Marquette Law Review

Volume 45
Issue 1 *Summer 1961*

Article 7

1961

Federal Jurisdiction and Procedure: Discretionary Award of Costs Under Title 28 U.S.C. Sec. 1332(b) and Federal Rule 54(d)

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RECENT DECISIONS

Federal Jurisdiction and Procedure: Discretionary Award of Costs Under Title 28 U.S.C. Sec. 1332(b) and Federal Rule 54(d)—Plaintiff brought suit in Federal District Court for a cause of action arising out of an automobile accident. Plaintiff claimed $25,000.00 but obtained a jury verdict of only $8,000.00. Defendant claimed costs should be awarded to him in accordance with Section 1332(b) providing that:

> Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000.00, computed without regard to any set-off and counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the District Court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.[1]

The court, in construing Section 1332(b), held that at the time plaintiff commenced his action he could reasonably have expected to recover a verdict for the jurisdictional amount of more than $10,000.00. The court stated that it was convinced plaintiff's claim for damages was made in good faith and not merely to give a Federal court jurisdiction. *Stachon v. Hoxie,* 190 F. Supp. 185 (W.D. Mich. 1960).

Since 1789 by the Judiciary Act[2] Congress has restricted the diversity-of-citizenship jurisdiction of the Federal District Courts by requiring that there be a minimum amount in controversy. By the Act of July 25, 1958[3] (Section 1331) the minimum amount was raised to $10,000.00 and the unique feature providing for a discretionary award of costs in the case of recovery of less than $10,000.00, as quoted above, was added. The purpose of the 1958 Act was to reduce congestion in the federal courts.[4]

Section 1332(b), as to most of its features, was the result of the work of the United States Judicial Conference, particularly its Committee on Venue and Jurisdiction. However, the provision interpreted by the courts in the *Stachon* case relating to discretionary costs was not a part of the Judicial Conference recommendation. This provision was added as a committee amendment in the House.[5] It was emphasized in Congress that the increase in jurisdictional amount was merely an adjustment to the diminution in the value of

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[1] 28 U.S.C. §1332(b) (1958).
[2] Act of Sept. 24, 1789, ch. 20, §20, 1 Stat. 78 ($500.00 minimum).
[3] 28 U.S.C. §§1331-32 (1958).
[4] See H.R. Rep. No. 1706, 85th Cong., 2d Sess. *passim* (1958).
[5] See, 104 CONG. REC. 11503, 11508-9 (1958).

the dollar.[6] However, House members feared that this increase in jurisdictional amount might induce a plaintiff who wished his case to be heard in the Federal court merely to enlarge greatly the amount of his claim without regard to the true value thereof.[7] Hence the cost provision was incorporated but since it had not been studied by the Judicial Conference, the sub-committee decided that it should go no further than to make imposition of costs within the discretion of the trial judge.[8]

The Senate Committee on the Judiciary agreed with the House amendment saying:

> This provision will apply only to amounts determined by a verdict or a final judgment decided by the court; not to compromise agreements. In deciding whether to deny costs and/or impose costs on the plaintiff, the court will undoubtedly take into consideration, whether the amount claimed was made in good faith or whether it was made simply to get into Federal Court. It will also take into consideration the fact, if it be a fact, that the plaintiff's net recovery has been reduced by set-off or counterclaim, the validity of which the plaintiff contested in good faith.[9]

The court in the *Stachon* case stated:

> An evaluation of the objective manifestations of the legislative intent at the time the statute was enacted clearly indicates that the plaintiff's right to tax costs should depend upon his good faith in claiming more than the jurisdictional amount provided in the statute.[10]

This decision, which is apparently the first to construe section 1332(b), thus adopts the traditional test of good faith long utilized by the federal courts to determine whether plaintiff's claim is originally within the jurdictional amount where jurisdiction is challenged for lack of jurisdictional amount.[11] Therefore, it would seem that only if the defendant has *not* challenged the plaintiff's jurisdictional amount upon the plaintiff's filing his claim will 1332(b) come into play. The court held that 1332(b) was intended to be applied only in cases where the plaintiff has *obviously* acted in bad faith in claiming over $10,000.00 in order to bring the action in a federal court.

