

upon future state legislation and court decisions, owing to the prestige and authority over desirable policy which the Commission possesses.

In conclusion, a court desiring to extend workmen's compensation coverage to an off-premises work break injury could reach such a result by relying on the employer benefit theory, the personal comfort doctrine, or the contract theory. Alternatively, rather than stretch a fact situation to fit one of these theories, a court could simply announce the general rule that a short off-premises break that is consented to by the employer and that is not unusual or unreasonable is part of the work relationship. It is submitted that this latter alternative is the more desirable because it is more consistent with a liberal policy in favor of compensating injured workers, and because in recent years work breaks have in fact become a part of the work relationship. It is further submitted that the National Commission on State Workmen's Compensation Laws should adopt a recommendation in favor of this rule, since such a proposal would encourage the extension of the liberal trend.

ARNOLD E. COHEN

Federal Rules of Civil Procedure—Discovery—Denial of Discovery Pertaining to Subject Matter Jurisdiction and Standing—Mandamus as a Means of Review—*Investment Properties International, Ltd. v. IOS, Ltd.*¹—Investment Properties International, a Canadian corporation, and its subsidiaries brought an action for damages against the respondents, IOS, also a Canadian corporation, and its subsidiaries in the United States District Court for the Southern District of New York.² The complaint alleged violations of section 10(b) of the Securities Exchange Act of 1934³ and Rule 10b-5 promulgated thereunder,⁴ as well as violations of the Sherman Antitrust Act.⁵ Plaintiffs' request for a preliminary injunction was denied on the grounds that it was unlikely that plaintiffs would be able to establish standing and subject matter jurisdiction. Plaintiffs thereupon sought to depose certain officers of the defendants, the examination to be limited to the threshold issues of standing and subject matter jurisdiction. The district court, on motion by defendants, vacated plaintiffs' notice of deposition "without prejudice to further discovery if it is determined that this Court has jurisdiction of the subject matter of this action."⁶ Plaintiffs then sought

¹ 459 F.2d 705 (2d Cir. 1972). The factual description of the case given in the text relies in part on the report of the denial of plaintiffs' motion for a preliminary injunction in [1970-1971 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 93,011 (S.D.N.Y., April 21, 1971).

² The district court opinion is unreported. The text follows the summary of the case in 459 F.2d at 706.

³ 15 U.S.C. § 78j(b) (1970).

⁴ 17 C.F.R. § 240.10b-5 (1972).

⁵ 15 U.S.C. §§ 1-7 (1970).

⁶ As quoted by the court of appeals in 459 F.2d at 707.

a writ of mandamus from the Court of Appeals for the Second Circuit directing the district judge to reverse his decision and permit the proposed discovery. The court HELD: limited discovery pertaining to standing and subject matter jurisdiction must be allowed when factual disputes exist concerning these threshold issues and it is otherwise "virtually impossible to discover the facts on which jurisdiction and standing turn": accordingly the district judge's vacation of the notice of deposition was an abuse of discretion.⁷ The court directed him to vacate his order and to allow limited discovery regarding subject matter jurisdiction and standing.

The *IOS* decision is significant as a clarification of the principles and circumstances which make discovery regarding threshold issues available to the parties, and it may be useful to parties desiring threshold discovery in areas where at present such discovery is a novelty.⁸ Furthermore, one point in the *IOS* rationale may be interpreted as a resuscitation of the theory that a question of first impression may be grounds for granting mandamus and arguably could be utilized as authority to expand use of mandamus as a means of reviewing issues of first impression.⁹

This discussion of the *IOS* decision will focus on two central issues: the propriety of the result reached by the district court in denying threshold discovery and the appropriate grounds on which to fashion appellate relief via mandamus. First, the case law of other circuits regarding the availability of threshold discovery in circumstances comparable to those of *IOS* will be examined. Second, the prevailing doctrine regarding threshold discovery in the Second Circuit will be examined, and an argument presented that that doctrine, properly applied, required the granting of threshold discovery to the parties seeking it in the instant case. Third, the grant of mandamus in *IOS* will be evaluated in terms of the judicial standards that govern the issuance of mandamus. Finally, the *IOS* court's use of mandamus will be found correlative with the policies of liberal discovery and judicial economy.

Propriety of Threshold Discovery

The district court denied plaintiffs the use of depositions to investigate factual matters relating to standing and subject matter jurisdiction. The question immediately arises whether such a ruling is correct in view of the policy of liberal discovery of relevant facts which is one of the cardinal aims of the Federal Rules of Civil Proce-

⁷ *Id.* at 707-08.

⁸ See, e.g., note 102 *infra*.

⁹ Indeed, a recent decision by the Second Circuit denying mandamus recently prevailed over a forceful dissent urging issuance of mandamus to meet issues of first impression. *Securities & Exchange Comm'n v. Stewart*, Nos. 73-1250, 73-1251 (2d Cir., Mar. 16, 1973). The dissent relied on *IOS* as a basis of its decision. Slip Op. at 2349.

ture.¹⁰ The Supreme Court has declared, albeit in dicta, that "[t]he various instruments of discovery" should be utilized "for the parties to obtain the fullest possible knowledge of the issues and facts before trial."¹¹ To achieve the goal of fullest possible knowledge, it is essential "that the deposition-discovery rules are to be accorded a broad and liberal treatment."¹² It is true that under Rule 26(c)¹³ the district court, on motion of a party and for good cause shown, has the power to deny the discovery. However, the record in the instant case is silent concerning any "good cause shown" for such a denial;¹⁴ the district court apparently based its ruling on the discretionary powers given the judge in Rule 26(c). If in fact that is the case, and the effect on plaintiffs is prejudicial, the order may be deemed an abuse of discretion, correctable by a writ of mandamus.¹⁵

Following the introduction of the Federal Rules of Civil Procedure in 1938, the courts were initially of the opinion that depositions under Rule 26 could not be permitted until jurisdiction had been established.¹⁶ This view met with disapproval in *Urquhart v. American-La France Foamite Corp.*¹⁷ In *Urquhart*, plaintiffs sought to take depositions concerning factual issues raised in defendant's affidavits denying jurisdiction. The district court refused the discovery on the ground that Rule 26(a) permits discovery only after jurisdiction has been established, and granted defendant's motion to dismiss.¹⁸ On appeal, the Court of

¹⁰ *Hickman v. Taylor*, 329 U.S. 495 (1947); 4 J. Moore, *Federal Practice* § 26.69, at 26-493. (2d ed. 1972) [hereinafter cited as Moore]. "An order that the deposition shall not be taken is a drastic order, seldom entered since its extensive use would defeat the broad aims of discovery . . ." F. James, *Civil Procedure* 219 (1965).

