that the plaintiff's damages will exceed the jurisdictional amount. *See* Burns v. Windsor Ins. Co., 31 F.3d 1092, 1095 (11th Cir. 1994).

313 *De Aguilar II*, 47 F.3d at 1412; *see also*, *e.g.*, Jeffery v. Cross Country Bank, 131 F. Supp. 2d 1067, 1070 (E.D. Wis. 2001) (remanding where plaintiff's complaint affirmatively disavowed a damage claim in excess of $75,000); Moore v. Toyota Motor Corp., 64 F. Supp. 2d 612, 614 (N.D. Miss. 1999) (remanding where plaintiff stipulated that she was seeking less than $75,000 and that she would not amend her ad damnum after the one-year diversity removal period expired).

314 *See* John H. Beisner & Jessica Davidson Miller, *They're Making a Federal Case Out of It . . . in State Court*, 25 HARV. J.L. & PUB. POL'Y 143, 148 (2001); *see*, *e.g.*, Cowan v. Combined Ins. Co. of Am., 67 F. Supp. 2d 1312, 1316 (M.D. Ala. 1999) (waiving all punitive damages, in addition to compensatory and other damages above $74,000 for each class member); Hooks v. Assocs. Fin. Serv. Co., 966 F. Supp. 1098, 1099 (M.D. Ala. 1997) (waiving each class member's recovery above $49,000); *see also*, *e.g.*, Brooks v. Pre-Paid Legal Servs., Inc., 153 F. Supp. 2d 1299, 1300 (M.D. Ala. 2001) (waiving each plaintiff's relief above $74,500).

resort to the expedient of suing for less than the jurisdictional amount, and though he would be justly entitled to more, the defendant cannot remove."[315] Here too, the courts seem to be honoring the supposed waiver and valuing each class member at that amount.[316]

To the extent the courts continue to allow this type of maneuvering,[317] defendants are effectively stripped of their ability to remove diversity class actions. While the actual distribution method may vary somewhat, the class members will split up any eventual recovery of overlapping forms of relief like punitive damages.[318] Knowing this, class counsel can discount the recovery each class member purports to seek individually based on the realities of group award distributions. For example, if class counsel anticipates that the most that the defendant might have to pay in punitive damages is $20 million, counsel can quickly calculate that, for a 1,000 member class, the prorata *payout* will be just $20,000. Thus, class counsel can comfortably "waive" each individual's *claim* above $75,000 knowing that it will have no effect on actual class member payout.[319]

---

315 St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 294 (1938).

316 *See supra* cases cited in note 314. *But see De Aguilar II*, 47 F.3d at 1413 (disregarding "value waiver" in non-class action on basis that class counsel were not the legal representatives of the real plaintiffs).

317 *Snyder*, of course, requires that the court value the class members individually. And *Red Cab* certainly holds that a court must recognize a single plaintiff's voluntary waiver when valuing the jurisdictional amount. But do either *Snyder* or *Red Cab* require that the court accept value waivers in class actions? One alternative application of *Red Cab* would be to accept value waivers only to the extent that the remaining total of all parties' relief did not exceed $75,000. That application would still honor the animating principle of *Red Cab*—to preserve the state forum for plaintiffs willing to forego relief to get it—because individual class members, at least in Rule 23(b)(3) class actions, could still opt out, re-file in state court, and affirmatively waive relief above the jurisdictional amount in their single plaintiff suits. It would also honor *Snyder* because it would not displace the requirement that each plaintiff's actual total claim value exceed the jurisdictional amount. Its effect, then, would be solely to prevent parties who individually could have received in excess of $75,000 from joining together to collectively seek more than the jurisdictional amount, while simultaneously disclaiming that any of them is individually seeking the jurisdictional amount.

318 *See* Hines, *supra* note 237, at 924 (discussing variations in distribution of class-wide punitive damages).

319 Looking at this from the other direction, class counsel can "waive" the amounts above $75,000 and still seek enormous class-wide relief. For example, in the 1,000 member class action hypothesized above, class counsel can "waive" all recovery above $75,000 per class member (for total damages) and still affirmatively seek $75 million in total damages.

B. Comprehensive Class Action Jurisdictional Reform

For the past several years, Congress has considered legislation that would comprehensively reform class action jurisdiction in federal court.[320] In 2003, for example, bills titled the Class Action Fairness Act were introduced in both the House of Representatives and the Senate.[321] The openly-avowed purpose of these bills is to open the federal courts to a much greater range and number of state law class actions.[322] The bills accomplish this primarily by expressly applying the minimal diversity standard to class actions[323] and by using the aggregate value of class-wide relief to determine the amount in controversy, with the ju-

320 In a related development, Congress recently expanded federal jurisdiction over mass accident litigation via the Multiparty, Multiforum Trial Jurisdiction Act of 2002. 28 U.S.C. § 1369 (2000). Like the comprehensive class action reform proposals discussed *infra*, it relies on minimal diversity and an altered amount in controversy requirement to provide a federal forum for large scale litigation involving citizens of different states. It is far narrower in scope, however, as it covers only cases arising out of a single accident and applies only where at least seventy-five natural persons have died as a result. 28 U.S.C. § 1369(a) (2000).