The discretionary costs provision does not apply to removed

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[6] See H.R. Rep. No. 1706, 85th Cong., 2d Sess. 18 (1958); 1951 Report of the Committee on Jurisdiction and Venue of the Judicial Conference of the United States, 1957 Hearings 44.
[7] See 1957 Hearings 30-31.
[8] See 1957 Hearings, 30, 32.
[9] 2 *U.S. Code Congressional and Administrative News,* at 3103 (1958).
[10] Stachon v. Hoxie, 190 F. Supp. 185, 186 (W.D. Mich. 1960).
[11] St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283 (1938); Columbia Pictures Corp. v. Rogers, 81 F. Supp. 580 (S.D.W.Va. 1949).

cases, where the defendant rather than the plaintiff has sought the federal forum.[12]

Rule 12(h)(2) of the Federal Rules of Civil Procedure provides that the court, on its own motion shall dismiss an action if at any time it appears that it lacks jurisdiction over the subject matter. Therefore, it would seem that if during the trial the lack of good faith is established the court would be required to dismiss the action for want of jurisdiction originally rather than to retain jurisdiction and assess costs against the plaintiff under 1332(b). It has been suggested that a court might be reluctant to dismiss a case near its conclusion in the interests of the efficient administration of justice, but willing, instead, to tax costs against the plaintiff after its verdict.[13] But it has also been suggested that a determination not to dismiss during the trial but to tax costs would seem to require the logically impossible finding that a plaintiff met the test of good faith in claiming an amount over $10,000.00 for jurisdictional purposes, and at the same time did not meet the identical test for the purpose of awarding costs.[14]

A provision similar to 1332(b) was part of the Judiciary Act of 1789[15] but was repealed in 1948.[16] It provided that a plaintiff recovering an amount of $500.00 or less "shall not be allowed, but . . . may be adjudged to pay, costs." This sum was never changed notwithstanding increasing minimum jurisdictional amounts. The courts refused to hold it amended by implication.[17] This discretion to tax costs against plaintiff was apparently never exercised but dicta indicated when costs could be so taxed. In *Greene v. Bateman*[18] the court said:

> We are referred to no precedents in this district, or elsewhere, of the court in its discretion imposing this additional burden on the plaintiff. . . . I can conceive of (such) cases. . . . Thus, if the claim of the plaintiff was a trivial or frivolous one. . . . Or if the suit seemed brought in this court for vexation, or the plaintiff having doubtfully a real residence elsewhere, and the defendant dragged far from home for trial at unnecessary and aggravated expense . . . [then costs may be taxed].[19]

In another early case,[20] a replevin action to recover possession

[12] *Supra* note 5, at 11508.
[13] Cowen, *Federal Jurisdiction Amended,* 44 VA. *L.* REV. 971, 977 (1958).
[14] Comment 58 COL. L. REV. 1287 (1958).
[15] Judiciary Act of 1789, ch. 20, §20, 1 Stat. 83.
[16] Act of June 25, 1948, ch. 646, §39, 62 Stat. 993.
[17] Eastman v. Sherry, 37 Fed. 844 (E.D. Wis. 1889); Johnson v. Watkins, 40 Fed. 187 (W.D. Mich. 1889).
[18] 10 Fed. Cas. 1126 (No. 5762) (R.I. 1846).
[19] *Id.* at 1128. *Cf.* Hunter v. Marlboro, 12 Fed. Cas. 957 (No. 6908) (C.C. Mass. 1846); Cattle v. Payne, 6 Fed. Cas. 616 (No. 3269) (C.C. Conn. 1808).
[20] Crowe v. Peaslee-Goulbert Co., 37 F. 2d 216 (1st Cir. 1930).

of goods over the jurisdictional amount and damages for detention, the plaintiff recovered possession of the goods but only $1.00 damages. The majority held the discretionary costs provision inapplicable but the dissent stated the only issue tried or triable on the pleadings was illegal detention. The dissenter felt that the only "amount in dispute" was the damage for such detention since the answer disclaimed any title or other right in the goods. This theory would seem to disregard the well-established rule that a valid defense in diminution of the amount claimed does not diminish the amount that is or may be claimed in good faith by the plaintiff.[21]

The decisions employing the good faith test in determining whether plaintiff's claim is originally within the jurisdictional amount will probably be utilized by the courts in determining what is good faith under 1332(b). It has been held that mistake on the part of the plaintiff in making claim to an amount over the jurisdictional amount does not vitiate plaintiff's good faith.[22] Also, plaintiff has a right to press his most optimistic theory of recovery.[23] Subjective good faith of a plaintiff is not the test.[24] A study should be made of the facts, not of the plaintiff's state of mind. In *Food Fair Stores v. Food Fair*[25]the court held that it was not accurate to say that a finding of good faith as to amount in controversy could not be based upon future or contingent damages. It pointed out that while it could not be based upon a mere possibility of future harm, it can be based upon a present probability of such harm.[26] In the *McNutt v. General Motors Corp. case*[27] the court held that if plaintiff's allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof. It was determined in that case that plaintiff had the burden of showing he is properly in court by a preponderance of the evidence.[28]

Various general phrases have been used by the courts in indicating what would be bad faith. Some illustrations are "magnified fraudulently beyond the jurisdictional amount,"[29] "hopelessly exaggerated,"[30] "frivolous"[31] or that "the court is satisfied to a legal certainty that the plaintiff never was entitled to recover the requisite