¹¹ *Hickman v. Taylor*, 329 U.S. 495, 501 (1947).

¹² *Id.* at 507. The Court continued: "Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession." *Id.* "Disgorgement" is precisely what the *IOS* plaintiffs sought by their discovery. See note 26 *infra*.

¹³ Fed. R. Civ. P. 26(c) provides:

Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense including one or more of the following: (1) that the discovery not be had . . .

¹⁴ The "good cause shown" under Rule 26(c) is usually an abuse of the processes of discovery, such as harassment of the opposing party, undue delay, or failure to abide by the discovery rules. 4 Moore § 26.69, at 26-499 to 26-503.

¹⁵ *Schlagenhauf v. Holder*, 379 U.S. 104, 111 (1964).

¹⁶ See *Fox v. House*, 29 F. Supp. 673, 675 (E.D. Okla. 1939). See also the discussion of the lower court decision in *Urquhart v. American-La France Foamite Corp.*, 144 F.2d 542, 544 (D.C. Cir. 1944).

¹⁷ 144 F.2d 542 (D.C. Cir.), cert. denied, 323 U.S. 783 (1944).

¹⁸ As recounted in 144 F.2d at 543-44. The court quoted Rule 26(a) as it read at that time: "By leave of court after jurisdiction has been obtained over any defendant or over property which is the subject of the action . . . , the testimony of any person . . . may be taken at the instance of any party by deposition . . ." *Id.* at 543. The relevant portion of Rule 26(a) now reads: "Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions . . ." Fed. R. Civ. P. 26(a).

Appeals for the District of Columbia Circuit held that this interpretation was erroneous: "In many cases it would in effect make it impossible for a plaintiff to obtain counter-evidence against the defendants' affidavits."¹⁹ The court stated that the district court "should ordinarily grant leave to the plaintiff to take depositions on the issues of fact, if any, raised by the motion [to dismiss]"²⁰ The *Urquhart* court further stated that "in view of the terms of the affidavits it is likely that permission would have been granted to take depositions had the court thought it had power to do so."²¹ That the circuit court did not share the district court's uncertainty regarding power is evinced by its ruling that threshold discovery may properly precede definitive establishment of the court's jurisdiction. However, the *Urquhart* court stated in dictum: "We recognize that the [district] court has discretion under Rule 43(e) to decide on affidavits alone such a motion to dismiss as the one we are considering here."²² The question presented in *IOS*, then, is whether this discretionary power to decide threshold issues on affidavits (or oral testimony) may be exercised by the district court when one of the parties has requested discovery pertaining to the threshold issues. The *Urquhart* opinion implies that where factual questions concerning threshold issues are disputed in the affidavits, the threshold discovery should be allowed.²³

The notion that a district court can deny a party threshold discovery and proceed to trial on the merits of the threshold issues has been explicitly rejected by the First Circuit. In *Surpitski v. Hughes-Keenan Corp.*,²⁴ the plaintiff filed interrogatories to one of the defendants in an effort to establish the court's jurisdiction; the defendants countered with a motion to dismiss for want of jurisdiction. The district court requested affidavits on the merits of the jurisdictional issues. After weighing the affidavits, the court denied additional interrogatories²⁵ sought by plaintiff and granted defendants' motion to dismiss. On appeal, the First Circuit reversed:

A plaintiff . . . should not be required, unless he has been undiligent, to try such an issue on affidavits without the bene-

¹⁹ 144 F.2d at 544.

²⁰ *Id.*

²¹ *Id.*

²² *Id.* Rule 43(e) reads: "When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions." Fed. R. Civ. P. 43(e). Rule 43(e) stands as promulgated in 1938.

²³ The *Urquhart* case has been cited in support of this proposition. See, e.g., *Savage v. Isthmian S.S. Co.*, 6 F.R.D. 311, 312 (E.D. Pa. 1946); *Silk v. Sieling*, 7 F.R.D. 576, 577 (E.D. Pa. 1947). Indeed, when factual questions bearing on the court's jurisdiction are extremely complicated, the court may refuse to decide the jurisdictional question on affidavits alone. See *Goldstein v. Compudyne Corp.*, 262 F. Supp. 524 (S.D.N.Y. 1966). In *Goldstein*, the court itself decreed that the parties undertake discovery proceedings to further develop the jurisdictional issues. *Id.* at 528.

²⁴ 362 F.2d 254 (1st Cir. 1966).

²⁵ Defendant answered the first interrogatories. *Id.* at 255.

fit of full discovery [P]laintiff was certainly entitled to file such further interrogatories as were reasonably necessary and, if he wished, to take depositions.²⁶

The *Surpitski* court thus allowed a party a discovery "of right" on threshold issues, presuming, of course, that there are issues of fact to be probed by the discovery.

In *H.L. Moore Drug Exchange, Inc. v. Smith, Kline & French Laboratories*,²⁷ the Second Circuit, the same circuit that decided the instant case, seemingly accepted the doctrine of *Urquhart* and *Surpitski*, stating that "when a defendant moves to dismiss for lack of jurisdiction, either party should be permitted to take depositions on the issues of fact raised by the motion"²⁸ Plaintiff had sought to depose defendant in the face of defendant's motion to dismiss for want of jurisdiction. The district court found that there were no issues of fact raised by the clash of opposing affidavits on the jurisdictional issue and granted defendant's motion to dismiss. On appeal, the Second Circuit affirmed, stating that the finding of no factual disputes which would warrant discovery was within the "broad discretion in the trial court which should not be overruled without a showing of abuse."²⁹ It agreed with the district court that only "a very strained reading of defendant's affidavits" could create a bona fide issue of fact.³⁰ Thus the denial of threshold discovery was appropriately sustained in *Moore Drug*. Nevertheless, the Second Circuit plainly contemplated the availability of threshold discovery when jurisdictional facts are in dispute, and implied that a district court's denial of threshold discovery when jurisdictional facts are sharply disputed is an abuse of discretion.³¹

A similar problem arose in *IOS* when the plaintiffs sought to invoke the court's jurisdiction under section 27 of the Securities Exchange Act of 1934.³² Since the defendants had structured their opera-

²⁶ *Id.* The *Surpitski* court qualified its opinion by stating that plaintiff was a "total stranger" to the defendant corporation. *Id.* In *IOS* the officers of plaintiff corporation were formerly in IOS' employ. See *Investment Prop. Int'l, Ltd. v. IOS, Ltd.*, [1970-1971 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 93,011, at 90,730 (S.D.N.Y., April 21, 1971). However, plaintiffs alleged that defendants had exclusive control of information that would establish the court's jurisdiction. Brief for Appellant at 8, *Investment Prop. Int'l, Ltd. v. IOS, Ltd.*, 459 F.2d 705 (2d Cir. 1972). Thus, while the *IOS* plaintiffs are not total strangers to the *IOS* defendants, it is the allegation of defendant's exclusive control of information pertaining to jurisdiction that makes threshold discovery all the more important. Cf. *Littlejohn v. Shell Oil Co.*, 456 F.2d 225, 229 (5th Cir. 1972).

