Louisiana Law Review

Volume 21 | Number 4
June 1961

1958 Amendment to the United States Judicial Code Relative to the Denial of Costs to a Plaintiff

George C. Herget Jr.

Repository Citation
George C. Herget Jr., *1958 Amendment to the United States Judicial Code Relative to the Denial of Costs to a Plaintiff*, 21 La. L. Rev. (1961)
Available at: https://digitalcommons.law.lsu.edu/lalrev/vol21/iss4/7

This Comment is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.

the case or controversy philosophy is evidenced by a palpable reluctance to make use of the device.[19]

If the advantages of inter-sovereign certification should be determined by the federal judiciary to outweigh the disadvantages, further use of the device to implement, or to an extent to supplant, the usual type of abstention may perhaps be expected. It is to be hoped that cognizance of some of the possibilities noted here will be taken before widespread use is undertaken.

David W. Robertson

1958 Amendment to the United States Judicial Code Relative to the Denial of Costs to a Plaintiff

Since the Judiciary Act of 1789, there has been a jurisdictional amount requirement for suits brought in federal courts where jurisdiction is predicated on diversity of citizenship between the parties.[1] In 1958, in an effort to reduce the number of cases brought in the federal courts,[2] Congress raised the jurisdictional amount, exclusive of interest and costs, from $3,000 to $10,000.[3] Included in this statute is a provision allow-

19. Although the United States Supreme Court's jurisdiction over questions certified from the courts of appeal is theoretically mandatory, the cases where certificates have been dismissed, as improperly framed or as containing questions improper for certification, are practically legion. *E.g.*, Busby v. Electrical Utilities Employees Union, 323 U.S. 72 (1944); NLRB v. White Swan Co., 313 U.S. 23 (1941); Atlas Life Insurance Co. v. Southern, Inc., 306 U.S. 563 (1939); Lowden v. Northwestern National Bank & Trust Co., 298 U.S. 160 (1936); State-Planters Bank and Trust Co. v. Parker, 283 U.S. 332 (1931). The *Lowden* case contains an illuminating exposition by Justice Cardozo of the Supreme Court's policy as to certified questions of law, including discussion of the case or controversy requirement. See also Moore & Vestal, *Present and Potential Role of Certification in Federal Appellate Procedure*, 35 VA. L. REV. 1 (1949).

1. The Act of September 24, 1789, § 11, 1 Stat. 73, 78, provided that the value of the matter in controversy must exceed $500. This was raised to $2,000 in 1887, to $3,000 in 1911, and to $10,000 in 1958. See 1 MOORE, FEDERAL PRACTICE 817, ¶ 0.90 (2d ed. 1960).

2. See H.R. Rep. No. 1706, 85th Cong., 2d Sess. 2-3 (1958), in which it is stated: "In adopting this legislation the committee feels that it will bring the minimum amount in controversy up to a reasonable level by contemporary standards and that it will ease the workload of our Federal courts by reducing the number of cases involving corporations which come into Federal district courts on the fictional premises that a diversity of citizenship exists."

3. 72 Stat. 415 (1958), amending 28 U.S.C. §§ 1331, 1332 (1952). In addition to the provision increasing the jurisditcional amount and providing that costs may be denied the plaintiff in certain instances, the statute also provides that a corporation shall be deemed a citizen of the state where it has its principal place of business and that civil actions in any state court arising under the workmen's compensation laws of that state may not be removed to federal district

ing a judge to deny costs to a successful plaintiff or to impose costs on him in the event that he recovers less than the jurisdictional amount.[4] The provision's applicability is limited to final judgments[5] in suits filed originally in federal courts,[6] and the amount recovered is to be computed without regard to any setoffs or counterclaims.[7] The apparent purpose of this amendment was to reduce the number of cases brought in federal court by providing for the discretionary imposition of costs in the situation where the plaintiff recovers a judgment under the jurisdictional amount.[8]