[21] Harris v. Ill. Central RR Co., 220 F. 2d 734 (5th Cir. 1955).
[22] Sullivan v. Farmers Bank & Trust Co., 145 F. Supp. 702 (E.D. Ky. 1956).
[23] Allman v. James Healing Company, 142 F. Supp. 673 (D.N.J. 1956).
[24] Cumberland v. Household Research Corp. of America, 145 F. Supp. 782 (D. Mass. 1956).
[25] 177 F. 2d 177 (1st Cir. 1949).
[26] *Id.* at 184.
[27] 298 U.S. 178 (1936).
[28] *Id.* at 189.
[29] Smithers v. Smith, 204 U.S. 632, 644 (1907).
[30] *Supra* note 24.
[31] Firemen's Fund Ins. Co. v. Railway Express Ag., Inc., 253 F. 2d 780 (6th Cir. 1958).

jurisdictional amount and that the claim was therefor colorable for the purpose of conferring jurisdiction."[32] If under applicable state law it is apparent that a real legal controversy exists with respect to the amount of damages, plaintiff usually will have satisfied this latter test.[33] In *Saint Paul Mercury Indemnity Co. v. Red Cab Company*[34] the court held that plaintiff's good faith is open to challenge not only by resort to the face of the complaint, but by the facts disclosed at the jurisdictional hearing.

There is a provision in the Federal Rules of Civil Procedure relating to the discretion of the court in allowing costs in addition to 1332(b). Rule 54(d) of the Federal Rules of Civil Procedure provides that in the absence of express statutory provision ". . . costs shall be allowed as of course to the prevailing party unless the court otherwise directs. . . ." A variety of decisions relating to costs have resulted from interpretation of this Rule. In two recent cases[35] on almost identical facts the courts came to different conclusions as to who should bear the costs. The plaintiff in each case was a seaman setting up his claim on three counts: negligence, unseaworthiness of the ship, and recovery of maintenance and cure. They both recovered on the third count only. The court in one case[36] held that the facts were so "inseparably intertwined" that would be impossible to apportion costs between the counts. The court stated that many of the facts testified to were relevant on all of the counts. In conclusion it felt the best solution would be to have each party bear its own costs. In the other case[37] the court held that the plaintiff was not the prevailing party on the significant issues. The court felt that since the plaintiff had prevailed on one minor count it would in its discretion apportion the costs, i.e., plaintiff recovered one-third of his costs. Usually, the defendant must prevail on "clearly severable" matters so as to be entitled to costs on those issues.[38] In *Brown v. Consolidated Fisheries Company*[39] plaintiff's action at law claimed $26,581.59 damages. He recovered $1,471.22 and attempted to tax costs in the sum of $728.60 against defendant. The court held that the plaintiff was a "prevailing" party within the meaning of

[32] St. Paul Mercury Indemnity Co. v. Red Cab Company, 303 U.S. 283, 288 (1938).
[33] Calhoun v. Kentucky-West Va. Ga. Co., 166 F. 2d 530 (6th Cir. 1948); Columbia Pictures v. Grengs, 257 F. 2d 45 (7th Cir. 1958) (punitive damages); Scottish Union & Nat. Ins. Co., v. Bejcy, 201 F. 2d 163 (6th Cir. 1953); Firemen's Fund Ins. Co. v. Railway Express Ag., Inc., 253 F. 2d 780 (6th Cir. 1958).
[34] *Supra* note 33.
[35] Sheaves v. Estrela Corp., 175 F. Supp. 484 (D. Mass. 1959); Simmons v. American Export Lines, Inc., 26 F.R.D. 111 (S.D.N.Y. 1960).
[36] Sheaves v. Estrela Corp., *supra* note 35.
[37] Simmons v. American Export Lines, Inc., *supra* note 35.
[38] Local 205 United E.R.&M. Wkrs. v. General Electric Co., 172 F. Supp. 960 (D. Mass. 1959).
[39] 18 F.R.D. 433 (D. Dela. 1955).

the Rule and entitled to costs even though he established only a portion of his claim. The fact that a plaintiff suing two defendants recovers against only one does not make him liable for one-half the costs.[40] When a defendant files a counterclaim and neither party recovers the courts have denied costs to both parties.[41] Another ground, though it is not frequently used by the courts as a basis for refusing to allow costs to either party under Rule 54(d), is "public interest" in the matter in controversy. One court using this ground felt there was sufficient public interest in an application for abandonment of a railroad line to deny costs to the parties.[42] Another court felt there was a public interest in whether an individual could properly run for office in an Alaskan House of Representatives.[43]

Some courts feel that an actual recovery much above what the defendant has admitted to be due is sufficient to impose costs on him regardless of the relationship of the recovery to the original claim.[44] If a defendant is found to have unnecessarily prolonged a proceeding or has greatly increased the costs, regardless of the result on appeal, the court will not award costs to him[45] and will, in addition, impose all costs on him. The fact that a party has recovered a large verdict does not permit the court to limit his costs to a small sum or nothing at all.[46]

A recent case[47] has held that the Rules of Civil Procedure are applicable to all civil actions. Therefore, the court held there is now no distinction between equitable or legal considerations as to the discretion of the court in relation to costs.