²⁷ 384 F.2d 97 (2d Cir. 1967).

²⁸ *Id.* The District Court opinion is unreported.

²⁹ *Id.*

³⁰ *Id.* at 98. This point was more recently emphasized in *Leasco Data Processing Equip. Corp. v. Maxwell*, 319 F. Supp. 1256, 1263 (S.D.N.Y. 1970).

³¹ A similar conclusion regarding threshold discovery to probe improper venue was reached by *Hayashi v. Red Wing Peat Corp.*, 396 F.2d 13, 14 (9th Cir. 1968). See note 41 *infra*. See also *Autera v. Robinson*, 419 F.2d 1197, 1202 (D.C. Cir. 1969).

³² 15 U.S.C. § 78aa (1970).

tions to prevent sale of their stock to any United States citizen in any domestic securities market,³³ the plaintiffs were initially faced with a jurisdictional hurdle. In order to establish jurisdiction under the Securities Exchange Act, it must be shown that the allegedly fraudulent stock transactions had caused "significant impact" on United States securities markets or on domestic investors.³⁴

Upon filing their complaint, the plaintiffs also sought a preliminary injunction to restrain defendants' allegedly damaging conduct.³⁵ Thus, at a very early stage of the proceedings, the district court was faced with questions of whether the plaintiffs had demonstrated jurisdiction to support a preliminary injunction.³⁶ In refusing the injunction, Judge Frankel expressed "profound doubts" concerning plaintiff's standing and the existence of subject matter jurisdiction. To his mind, the doubts precluded the issuance of so drastic a remedy as a preliminary injunction.³⁷ However, Judge Frankel also stated that he had no desire to foreclose inquiry on these matters and that "perhaps plaintiffs could profit from discovery."³⁸

It is against this background of substantial factual dispute regarding the threshold issues that plaintiffs sought the limited discovery which Judge Bonsal denied in the district court decision in *IOS*.³⁹ Of course, plaintiffs could have gone forward to trial on the merits of the jurisdictional issue; conceivably, plaintiffs' affidavits or oral testimony might have been sufficient to show jurisdiction. Realistically, however, judging by the "very substantial doubts" expressed in the earlier decision denying the injunction,⁴⁰ such a course must have seemed unlikely to succeed unless plaintiffs could supplement their initial contentions with the relevant information which they claimed to be in defendants' exclusive control. It would appear, then, that Judge Bonsal's denial of discovery under these circumstances disregarded both the earlier decisions in *Urquhart*, *Surpitski*, and *Moore Drug* and the policy of liberal discovery practice expressed in the Federal Rules. The information-gathering functions of discovery can certainly contribute to probing such factual disputes as those in *IOS*, which turned on information in the exclusive control of the de-

³³ [1970-1971 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 93,011, at 90,736.

³⁴ *Id.* at 90,735. See generally Comment, Offshore Mutual Funds: Extraterritorial Application of the Securities Exchange Act of 1934, 13 B.C. Ind. & Com. L. Rev. 1225 (1972).

³⁵ [1970-1971 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 93,011, at 90,728.

³⁶ *Id.* at 90,729.

³⁷ *Id.* The court also said: "[I]f it were necessary or appropriate to render a final decision now, both of these points would go for defendants." *Id.* The existence of "substantial factual disputes" regarding the threshold issues was in itself a factor against issuing the preliminary injunction. *Id.* at 90,733.

³⁸ *Id.*

³⁹ 459 F.2d at 707. See also notes 26, 36 *supra*. Judge Frankel presided over the request for a preliminary injunction. Eight months later the main action came up before Judge Bonsal.

⁴⁰ [1970-1971 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 93,011, at 90,740.

fendants alleged to be essential to a showing of jurisdiction under the Securities Exchange Act of 1934.⁴¹ In *IOS*, then, the district court's denial of threshold discovery⁴² thwarted the exploration of allegedly crucial factual material and stands in sharp contrast to the spirit of liberality mandated by the Supreme Court for the practice of the federal discovery procedures.⁴³

Appropriateness of Mandamus as a Means of Review

After the district court denied discovery, the *IOS* plaintiffs were faced with the probability of dismissal on jurisdictional grounds. Assuming that the plaintiffs awaited action of the district court on the merits of their jurisdictional claims, the probable dismissal would provide the basis for an appeal from a final judgment. The decisions in *Urquhart* and *Surpitski* indicated that their prospects on appeal would be fairly good,⁴⁴ and *Moore Drug* had shown the Second Circuit to be in favor of allowing threshold discovery when facts concerning threshold questions are disputed.⁴⁵ However, appeal from a final judgment was taken in *Urquhart* and *Surpitski* because the actions themselves were dismissed simultaneously with the denial of discovery.⁴⁶ In *IOS*, on the other hand, the threshold discovery was denied at a

⁴¹ One court has stated that discovery should be permitted on a motion to dismiss for improper venue "where discovery may be useful in resolving issues of fact . . . and the relevant evidence is peculiarly within the movant's possession." *Hayashi v. Red Wing Peat Corp.*, 396 F.2d 13, 14 (9th Cir. 1968).

⁴² Moreover, the danger of abuse of the discovery processes by the *IOS* plaintiffs seems small: the discovery was expressly limited to the threshold issues, and the district court possesses a formidable arsenal of sanctions under Rule 26(c) to restrain improper discovery. The pertinent sanctions under Rule 26(c) are "(1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; . . . (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters . . ." Fed. R. Civ. P. 26(c). For the portion of Rule 26(c) describing the conditions under which these sanctions can be invoked, see note 10 *supra*. Presumably these sanctions are adequate to satisfy doubts which might arise with regard to possible abuse of threshold discovery, e.g., "May a litigant file a complaint which on its face is insufficient for subject matter jurisdiction and . . . stall off summary judgment so as to pursue discovery which may or may not turn up jurisdictional facts [?]" *Littlejohn v. Shell Oil Co.*, 456 F.2d 225, 232 (5th Cir. 1972) (dissenting opinion).