321 *See* Class Action Fairness Act of 2003, H.R. 1115, 108th Cong. (2003); Class Action Fairness Act of 2003, S. 274, 108th Cong. (2003). Similar bills passed the House of Representatives in 1999 and 2002. *See* H.R. 2341, 107th Cong. (2002); H.R. 8595, 106th Cong. (1999). For a discussion of the 1999 class action jurisdiction bills, see Glenn A. Danas, Comment, *The Interstate Class Action Jurisdiction Act of 1999: Another Attempt to Federalize State Law*, 49 EMORY L.J. 1305, 1335-37 (2000); Stephen D. Kaufmann, Comment, *"Federalizing" Class Actions: The Future of the Jurisdictional Requirements for Diversity-Based Class Actions*, 52 ALA. L. REV. 1029, 1044-49 (2001) (discussing Interstate Class Action Jurisdiction Act of 1999 and the Class Action Fairness Act of 1999, neither of which Congress enacted). It is worth noting that this is not Congress's first encounter with class action jurisdiction bills, as several were introduced by plaintiff and consumer groups in the wake of *Snyder* and *Zahn*. *See* RAND/ICJ STUDY, *supra* note 4, at 17 (discussing proposed legislation); *see generally* Leete, *supra* note 5, at 46 (discussing the proposed but not enacted Consumer Class Action Act); James E. Starrs, *The Consumer Class Action—Part II: Considerations of Procedure*, 49 B.U. L. REV. 407, 494 (1969) (same).

322 *See* H.R. 1115 § 2(b)(3) (stating that purpose of the Act is "to restore the intent of the framers of the Constitution by providing for Federal court consideration of interstate class actions."); S. 274 § 2(b)(2) (same); *see also* Schwartz et al., *supra* note 5, at 510-12 (discussing jurisdictional purpose of essentially identical previous bills).

323 *See* H.R. 1115, § 4(a)(2)(A); S. 274 (4)(a)(2)(A). In so doing, it effectively gives defendants the same "minimal diversity option" that class plaintiffs enjoy as a practical matter under *Ben Hur*. *See* Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356, 366 (1921) (holding that only named class members count towards determining diversity of citizenship). The bills contain exceptions, however, for cases in which the "substantial majority" of class members are from the same state as the primary defendant and in which the local state law would apply. *See* H.R. 1115, § 4(a)(3)(A); S. 274 (4)(a)(3)(A).

risdictional amount then set at five million dollars.[324] The Class Action Fairness Act bills also facilitate removal of class actions by eliminating the one year time limit for removal of diversity cases for class actions.[325]

It is apparent that a bill of this nature, if enacted, would substantially impact the amount in controversy issues that lie at the core of this Article. Quite obviously, courts need not fret over how properly to value common relief on a per class member basis if Congress overrules *Snyder* and institutes an aggregate value test.[326] By design, the bills would also address the valuation problem caused by the one-year cap on diversity removal. By providence, the adoption of an aggregate value standard would address the thorny problem of "value waiving."[327]

Nevertheless, it remains important to proceed with the task at hand. If nothing else, it is far from certain that Congress will pass comprehensive class action jurisdiction reform any time soon.[328] Class action jurisdiction bills are controversial because of the belief that, even at the seemingly high threshold of five million dollars, they would sweep most "small claims" state law class actions into federal court.[329] The proponents argue that sweeping juris-

---

[324] *See* H.R. 1115 § 4(a)(4); S. 274 § 4(a)(4).

[325] *See* H.R. 1115 § 5(b); S. 274 § 5(b); *see also* Schwartz et al., *supra* note 5, at 513. Incidentally, the same concern that plaintiffs were manipulating § 1446(b) led to the proposal in the Federal Judicial Code Revision Project to eliminate the one year cap on delayed removal in diversity cases and replace it with a new section, 28 U.S.C. § 1447(b), that would authorize district judges to remand diversity cases removed after one year from initial filing "in the interest of justice." *See* American Law Institute, Federal Judicial Code Revision Project § 1447(b), at 154 (Tentative Draft No. 3, 1999).

[326] Some judges might welcome passage of the bill if for no other reason than to free them from *Snyder*'s command that they calculate per class member jurisdictional amounts at all.

[327] *See supra* notes 313-19 and accompanying text. While aggregate valuation does not foreclose class counsel from waiving the value of individual class member's claims, it severely limits the benefit of doing so because class counsel must then waive enough value for every class member to get under two million dollars for the class.

[328] Similar bills have been introduced many times without enactment. *See supra* note 321.