Under Rule 54(d) of the Federal Rules of Civil Procedure, a

---

court. For discussion of the 1958 statute see Cowen, *Federal Jurisdiction Amended,* 44 VA. L. REV. 971 (1958); Friedenthal, *New Limitations on Federal Jurisdiction,* 11 STAN. L. REV. 213 (1959); Wollett, *Federal Jurisdiction and Practice,* 35 N.Y.U.L. REV. 145 (1960); Wright, *Act 85-554 of 1958 and the Disposal of the Judicial Power of the United States,* 6 LA. B.J. 147 (1958); Notes, 58 COLUM. L. REV. 1287 (1958), 72 HARV. L. REV. 391 (1958), 53 NW. L. REV. 637 (1958), 33 TUL. L. REV. 167 (1958), 6 UTAH L. REV. 231 (1958).

4. 28 U.S.C. § 1332(b) (1958), as amended by 72 Stat. 415 (1958): "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, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff."

Id. § 1331(b), as amended by 72 Stat. 415 (1958): "Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff."

5. The statute contains the language "where the plaintiff is finally adjudged . . . ." 28 U.S.C. § 1331(b) (1958). A similar provision is found in 28 U.S.C. § 1332(b) (1958). In the Report of the House Committee on the Judiciary, it is stated that "this provision will apply only to amounts determined by a verdict or a final judgment decided by the court; not to compromise agreements." H.R. Rep. No. 1706, 85th Cong., 2d Sess. 5 (1958).

6. 28 U.S.C. § 1332(b) (1958), dealing with diversity citizenship jurisdiction, limits the applicability of the statute to "the plaintiff who files the case originally in the Federal courts." This provision was added by amendment in order to prevent the assessment of costs on the plaintiff whose action was removed from state court. However, no such provision was incorporated in the section dealing with federal question jurisdiction. Nevertheless, it would seem that the intent was that the limitation should apply to both. See 104 Cong. Rec. 12689 (daily ed. June 30, 1958). See also Wollett, *Federal Jurisdiction and Practice,* 35 N.Y.U.L. REV. 145, 147 (1960).

7. Both 28 U.S.C. §§ 1331(b) and 1332(b) (1958) state that the sum is to be "computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled."

8. H.R. Rep. No. 1706, 85th Cong., 2d Sess. 5 (1958): "To make the $10,000 limitation a forceful one and to prevent inflated claims, the committee has inserted a subsection permitting the trial judge to either withhold costs and/or impose costs on the plaintiff if the plaintiff fails to obtain a judgment for at least the jurisdictional amount."

federal court has the power to assess costs in its discretion.[9] Under this authority costs have been denied to a successful plaintiff who recovered only the amount previously tendered into the court by the defendant,[10] and costs have been apportioned where the plaintiff was successful on only a part of the claim.[11] The 1958 amendment would appear to inject a new notion into the scheme — to deny costs to plaintiff or assess costs against him in the situation where a successful plaintiff recovers less than the jurisdictional amount. While the amendment provides for discretion in this situation,[12] it contains no language suggesting what criterion should be used by the court.

Several interpretations of the amendment would appear possible. Perhaps the interpretation which most readily comes to mind is a test based on the plaintiff's good faith in claiming over $10,000 exclusive of interest and costs. Under this test, the court would deny costs if it were felt that the plaintiff's claim for an amount in excess of $10,000 was not made in good faith and the plaintiff in fact recovered less than $10,000. The adoption of such a test derives some support from the legislative history[13] and from the only cases thus far interpreting the

9. FED. R. CIV. P. 54(d): "Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law."

10. Western Millers Mut. Fire Ins. Co. v. Thompson, 95 F. Supp. 993 (W.D. Mo. 1951). *But see* Schmieding v. American Farmers Mut. Ins. Co., 138 F. Supp. 167 (D. Neb. 1955) (costs awarded to plaintiff even though he recovered only an amount which defendant had previously tendered into court).