It is apparent from the foregoing decisions under Rule 54(d) that prediction as to what a particular federal court will do is very difficult. Discretion of the court under Rule 54(d) is very wide. Under this Rule the court takes into consideration the whole conduct of the trial and the ultimate result, such as whether plaintiff recovered on only one of several clearly severable counts, whether a successful defendant has unduly delayed the trial through the injection of immaterial issues, whether both parties were negligent, etc. Under 1332(b), however, it would appear from the *Stachon* case

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[40] Dubuque Fire & Marine Ins. Co. v. Union Compress & W. Co., 146 F. Supp. 482 (W.D. La. 1956).
[41] Srybnik v. Epstein, 230 F. 2d 683 (2d Cir. 1956).
[42] Michigan Public Service Comm. v. U.S., 162 F. Supp. 670 (W.D. Mich. 1958).
[43] Hendrick v. Heintzleman, 141 F. Supp. 633 (D.C. Alaska 1956).
[44] Wilson v. Homestead Valve Mfg. Co., 217 F. 2d 792 (3d Cir. 1954); (claimed: ($29,577.41; recovered: $4,900.00); Palma v. Fox, 182 F. 2d 895 (2d Cir. 1950).
[45] Bowman v. West Disinfecting Company, 25 F.R.D. 280 (E.D.N.Y. 1960).
[46] Lichter Foundation Inc. v. Welch, 269 F. 2d 142 (6th Cir. 1959).
[47] Proshker v. Beech Aircraft Corp., 24 F.R.D. 305 (D. Del. 1959).

that the court will limit its investigation to plaintiff's good faith when the action is commenced.

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Federal Income Taxation—Alimony Deduction—"Fixed" Payments for the Support of Children. A deficiency was asserted against the taxpayer because he took a deduction for the full amount of alimony paid to his wife. The Commissioner's contention was based on a provision in the divorce decree that "in the event that any of the [three] children . . . shall marry, become emancipated, or die, then the payments herein specified [which were awarded to the wife alone] shall on the happening of each such event be reduced in a sum equal to one-sixth of the payments which would thereafter otherwise accrue." He asserted that this provision bought one-half of the alimony payments within the terms of the predecessor of Section 71(b) of the 1954 Internal Revenue Code[1] as sums "fixed" for the support of children. Also, since such sums would not be included in the wife's gross income, they should not have been taken as deductions by the husband.[2] The Tax Court[3] agreed with the Commissioner and held that the decree "as a whole," fixed these payments for the support of the children. The Court of Appeals[4] reversed and held that this provision did not "fix" any sum that the wife was *obligated* to use for the support of the children prior to the happening of any of the contingencies. The United States Supreme Court granted certiorari and affirmed. It held that the intent of Congress was to provide certainty in this area and thus there must be a specific designation of amounts to be used for the support of children, and not an allocation based on inference or conjecture. *Commissioner v. Lester,* —U.S.—, 81 S. Ct. 1343 (1961).

Prior to this decision, there was a dispute in the Tax Court and the various circuit courts over the interpretation of Section 71(b). By granting certiorari,[5] the Supreme Court finally decided to take a position and settle the dispute. Provisions in divorce decrees which stated that a certain unqualified sum was to go to the wife, or that specified that

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[1] Section 22(k) of the Internal Revenue Code of 1939, as amended in 1942, provided: "This subsection shall not apply to that part of any such periodic payment which the terms of the decree or written instrument fix, in terms of an amount of money or a portion of the payment, as a sum which is payable for the support of minor children of such husband." Section 71 (b) contains substantially the same language: "Subsection (a) shall not apply to that part of any payment which the terms of the decree, instrument, or agreement fix, in terms of an amount of money or a part of the payment, as a sum which is payable for the support of minor children of the husband." In this article, further reference to the provision will be made to Section 71(b) only.

[2] See: Int. Rev. Code of 1954, §215.

[3] Lester v. Commissioner, 32 T.C. 1156 (1959).

[4] Lester v. Commissioner, 279 F.2d 354 (2d Cir. 1960).

[5] Certiorari was denied in Commissioner v. Weil, 353 U.S. 958 (1957), and Eisinger v. Commissioner, 356 U.S. 913 (1958).