⁴³ See *Hickman v. Taylor*, 329 U.S. 495, 501 (1947).

⁴⁴ See text at notes 16-26 *supra*.

⁴⁵ However, the discussion in *Moore Drug* favoring threshold discovery, 384 F.2d at 97, was dictum. Furthermore, after the trial is over, a court of appeals, as in *Moore Drug*, is customarily reluctant to review interlocutory rulings of the district court judge. See 4 *Moore* ¶ 26.83[10], at 26-627 to 26-632.

⁴⁶ The fact that there was no motion to dismiss for want of jurisdiction in *IOS* has no bearing on the question of whether the proposed discovery was justified. It would appear, on the basis of the cases discussed in text at notes 16-31 *supra*, that factual disputes on threshold issues necessitate allowance of the threshold discovery. See also *Blair Holdings Corp. v. Rubenstein*, 159 F. Supp. 14, 15 (S.D.N.Y. 1954). Nevertheless, the district court denied the proposed discovery "without prejudice to further discovery if it is determined that this Court has jurisdiction of the subject matter of this action." 459 F.2d at 707.

stage preceding final judgment, and theoretically the plaintiffs could still litigate on the jurisdictional issues. However, by doing so they would subject themselves to burdensome expense and delay,⁴⁷ and moreover they might reasonably fear that willingness to go forward to trial could be construed on appeal as rebutting the claim that they were harmed by the denial of threshold discovery.⁴⁸ Therefore, given the fact that other alternatives were available, it is not surprising that the plaintiffs avoided the final judgment path.

Two avenues of interlocutory review were available to the plaintiffs: discretionary review under 28 U.S.C. § 1292(b),⁴⁹ and mandamus under 28 U.S.C. § 1651, the All Writs Act.⁵⁰ Review under section 1292(b), however, allows courts of appeals to exercise a discretionary jurisdiction over an appeal from an interlocutory order of district courts *only* when the district judge is willing to certify the disputed question of law;⁵¹ and one court has ruled that an order granting discovery of documents cannot be considered as involving a controlling question of law.⁵² Furthermore, the plaintiffs may have been reluctant to utilize this process of interlocutory review since

⁴⁷ Cf. *Bell v. Swift & Co.*, 283 F.2d 407 (5th Cir. 1960).

⁴⁸ The reluctance of appellate courts to engage in interlocutory review of rulings by the trial court appears to be heightened upon the appeal of the final judgment. See *Address of Judge Waterman*, 20 F.R.D. 420, 422-23 (1961). Appellate courts are inclined to avoid reversing the final judgment and imposing a second trial because of an erroneous denial of discovery. *Bank of America Nat'l Trust & Savings Ass'n v. Hayden*, 231 F.2d 595, 606 (9th Cir. 1956). A showing of harm or substantial prejudice is required of the appellant. *Id.* In the instant case, the appellants did not know what the specific results of the anticipated discovery would be. See note 23 *supra*. This very ignorance would have made it harder to show the exact way in which the denial of the discovery was harmful and prejudicial. See *Developments in the Law—Discovery*, 74 Harv. L. Rev. 940, 993 (1961).

⁴⁹ 28 U.S.C. § 1292(b) (1970) provides:

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however*, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

⁵⁰ 28 U.S.C. § 1651 (1970). This Act empowers federal courts to issue "all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a) (1970).

⁵¹ 28 U.S.C. § 1292(b) (1970), quoted in note 49 *supra*.

⁵² *United States v. Woodbury*, 263 F.2d 784, 787 (9th Cir. 1959). Also, it has been contended that the resolution of minor controversies regarding discovery fails to meet the statutory standard of "materially advanc[ing] the ultimate termination of the litigation." 28 U.S.C. § 1292(b) (1970). See 4 Moore ¶ 26.83 [9.—2], at 26-608 to 26-613. However, it should be pointed out that when the district court has *denied* a discovery, as in the instant case, and the denial is deemed to be erroneous, a certified appeal correcting the erroneous denial may avoid the need for a second trial and thus *will* serve the statutory purpose of materially advancing the ultimate termination of the litigation.

it would have required the exercise of discretion by a trial judge who had already exercised his discretion against the plaintiffs in denying discovery.⁵³

Thus, with defeat on the merits of the jurisdictional issue extremely likely and the prospects for section 1292(b) interlocutory relief poor, it is not surprising that plaintiffs chose to petition for mandamus. If Judge Bonsal's order was demonstrably erroneous and prejudiced plaintiffs' efforts to show subject matter jurisdiction, thereby making eventual dismissal inevitable, it was arguably an abuse of discretion. Therefore challenging the order by a petition for mandamus appeared more appropriate than an appeal under 1292(b).⁵⁴

Writs of mandamus were originally common law writs;⁵⁵ at present they are issued by federal appellate courts under the authority of the All Writs Act.⁵⁶ As forceful commands to inferior courts, "[t]he peremptory common-law writs are among the most potent weapons in the judicial arsenal."⁵⁷ The Supreme Court has continually stressed the summary nature of mandamus and has urged that courts of appeals exercise great restraint in employing the writ.⁵⁸ The Court has emphasized that writs of mandamus "may not be used to thwart the Congressional policy against piecemeal appeals"⁵⁹ embodied in the final judgment rule.⁶⁰ "Courts faced with petitions for the peremptory

⁵³ 459 F.2d at 706.

⁵⁴ The suggestion that mandamus be used to compel certification has been rejected by the Fifth Circuit. *Tokio Marine & Fire Insurance Co. v. Aetna Cas. & Sur. Co.*, 322 F.2d 113, 115 (5th Cir. 1963). Since § 1292(b) certification is discretionary, an improper denial by the district court would have to reach the level of an abuse of discretion or reversible error to warrant appellate intervention. In such a case the better practice would be to deal directly with the substance of the dispute through mandamus. Little purpose would be served by issuing mandamus to compel the mere formality of certification. Such a cumbersome procedure would utilize mandamus to compel certification of a ruling that might be ultimately vindicated as correct. See Note, *Appealability in the Federal Courts*, 75 Harv. L. Rev. 351, 382 (1962).