11. Dyker Bldg. Co. v. United States, 182 F.2d 85 (D.C. Cir. 1950) (the district court did not abuse its discretion under FED. R. CIV. P. 54(d) in dividing the costs of the reference to a special master where the amount claimed was substantially more than the award); United States v. Madsen Const. Co., 139 F.2d 613 (6th Cir. 1943) (90% of costs assessed against intervenor who claimed $65,579.43 and recovered $814.94); Steel Const. Co. v. Louisiana Highway Comm'n, 60 F. Supp. 183 (E.D. La. 1945) (where 9/10ths of the record related to matters on which plaintiff was unsuccessful, costs were apportioned on the basis of 90% against the plaintiff and 10% against the defendant). *But see* Brown v. Consolidated Fisheries Co., 18 F.R.D. 433 (D. Del. 1955) (full costs allowed plaintiff recovering $1,471.33 on a claim for $26,581.59); Schmieding v. American Farmers Mut. Ins. Co., 138 F. Supp. 167 (D. Neb. 1955) (costs allowed plaintiff recovering $33.37 on a claim for $5,300 and an accounting).

12. Although the statute grants discretion to the trial court either to deny costs to a successful plaintiff or to impose costs on him, this paper will be confined to the denial of costs. It would seem, however, that analytically no great difference should exist between the two as to when the statute becomes operative, the power to impose costs coming into play in the more aggravated situations.

13. H.R. Rep. No. 1706, 85th Cong., 2d Sess. 5 (1958): "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."

amendment.[14] However, the adoption of a good faith test appears to raise serious questions. It is clear from the decisions[15] and from Rule 12(h)[16] that dismissal for lack of jurisdiction is required whenever a court finds that the jurisdictional amount is not present. The test which has been evolved for determining whether a claim satisfies this jurisdictional requisite is often stated to be the amount exclusive of interest and costs claimed by the plaintiff in good faith.[17] Under the jurisprudence, the amount demanded in the complaint has been held to fix the jurisdiction prima facie unless made solely for the purpose of conferring jurisdiction or unless it is clear from the face of the record that the requisite sum is in fact absent.[18] Consequently, if either of these two factors is found to be present, the plaintiff is deemed not to be in good faith and the complaint is dismissed. Thus it can be seen that if "good faith" means the same thing for the purpose of jurisdiction and for the purposes of denying costs, the 1958 amendment will have no effect; for, if the successful plaintiff is in "good faith," costs will not be

14. In Bockenek v. Germann, 191 F. Supp. 104 (E.D. Mich. 1960) the plaintiffs recovered less than the jurisdictional amount and the defendant asked that plaintiffs' costs be denied and that defendant's costs be awarded under 28 U.S.C. § 1332(b). On the basis of the legislative history the court apparently adopted a good faith test and, on a finding that the plaintiffs did act in good faith when they claimed an amount in excess of the jurisdictional minimum, refused to deny costs.

In Stachon v. Hoxie, 190 F. Supp. 185 (W.D. Mich. 1960), although plaintiff had demanded more than the required $10,000 jurisdictional amount, the jury verdict in favor of plaintiff had been for $8,000. Defendant sought to prevent his being taxed for any of the court costs. However, the court refused to deny costs to plaintiff apparently on the ground that a plaintiff who recovers less than the jurisdictional requirement will be denied costs only if his claim for damages in excess of the jurisdictional requirement was not made in good faith. Consequently, after finding that at the time the plaintiff began the suit he could reasonably have expected to recover a verdict for the jurisdictional amount, the court rejected defendant's motion to deny costs to plaintiff. There is language in the opinion which suggests an even lesser scope of application for the statute; for at one point the court states that the statute was intended to be applied only in cases where the plaintiff has *obviously* acted in bad faith in claiming over $10,000 in order to bring the action in federal court.

15. McNutt v. General Motors Acceptance Corp., 298 U.S. 178 (1936). See St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283 (1938); Food Fair Stores, Inc. v. Food Fair, Inc., 177 F.2d 177 (1st Cir. 1949).