[329] The Federal Judicial Center is completing work on a national survey of plaintiffs' and defendants' attorneys in class action litigation that examines, among other things, why they had chosen the forum they did. Although the report is not yet finished, the initial data suggest that a sizable number of class actions involve predominantly local class members and yield aggregate recoveries far below $5,000,000. Interview with Thomas E. Willging, Senior Researcher, Federal Judicial Center, in Washington, D.C. (Nov. 18, 2003). While the eventual recovery does not define the *ex ante* amount in controversy, these data do call into question the com-

dictional reform is the only way to remedy what they characterize as a system that rewards rampant forum shopping for the state court judges most willing to abuse class action procedures and choice of law.[330] In that regard, the proponents of the comprehensive class action reform bills seek to regulate state court class action practice by shrinking it and placing the class action docket in the hands of federal judges who already follow what the reformers believe to be the "better practice" (and who are more readily subject to direct federal regulation).[331] The opponents see this as an affront to federalism, in which Congress would use the power of the conservative federal courts to suppress proconsumer and proplaintiff state practices.[332]

CONCLUSION

Whether a class action proceeds in state court or federal court

mon impression that most class actions would easily satisfy the proposed $5,000,000 aggreate amount in controversy requirement.

330 *See* H.R. 1115 § 2(a)(4) (listing abuses that occur when "plaintiffs are able to avoid litigating class actions in Federal court"). As one critic asserts:

> [c]lass action abuse flourishes because of the ease with which contingency fee lawyers manipulate federal law to avoid federal courts and to have their cases heard in more sympathetic state courts. State courts often express bias against out-of-state corporate defendants and fail to apply class action certification standards as rigorously as federal courts do.

Schwartz et al., *supra* note 5, at 484. A related motivating factor is the need to address the problem of "universal venue," by which class counsel take advantage of the existing personal jurisdiction and state-law venue rules to forum shop to find the state courts that are the least rigorous in applying class action certification and settlement standards. *See* Beisner & Miller, *supra* note 314, at 155; *see also* Edward H. Cooper, *Federal Class Action Reform in the United States: Past and Future and Where Next?*, 69 DEF. COUNS. J. 432, 437 (2002). While the federal court system has mechanisms for transferring and consolidating duplicative cases, *see* 28 U.S.C. § 1404 (2000) (change of venue statute); 28 U.S.C. § 1407 (2000) (multidistrict litigation statute for pre-trial consolidation), there is no effective way to consolidate duplicative class actions pending in the various state courts. *See* RAND/ICJ STUDY, *supra* note 4, at 482-83 (discussing practical problems associated with competing class actions in state courts).

331 *See* Proposed Amendments to Fed. R. Civ. P. 23 (submitted to U.S. Supreme Court in December 2002) (proposing changes that, among other things, would set stricter requirements for approving class action settlements, including explicitly authorizing federal judges to condition settlement approval on giving the class members an opportunity to "opt-out" of the settlement itself).

332 *See* Anderson, *supra* note 4, at 347-51 (addressing ALI proposal that also would shift class action docket from state court to federal court); Danas, *supra* note 321, at 1305-06; *see also* Robert Torricelli, *Class Action Legislation: A View from the U.S. Senate*, 215 N.J. LAW. MAG. 9 (2002) (arguing that the pending class action legislation "sweeps too broadly" and could "greatly hinder the ability of plaintiffs to obtain any class action relief at all").

can have substantial consequences for certification, settlement, and other important factors that straddle the line between management and merits. One of the critical issues in determining whether a class action can be filed in—or removed to—federal court is how courts calculate the amount in controversy. Under the existing scheme, class actions must meet the general amount in controversy requirements under § 1332, and courts are supposed to calculate the amount in controversy in class actions in the same way that they would calculate the amount in controversy in non-class cases. Thus, class members are valued as separate individuals and may invoke the aggregate value of relief sought only to the extent that they could have done so as non-class litigants under the common and undivided interest rule. In short, joinder and class structure do not—or at least should not—matter.

In practice, however, joinder and class structure do matter because the federal courts have adopted valuation techniques that impose jurisdictional penalties on certain types of claims when they are raised in a class action. When courts prorate the value of class action claims for punitive damages or attorneys' fees, they use simple division in a way that undervalues those claims relative to what the value would be if the class members had sued as solo plaintiffs. In addition, some courts value equitable relief like injunctions and restitution claims in ways that may fail to credit each class member with the full jurisdictional value of those claims.

At this point, it is unclear whether Congress, as part of an effort to reform class action litigation generally, will adopt a new valuation model for class actions that is based on aggregate valuation. But, at least for now, class actions remain under the general diversity jurisdiction rubric, and so it is imperative that courts get it right. The rule of individual valuation is crucial to the existing diversity statute because it is the only valuation technique that accomplishes the result that the Supreme Court says Congress intended—for individual class members to be valued based on their own claims, no more and no less. Valuation principles (as well as removal loopholes) that prevent federal courts from hearing class claims that, were they properly valued, would satisfy the existing jurisdictional amount deprive deserving litigants of the federal forum and serve only to fuel the cry that the existing diversity rule misfires for all class actions.