⁵⁵ For a history of the evolution in the common law writs under the All Writs Act, see 9 Moore ¶ 110.26, at 275-86.

⁵⁶ 28 U.S.C. § 1651 (1970) is quoted in note 50 supra.

⁵⁷ *Will v. United States*, 389 U.S. 90, 107 (1967).

⁵⁸ "As extraordinary remedies, [mandamus, prohibition, and injunction against judges] are reserved for really extraordinary causes." *Ex parte Fahey*, 332 U.S. 258, 260 (1947). See generally 9 Moore ¶¶ 110.27-29.

⁵⁹ *Parr v. United States*, 351 U.S. 513, 520-21 (1956). The writ may not be used as "a mere shortcut for appeal." *Bank Line Ltd. v. United States*, 163 F.2d 133, 137 (2d Cir. 1947).

⁶⁰ The final judgment rule provides that appeals from interlocutory rulings of a district court are to be taken only in a unified appeal from the final judgment in the trial court action. As codified in 28 U.S.C. § 1291 (1970) the rule provides: "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . ." See *Cobbledick v. United States*, 309 U.S. 322, 324-27 (1940); see generally 9 Moore ¶¶ 110.06-08. One commentator has suggested that the high value accorded to the final judgment rule arises from concern that the appellate courts would be overwhelmed by petitions for interlocutory relief should the operation of the rule be relaxed. Crick, *The Final Judgment Rule as a Basis for Appeal*, 41 Yale L.J. 539, 551 (1932). See generally Carrington, *Crowded Dockets and the Courts of Appeals*:

writs must be careful lest they suffer themselves to be misled by labels such as 'abuse of discretion' and 'want of power' into interlocutory review of nonappealable orders on the mere ground that they may be erroneous."⁶¹ However, the use of writs of mandamus for certain instances of interlocutory review need not be viewed as inherently antithetical to the purposes of the final judgment rule. Indeed, the goals of the All Writs Act and the doctrine of finality have been called similar, if not identical: to ensure "efficient functioning of the judicial system so that the parties may obtain a timely decision and terminate the litigation."⁶² Within these restraining guidelines, courts of appeals engage in a continuing struggle to define those "extraordinary" occasions where mandamus is a proper remedy and not an evasion of the final judgment rule.⁶³

The leading Supreme Court case discussing the application of writs of mandamus to district court rulings on discovery motions is *Schlagenhauf v. Holder*.⁶⁴ In *Schlagenhauf*, the Court vacated the Seventh Circuit's denial of a petition for mandamus and remanded the case to the district court. The Court declared that writs of mandamus are "appropriately issued . . . where there is 'usurpation of judicial power' or a clear abuse of discretion"⁶⁵ The petitioner's basic allegation was that the district court lacked power to order him

The Threat to the Function of Review and the National Law, 82 Harv. L. Rev. 542 (1969).

⁶¹ *Will v. United States*, 389 U.S. 90, 98 n.6 (1967).

⁶² Comment, *Mandamus Proceedings in the Federal Courts of Appeals: A Compromise with Finality*, 52 Calif. L. Rev. 1036, 1048 (1964). A balance must be struck: Just as indiscriminate use of the extraordinary procedure can create a burden upon the courts of appeals, the rigid application of the final judgment rule will result not only in undue expense to the litigants but in a burden upon the already overcrowded trial courts where the merits of the action must be tried twice should the trial court's determination be erroneous.

Id. Fears that the appellate dockets will be overwhelmed may be allayed by the fact that any petition for mandamus that is frivolous or is predicated on an obvious attempt at delay may be denied outright. Fed. R. App. P. 21(b).

⁶³ Recognizing that "sometimes the granting of mandamus may bring about the review of a case as would an appeal," 389 U.S. at 108 (Black, J., concurring), procedural requirements might be attached to requests for mandamus. It has been held that relief by extraordinary writ, such as the writ of mandamus, should be conditioned on previous attempts by the petitioning party to secure interlocutory review under § 1292(b). *Ex parte Watkins*, 260 F.2d 548 (5th Cir. 1958). The Fifth Circuit has refused to issue writs of mandamus until the alternatives to mandamus, such as § 1292(b), have been invoked by the petitioner and denied by the court. *In re Humble Oil & Refining Co.*, 306 F.2d 567, 568 (5th Cir. 1962); *Rapp v. Van Dusen*, 350 F.2d 806, 813 (5th Cir. 1965). Two circuits have suggested that petitions for mandamus be postponed until § 1292(b) certification has been sought and refused. *Mohosco Indus., Inc. v. Lydick*, 459 F.2d 959 (9th Cir. 1972); *In re GAF Corp.*, 416 F.2d 1252 (1st Cir. 1969). However, the Seventh Circuit has rejected the idea of preconditioning mandamus on a prior application for § 1292(b) relief, reasoning that the availability of mandamus as immediate and extraordinary relief should not be impaired by technical requirements. *Allegheny Airlines, Inc. v. LeMay*, 448 F.2d 1341, 1346 (7th Cir. 1971).

⁶⁴ 379 U.S. 104 (1964).

⁶⁵ *Id.* at 110.

to submit to physical and mental examinations under Rule 35(a).⁶⁶
The Court stated:

That [the basic allegation of lack of power] was substantial is underscored by the fact that the challenged order requiring examination of a defendant appears to be the first of its kind in any reported decision in the Federal Courts under Rule 35⁶⁷

The basic allegation of lack of power, then, is the bedrock of the mandamus in *Schlagenhauf*. The presence of issues of first impression regarding the construction of Rule 35 *enhances* but does not of itself constitute sufficient grounds for allowing a writ of mandamus to issue.⁶⁸ While it is true that the Court did draw attention to the issue of first impression in *Schlagenhauf*, its statements must be viewed in context:

We recognize that in the ordinary situation where the sole issue presented is the district court's determination that "good cause" has not been shown for an examination, mandamus is not an appropriate remedy, absent, of course, a clear abuse of discretion. Here, however, the petition was properly before the court on a substantial allegation of usurpation of power in ordering any examination of a defendant, an issue of first impression that called for the construction and application of Rule 35 in a new context. The meaning of Rule 35's requirements of "in controversy" and "good cause" also raised issues of first impression. In our view, the Court of Appeals should have also, under these special circumstances, determined the "good cause" issue, so as to avoid piecemeal litigation and to settle new and important problems.⁶⁹

In sum, the attention given to the issues of first impression in *Schlagenhauf* should not be allowed to obscure the clear intent of the Supreme Court to require a substantial allegation of usurpation of power⁷⁰

⁶⁶ Id. Fed. R. Civ. P. 35(a) (1964) read:

In an action in which the mental or physical condition of a party is in controversy, the court in which the action is pending may order him to submit to a physical or mental examination by a physician. The order may be made only on motion for good cause shown

⁶⁷ 379 U.S. at 110.