16. See FED. R. CIV. P. 12(h) which provides: "A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, except . . . (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."

17. 1 MOORE, FEDERAL PRACTICE 827, ¶ 0.91 (2d ed. 1960). In St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 288 (1937), it was stated that "the rule governing dismissal for want of jurisdiction in cases brought in the federal court is that, unless the law gives a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith."

18. Ilsen & Sordell, *The Monetary Minimum in Federal Court Jurisdiction*, 29 ST. JOHN'S L. REV. 1-35, 183-225, at 4 (1954).

denied him under this interpretation of the amendment, and, if he is not in "good faith," the complaint should be dismissed for lack of jurisdiction, thereby affording no opportunity for the denial of costs. On the other hand, if "good faith" in the context of the 1958 amendment is interpreted as being different from that in the area of jurisdiction, it can be seen that there would be some area for application for the statute, the size of the area depending upon the gap between the two definitions.[19] However, in addition to the confusion which would seem to result from having two definitions, it would seem that the scope of application of the amendment would still be relatively small.

Because of this, it would seem that perhaps a different test should be adopted to cover the denial of costs in those situations

19. If the "good faith" approach is adopted, it can be seen that the scope of application of the statute will be directly dependent upon the definition of "good faith" for the purposes of jurisdiction and of denying costs. Thus, the scope of application of the statute will increase to the extent that the gap between the two definitions increases. It would seem, however, that the scope of application of the statute in any event would tend to be relatively small. As pointed out in the text, the test of "good faith" for the purposes of jurisdiction is that the amount claimed by the plaintiff will control unless made solely for the purpose of conferring jurisdiction or unless it is made clear on the face of the record that the requisite sum is in fact not present. In this connection the United States Supreme Court has stated that in order to justify a dismissal, it must appeal to a legal certainty that the claim is really for less than the jurisdictional amount. St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283 (1938). Consequently, it would seem that it would be relatively difficult to dismiss a case on the basis of lack of good faith on the part of the plaintiff in claiming an amount in excess of the jurisdictional amount. Thus, the scope of application of the statute would appear to be determined by the definition given the other variable — "good faith" for the purposes of denying costs.

In Stachon v. Hoxie, 190 F. Supp. 185, 186 (W.D. Mich. 1960), the court made several statements on this point. (1) "[T]he court concludes that § 1332(b) was intended to be applied only in cases where the plaintiff had obviously acted in bad faith in claiming over $10,000 in order to bring the action in a Federal court." (2) "There is no showing whatever from which it could be concluded that the plaintiff acted in bad faith in claiming an amount in excess of the jurisdictional requirement." (3) "The court is convinced that the plaintiff's claim for damages was made in good faith and not merely to give a Federal court jurisdiction." (4) "However, from the evidence presented it appears that the plaintiff at the time he began the action could reasonably have expected to recover a verdict for the jurisdictional amount of more than $10,000." Although it might appear that these various statements mean the same thing, there would appear to be some shades of meaning in them which might vary the scope of application of the statute. If "legal certainty" is adopted as the definition of the jurisdictional variable, the definition of the "costs" variable as being "obviously in bad faith" would seem to preclude all application of the statute; for if it cannot be said that it was not legally certain that the plaintiff's claim is for less than the jurisdictional amount, it would seem that it could not be said that the plaintiff was in obvious bad faith in claiming over $10,000. On the other hand, it would seem that it could be said that although it was not legally certain that the plaintiff's claim was for less than $10,000 (hence, the court would have jurisdiction), still the plaintiff could not reasonably have expected to recover a verdict for more than the jurisdictional amount (hence costs could be denied plaintiff if he recovered a judgment under $10,000). However, even this would seem to give relatively little scope of application to the statute.

where the plaintiff recovers less than the jurisdictional amount. A rule indiscriminately denying costs for recovery of less than $10,000 exclusive of interest and costs would seem to be precluded by the discretionary language of the statute.[20] However, it might be possible to devise a test which would not be imposed indiscriminately and yet would give some effect to the statute.