⁶⁸ See 4 Moore ¶ 26.83 [9.-3], at 26-621 to 26-622.

⁶⁹ 379 U.S. at 111 (citation omitted).

⁷⁰ It is assumed that there is no difference between an order that lacks power and one that usurps power. Both imply the improper assertion of a non-existent or unwarranted power. The *Schlagenhauf* opinion seems to use the two expressions interchangeably: see 379 U.S. at 110-11.

or abuse of discretion⁷¹ as prerequisite to the issuance of a writ of mandamus.⁷²

The *IOS* court could have rested its mandamus directly on *Schlagenhauf*. The existence of case law favoring the availability of threshold discovery⁷³ would have strongly substantiated an allegation that the denial of discovery in the case before it constituted an abuse of discretion. The presence of sharp factual disputes in *IOS* accentuated the appropriateness of discovery⁷⁴ and underscored the deleterious effect of the district court's order. Instead of relying solely on *Schlagenhauf*, however, the *IOS* court chose to refer in its rationale to an interpretation of *Schlagenhauf* advanced by an earlier Second Circuit decision, *American Express Warehousing, Ltd. v. Transamerica Insurance Co.*⁷⁵

In *American Express*, the district court ordered production of documents authored by agents of a party's attorney. The party appealed, claiming that the interlocutory ruling infringed the attorney-client privilege⁷⁶ and had a final effect that could be appealed under the collateral order doctrine.⁷⁷ Alternatively, the party petitioned for vacation of the order by writ of mandamus.⁷⁸ The court held that

⁷¹ The *Schlagenhauf* Court does not specifically discuss "abuse of discretion" except to indicate that it is on an equal footing with "usurpation of judicial power." *Id.* at 110. Justice Harlan suggests that usurpation of judicial power is for all practical purposes "tantamount" to abuse of discretion. *Id.* at 127-28 (dissenting opinion). In *Will*, Justice Black has suggested dropping the usurpation of power/abuse of discretion distinction altogether, in favor of mandamus issuing to meet "exceptional circumstances" only. 389 U.S. at 108 (concurring opinion).

⁷² Indeed, Justice Harlan, dissenting in *Schlagenhauf*, stated that any approval of issues of first impression as bases for mandamus was unwise because it could easily lead to overuse of the extraordinary writs:

I find it hard to escape the conclusion that this decision may open the door to the extraordinary writs being used to test any question of "first impression," if it can be geared to an alleged lack of "power" in the district court. As such it seems to me out of keeping with the rule of "finality"

379 U.S. at 129.

⁷³ See text at notes 16-31 *supra*.

⁷⁴ The presence of these factual disputes met the criteria advanced by the Second Circuit in *H.L. Moore Drug Exchange, Inc. v. Smith, Kline & French Laboratories*, 384 F.2d 97 (2d Cir. 1967), discussed in text at notes 27-31 *supra*.

⁷⁵ 380 F.2d 277 (2d Cir. 1967).

⁷⁶ Specifically, the alleged consequence of the order was interference with the attorney's work product. *Id.* See *Hickman v. Taylor*, 329 U.S. 495 (1947). See generally 4 Moore, ¶¶ 26.63-64.

⁷⁷ 380 F.2d at 280. The collateral order doctrine was expounded in *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541 (1949). The doctrine allows immediate appeal from an order which is collateral to the main litigation when the practical effect of the order is final and could not be repaired by any subsequent appeal. See generally 4 Moore ¶ 26.83[6]. However, in *IOS* the contested discovery might be considered essential to plaintiffs' case rather than collateral.

⁷⁸ 380 F.2d at 278. In the Second Circuit the interlocutory appeal would, in an appropriate case, be treated as a petition for mandamus. *International Prod. Corp. v. Koons*, 325 F.2d 403 (2d Cir. 1963).

the order could not be appealed and denied the mandamus, prefacing its discussion of mandamus with the following statement:

When a discovery question is of extraordinary significance or there is extreme need for reversal of the district court's mandate before the case goes to judgment, there are escape hatches from the finality rule: a certification by the district court under 28 U.S.C. § 1292(b), apparently not sought here, or an extraordinary writ.⁷⁹

In order to determine the appropriateness of mandamus, the *American Express* court interpreted *Schlagenhauf* as follows: "[T]he touchstones named by the Court of review by mandamus are usurpation of power, clear abuse of discretion and the presence of an issue of first impression."⁸⁰ The drawback to this summary of *Schlagenhauf* is that it could be interpreted to mean that the existence of "an issue of first impression" is a factor *equal* to and *independent* of "usurpation of power" or "abuse of discretion" as a ground for issuance of mandamus. The implication that mandamus can issue in response to any issue of first impression is of course *incorrect* when tested by the *Schlagenhauf* rationale, but unfortunately the court's statement—in conjunction with the fact that the court nowhere explicated or indeed further referred to that statement—may be read to suggest such an implication.⁸¹ Until the *IOS* decision, however, this implication remained unnoticed, as might have been expected since *American Express* neither allowed the interlocutory appeal nor issued mandamus. Moreover, with one very recent exception each subsequent citation of *American Express*, except *IOS*, invoked the opinion to deny an appeal from an interlocutory ruling that was claimed to have a final effect under the collateral order doctrine.⁸²

⁷⁹ 380 F.2d at 282. In the instant case, the record reveals no effort by plaintiffs to obtain certification from the district judge under 28 U.S.C. § 1292(b) (1970). The Second Circuit does not require a request for certification to precede a petition for mandamus. The plaintiffs may well have felt that certification was both unlikely to be granted and unnecessary for mandamus purposes.

⁸⁰ 380 F.2d at 283.

⁸¹ The *American Express* opinion makes no reference to the need for any "gearing" of the alleged question of first impression with a lack of power in the court; see note 72 *supra*. The absence of any such reference suggests that an important issue of first impression can justify a grant of mandamus. Another circuit favors a "cumulation of factors," such as issues of first impression and basic undecided questions. *United States v. Hughes*, 413 F.2d 1244, 1248 (5th Cir. 1969). The *Hughes* opinion did not mention abuse of discretion or usurpation of power by the district court. Both opinions, strictly speaking, are therefore incorrect on the basis of *Schlagenhauf* and *Will*, discussed in text at notes 83-94 *infra*. See also *In re Ellsberg*, 446 F.2d 954 (1st Cir. 1971); *United States v. United States Dist. Ct.*, 444 F.2d 651 (6th Cir. 1971), *aff'd*, 407 U.S. 297 (1972).

⁸² *Alart Assoc. v. Aptaker*, 402 F.2d 779, 781 (2d Cir. 1968) (district judge's assessment of preliminary costs is not an occasion for appeal under collateral order doctrine); *Clark v. Kraftco Corp.*, 447 F.2d 933, 936 (2d Cir. 1971) (denial of motion for summary judgment not a final judgment); see also *Caceres v. International Air Transp. Ass'n*, 422 F.2d 141, 143 (2d Cir. 1970); *Korn v. Franchard Corp.*, 443 F.2d 1301, 1305

A few months after *American Express* was decided, the Supreme Court, in *Will v. United States*,⁸³ restated its earlier holding in *Schlagenhauf*. In *Will*, a criminal prosecution for tax evasion, the district court ordered the Government to disclose information concerning oral statements of the defendant relied upon by the Government to support the charge in the indictment. The Seventh Circuit issued mandamus, without opinion, vacating the district court's order.⁸⁴ The Supreme Court reasoned that the district court ruling was at most an erroneous order that was inappropriate for the "drastic" mandamus remedy.⁸⁵ The Government had relied on *Schlagenhauf* in its arguments,⁸⁶ but the Court said of that case:

The Court there did note that the various questions concerning the construction of Rule 35 were new and substantial, but it rested the existence of mandamus jurisdiction squarely on the fact that *there was real doubt whether the District Court had any power at all to order a defendant to submit to a physical examination.*⁸⁷

The Court then went on to qualify an earlier case, *La Buy v. Howes Leather Co.*,⁸⁸ as limited to cases involving "a persistent disregard of the federal rules."⁸⁹ *La Buy* had been used to support an expansive use of mandamus where issues of first impression were concerned.⁹⁰ Viewed in light of *Will*, however, the standard for mandamus in *La Buy* was developed not from an issue of first impression but

(2d Cir. 1971) (appeal denied in one of two cases). None of these cases involved mandamus or § 1292(b).

But see *Securities & Exchange Comm'n v. Stewart*, Nos. 73-1250, 73-1251 (2d Cir., Mar. 16, 1973), which denied a challenge by mandamus to a district court order prohibiting plaintiff from taking depositions of several defendants unless they were granted use immunity. The *Stewart* court cited *American Express* as "stat[ing] the general rule" for issuance of writs of mandamus. Slip Op. at 2337 n.5. The *Stewart* court distinguished *IOS* as involving a narrow question of jurisdiction, *id.*, and referred to "the clear policy of denying mandamus except in the rarest situations." *Id.* at 2336. The dissent urged that the case below was one of "monumental proportions," *id.* at 2340, and that both the supervisory mandamus doctrine of *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957) (discussed in text at notes 88-91 *infra*), and the first impression criteria of *IOS* were sufficient bases for a mandamus that would bring the important interlocutory ruling before the appellate court. *Id.* at 2348-49 & nn. 7-8. See note 91 *infra*. It is submitted that the dissent is mistaken in refusing to read the *La Buy* opinion as severely limited by the Supreme Court in *Will*. See text at notes 83-91 *infra*. It is further submitted that the *Stewart* majority weakens its position by failing to recognize the extent to which the *American Express* opinion's reference to an issue of first impression as a base for mandamus supports the arguments of the *Stewart* dissent. See text at notes 92-94 *infra*.

⁸³ 389 U.S. 90 (1967).

⁸⁴ The circuit court order is printed *id.* at 94 n.3.

⁸⁵ *Id.* at 104.

⁸⁶ *Id.* at n.14.

⁸⁷ *Id.* at 104-05 n.14 (emphasis added).

⁸⁸ 352 U.S. 249 (1957).

⁸⁹ 389 U.S. at 104-05 n.14.

⁹⁰ 9 Moore ¶ 110.28, at 313.

from the basic question of judicial power. Accordingly it would seem that after *Will* a view of mandamus as authorizing interlocutory review of issues of first impression is unwarranted.⁹¹

In light of the *Will* opinion, the suggestion in *American Express* that an issue of first impression may serve as grounds for mandamus seems clearly untenable. Nevertheless, the *IOS* court utilized *American Express* in an effort to treat the district court's order denying threshold discovery as an issue of first impression, apparently in order to provide grounds for mandamus. After acknowledging that Judge Bonsal had power to vacate the notices of deposition, the court reasoned that that factor was offset by the existence of an issue of first impression as well as abuse of discretion: "Nevertheless, the issue here is one of first impression, and the vacation reveals, through its consequences, an abuse of discretion."⁹² The approach consistent with the *Will* and *Schlagenhauf* opinions would have been to focus only on district court conduct indicative of usurpation of power or abuse of discretion.⁹³ If any issues of first impression were raised by use of these traditional mandamus tests, they could then be dealt with in the writ of mandamus.⁹⁴ Consequently, the *IOS* court's use of *American Express* and the presence of an issue of first impression was not necessary to sustain issuance of the writ.

Moreover, the existence of analogous cases belies the contention that the denial of threshold discovery raises an issue of first impression. In fact, with the exception of one district court opinion⁹⁵ from the early years of the Federal Rules, the district courts would appear to be unanimously of the opinion that threshold discovery must be

⁹¹ But see Note, Supervisory and Advisory Mandamus Under the All Writs Act, 86 Harv. L. Rev. 595 (1973), where it is argued that the *Will* opinion can be read as supporting a more expansive notion of "advisory" mandamus. *Id.* at 622. "Advisory" mandamus, in this view, would be directed to "novel and important" questions and would serve as an occasion to enunciate "general guidelines" for the edification of inferior courts. *Id.* at 618. See *Atlass v. Miner*, 265 F.2d 312 (7th Cir. 1959), *aff'd* on other grounds, 363 U.S. 641 (1960). A policy of "advisory" mandamus would thus dispense with the traditional standards of mandamus propriety—usurpation of power and abuse of discretion. In their place would be a roving commission for courts of appeals to formulate rules and to respond to new and important questions as warranted by "exceptional circumstances." See the concurring opinion of Justice Black in *Will*, 389 U.S. 90, 108 (1967). Although "advisory" mandamus is not necessarily subversive of the final judgment rule, the danger of proceeding on a theory of "advisory" mandamus, in addition to encouraging possible overuse of the writ, see note 72 *supra*, is that the plain language of the *Will* opinion limits the *La Buy* doctrine to instances of "persistent disregard of the Federal rules," 389 U.S. at 104-05 n.14, and restates the *Schlagenhauf* holding as resting squarely on the traditional mandamus standard of "power". *Id.*

⁹² 459 F.2d at 707-08.