One basis of such a test might be the estimation of the judge as to the percentage of cases similar to the type before him in which the amount recovered by the plaintiff was less than $10,000. Thus, with respect to particular alleged injuries or damages, the judge may know from experience that in, for example, 10% of the cases where the plaintiff has in fact recovered has the amount been less than $10,000. This method of analysis could be used for the formulation of a rule to the effect that if a plaintiff in fact recovers less than $10,000, costs should be denied him if (assuming he would recover some amount) his chances of recovering less than $10,000 were above a certain percentage. In computing these chances, it would seem that the computation should be confined to a consideration of the amounts actually recovered and should not include any consideration of the chances of recovery *vel non*. If a figure of 50% were chosen, the judge, after considering the amount of the recovery in cases of a similar nature, would deny costs to the plaintiff who in fact recovered under $10,000 if he felt that in 50% of those cases of a similar nature the amount when recovered was under $10,000. The adoption of such a rule would give effect to the statute and would seem to discourage the bringing of marginal cases in federal courts. However, it might be felt that a rule of this nature would be unnecessarily complicated.

Another test might be formulated on the basis of cases involving remittitur on a motion for a new trial. One criterion for determining when a trial judge should grant a new trial is where a verdict is grossly excessive or shocks the court's conscience.[21] If the trial judge considers the motion for a new trial meritorious, it may either grant it or make its refusal to grant it conditioned on the plaintiff's remitting a stated portion of the amount.[22] If the idea here involved were used as a basis

20. 28 U.S.C. §§ 1331(b), 1332(b) (1958): "[T]he district court *may* deny costs to the plaintiff and, in addition, *may* impose costs on the plaintiff." (Emphasis added.)

21. 6 MOORE, FEDERAL PRACTICE 3741-43, ¶ 59.05[3] (1953).

22. *Id.* at 3737, ¶ 59.05[3].

for a rule governing the denial of costs to a plaintiff who recovered under $10,000, a judge would deny costs in those cases where, had the jury returned a judgment of more than $10,000, he would have felt obligated to require a remittitur to an amount less than $10,000.[23] Although the subject of remittitur bears little relation to the assessing of costs, such a test would be one with which the trial courts are familiar.

Another possible approach would be to vest discretion to deny costs to the successful plaintiff in the trial judge with little review on the part of the appellate courts, rather than adopting any one rule to be applied in all cases. Under this view, each trial judge would be accorded relatively large latitude in applying the statute and could perhaps apply it with a view toward the condition of his docket. Since the trial judge is given broad discretion under Rule 54(d) in assessing costs and since the adoption of any inflexible rule might not be feasible, this position might be best under the circumstances.[24]

In conclusion it would seem that the 1958 statutory provision relative to the assessment of costs creates more problems that it solves. If a good faith test were adopted, it would seem that the statute would have relatively little effect. If a stricter rule were adopted, the statute would be given some effect and would serve to discourage marginal cases. Such a result would be in keeping with the general purpose of the 1958 amendments to decrease the number of cases brought in federal courts. However, it may be wondered whether the use of the device of denying costs to a successful plaintiff is a proper method for achieving this result.

George C. Herget, Jr.

---

23. *Id.* at 3743-45, ¶ 59.05[3]. As to determining the amount of the remittitur, Moore points out that most courts have not articulated any definite standard by which to determine the amount of the remittitur. One court has taken the position that the amount remitted should reduce the verdict to the lowest amount that could reasonably be found by the jury. Others would reduce the verdict only to the maximum that would be upheld by the trial court as not excessive.

In such a situation, there would generally be no question of lack of jurisdiction, since the plaintiff could be in good faith in asking for more than the jurisdictional amount even though the judge might require that he accept a remittitur if he recovered more than $10,000.

24. As for what criterion the trial court would use in applying the amendment, it would seem that it might use one or more of the above-mentioned approaches as factors to be considered.