⁹³ Plainly, the abuse of discretion test would be met in the instant case. However, despite the fact that the *Will* opinion bristled with cautionary dicta and appeared "to rechart the area of the availability of mandamus along quite restrictive lines," 9 Moore ¶ 110.28, at 308, the *Will* opinion has not discouraged some courts from utilizing first impression issues as bases for mandamus. See note 81 *supra*.

⁹⁴ *Schlagenhauf v. Holder*, 379 U.S. 104, 110-11 (1964).

⁹⁵ See, e.g., *Fox v. House*, 29 F. Supp. 673, 675 (E.D. Okla. 1939).

allowed when there are factual disputes concerning threshold issues.⁹⁶ The Second Circuit has itself endorsed the appropriateness of threshold discovery, implying that such discovery can be denied only on a finding by the district court that no issues of fact have been raised regarding the threshold issues.⁹⁷

However, the *IOS* court did not rely only on the *American Express* theory. The rest of its rationale is firmly grounded within the ambit of the *Schlagenhauf* decision. It found that the district court's "vacation of plaintiffs' notice of deposition reveals, through its consequences, an abuse of discretion."⁹⁸ The harmful consequences of the lower court order were the freezing of plaintiffs' efforts to investigate facts bearing on jurisdiction and standing, and the resultant "limbo" in which plaintiffs find themselves.⁹⁹ As the *IOS* court stated:

Discovery . . . is the heart of the controversy, for on it turns plaintiffs-petitioners' right to be in court. The order below makes it virtually impossible to discover the facts on which jurisdiction and standing turn, and thus puts the plaintiffs-petitioners in a cul-de-sac which the Federal Rules never contemplated.¹⁰⁰

Accordingly, the order denying discovery is an abuse of discretion, and mandamus must issue.

The *IOS* decision, except for the reference to first impression elements from *American Express*, is wholly in keeping with the policies of judicial economy and liberal discovery. Plaintiffs' petition for mandamus raised the question of abuse of discretion at the moment the alleged abuse occurred. The granting of mandamus in such a case ensures timeliness and efficiency of district court decisions and thereby confirms the principles of the final judgment rule by preventing "unneeded delay and expense caused by multiple appeals in the same suit."¹⁰¹ The mandamus promotes an economy of judicial effort by obviating the need for a reversal of the offensive order on appeal, and a consequent second trial; furthermore, it ensures that the liberal discovery policies of the Federal Rules are fully implemented. Finally, since the *IOS* mandamus pertains to the correction of harmful error regarding the administration of a limited and specific area of discovery practice, it cannot be construed as portending a general assault on the final judgment rule or on the discretion of the district courts to enter interlocutory rulings.¹⁰²

⁹⁶ See text at notes 16-31 *supra*.

⁹⁷ *H.L. Moore Drug Exchange, Inc. v. Smith, Kline & French Laboratories*, 384 F.2d 97 (2d Cir. 1967).

⁹⁸ 459 F.2d at 707.

⁹⁹ *Id.* at 708.

¹⁰⁰ *Id.* at 707.

¹⁰¹ Comment, *Mandamus Proceedings in the Federal Courts of Appeals: A Compromise with Finality*, 52 Calif. L. Rev. 1036 (1964).

¹⁰² This is not to say that the *IOS* decision may not provide support for granting

In conclusion, the mandamus in *IOS* was an appropriate response to the restrictive order issued by the district court. That order, denying threshold discovery, was inconsistent with the spirit of the Federal Rules and contrary to the holding of several opinions that affirm the propriety of threshold discovery under circumstances analogous to *IOS*.¹⁰³ In *IOS*, plaintiff chose to petition for mandamus rather than go forward to a likely dismissal and take a subsequent appeal. While the Second Circuit was incorrect in basing its decision, in part, on the existence of an issue of first impression as grounds for mandamus, nevertheless its grant of mandamus was a proper response to an abuse of discretion. Although the authority of *American Express* had been undercut by the decision of the Supreme Court in *Will*,¹⁰⁴ the *IOS* court's use of *American Express* was unnecessary to its holding and does not render the mandamus unfounded. Given that the district court order was erroneous and its consequences harmful, the order must be deemed an abuse of discretion, and mandamus must issue to correct it.

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discovery in instances where such grants might be challenged. For example, the opinion implies that discovery should be made available to probe the \$10,000 amount in controversy requisite for diversity jurisdiction (28 U.S.C. § 1332 (1970)), 459 F.2d at 707. Usually, plaintiff's threshold dollar claim is assumed to have been made in good faith, *Saint Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288 (1938). However, either the court or the defendant may challenge plaintiff's jurisdictional amount, whereupon the burden is on plaintiff to show the sufficiency of his claim, *McNutt v. GMAC*, 298 U.S. 178, 182-89 (1936). It is within the discretion of the district court to determine the appropriate method of proof, *Gibbs v. Buck*, 307 U.S. 66, 71-72 (1939). Affidavits, oral testimony, and depositions have been deemed available to plaintiff in the effort to demonstrate the jurisdictional amount, *Alker v. Insurance Co. of N. America*, 279 F. Supp. 902, 903 (E.D. La. 1968), citing *Land v. Dollar*, 330 U.S. 731, 735 n.4 (1947). The court will make the final ruling whether the required jurisdictional amount has been met, and it has been assumed in one recent case that pre-trial discovery is available as a means to provide a basis for an informed ruling by the court, *Nelson v. Keefer*, 451 F.2d 289, 296 (3d Cir. 1971). The logic of the *IOS* opinion would indicate that a limited discovery must be allowed to either party to probe factual disputes concerning the sufficiency of the jurisdictional amount.

¹⁰³ See text at notes 16-31 *supra*.

¹⁰⁴ See text at notes 83-94 *supra*.