

**DEVELOPMENTS AND CHALLENGES
IN FEDERAL JURISDICTION**

JUDGE ROBERT J. SHELBY
CHIEF JUDGE DAVID NUFFER

11TH ANNUAL SOUTHERN UTAH FEDERAL LAW SYMPOSIUM
MAY 11, 2018

**Utah Plaintiff sues Defendant LLC in federal court.
Which adequately alleges diversity jurisdiction?**

- a. Defendant LLC is a Colorado Limited Liability Company.
- b. Defendant LLC is a Colorado Limited Liability Company with its principal place of business in Nevada.
- c. Defendant LLC is a Colorado Limited Liability Company whose member is a Nevada Limited Partnership.
- d. None of the above.

Utah Plaintiff sues Defendant Company in federal court. Which adequately alleges diversity jurisdiction?

- a. Defendant Company is located in Nevada.
- b. Defendant Company is incorporated in the state of Nevada.
- c. Defendant Company is a corporation incorporated in the state of Nevada.
- d. Defendant Company is formed in Nevada doing business in Idaho.
- e. None of the above.

Utah Plaintiff sues individual Defendants in federal court. Which adequately alleges diversity jurisdiction?

- a. Defendant Smith resides in Nevada.
- b. Defendant Smith works in Utah, but lives in Nevada.
- c. Defendant Smith is a citizen of Nevada and additional defendants are John Does 1-10.
- d. None of the above.

SUBJECT MATTER JURISDICTION

- Federal courts are courts of limited jurisdiction.
- Without subject matter jurisdiction, the court lacks the power to do anything but dismiss the case.
- Before deciding to file a complaint in federal court or remove a case, it is important to assess the basis of federal jurisdiction.

FEDERAL JURISDICTION

- Cases, in Law and Equity, arising under this Constitution;
 - Cases, in Law and Equity, arising under the Laws of the United States;
 - Cases, in Law and Equity, Arising under Treaties made, or which shall be made;
 - Cases affecting Ambassadors, other public Ministers and Consuls;
 - Cases of admiralty and maritime Jurisdiction;
 - Controversies to which the United States shall be a Party;
 - Controversies between two or more States;
 - Controversies between a State and a citizen of another State;
 - **Controversies between Citizens of different States;**
 - Controversies between Citizens of the same State claiming Lands under Grants of different States, and
 - Controversies between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.
- U.S. CONST. ART. III, § 2, cl. 1

FEDERAL JURISDICTION: OBLIGATION TO ASSESS

- At each stage of federal litigation, the court has an independent obligation to assess its own jurisdiction.
- “Because the jurisdiction of federal courts is limited, there is a **presumption against our jurisdiction, and the party invoking federal jurisdiction bears the burden of proof.**” *Marcus v. Kansas Dept. of Revenue*, 170 F.3d 1305, 1309 (10th Cir. 1999) (citations omitted).
- “A court lacking jurisdiction cannot render judgment but must dismiss [or remand] the cause *at any stage* of the proceedings in which it becomes apparent that jurisdiction is lacking.” *Id.* (emphasis in original) (citations omitted).

**DIVERSITY
28 U.S.C. § 1332(a)(1)**

“The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between—(1) citizens of different States. . . .”

**PLEADING DIVERSITY:
WHAT WE NEED**

- Must be pled affirmatively. Under Federal Rule of Civil Procedure 8(a)(1), a pleading that states a claim for relief “must contain: (1) a short and plain statement of the grounds for the court’s jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support”
- The court needs specific allegations concerning the jurisdictional facts necessary to determine whether complete diversity exists. *Martinez v. Martinez*, 62 F. App’x 309, 313 (10th Cir. 2003).

UNINCORPORATED ENTITIES

Business trusts that can act and be sued in their own name, limited liability companies, limited partnerships, etc.

- Such an entity has “the citizenship of all [its] members.” *Carden v. Arkoma Assoc.*, 494 U.S. 185, 195-96 (1990) (citations omitted).
- “Members” is a term the Supreme Court evaluates with reference to the applicable state law, and equates it with “owners” or “the several persons composing such an association.” *Americold Realty Trust v. Conagra Foods, Inc.*, 136 S.Ct. 1012, 1015 (2016) (citations omitted).

AMERICOLD EXAMPLE

- To determine the “members” of the REIT, the Supreme Court consulted the law of the state in which the trust was formed—Maryland.
- Maryland law provides that a REIT holds its assets for its “shareholders.”
- In an action by or against the REIT, diversity must be determined by the citizenship of each shareholder.

IN GENERAL, WHO ARE THE MEMBERS OF AN UNINCORPORATED ENTITY?

Allege the citizenship of all the following members to establish diversity-- and if the members are unincorporated, keep alleging regarding the sub-members!

- **Limited partnership:** all partners are the members.
- **Joint stock entities:** all shareholders.
- **Limited liability companies:** all members.
- **Business trusts that may be sued in their own name:** look to state law to determine—in *Americold*, the Court looked to Maryland law to determine this included all shareholder beneficiaries. (Note: in contrast, when a trustee files suit in her name, as in cases of traditional trusts that must act through trustees, “her jurisdictional citizenship is the State to which she belongs—as is true of any natural person.” *Navarro Savings Assn. v. Lee*, 446 U.S. 458, 465 (1980)).

CORPORATIONS

- “[A] corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business . . .” 28 U.S.C. § 1332(c)(1).
- “For diversity, a corporation is a citizen of its state of incorporation and the state where its principal place of business is located.” *Grynberg v. Kinder Morgan Energy, L.P.*, 805 F.3d 901, 905 (10th Cir. 2015).
- So, plead both: 1) state of incorporation and 2) principal place of business.

INDIVIDUALS

- “For purposes of diversity jurisdiction, one is a citizen of the state in which he or she is domiciled. Domicile, in turn, is the combination of physical presence in a location and an intent to remain there indefinitely.” *Martinez v. Martinez*, 62 F. App’x 309, 313 (10th Cir. 2003) (citations omitted).
- Thus, references to where one lives, or “residency,” are not enough to establish diversity of *citizenship*.
- One must allege facts showing “domicile:” 1) physical presence and 2) an intent to remain indefinitely.

JANE AND JOHN DOES

Allegations depend on whether the plaintiff files suit in federal court, or the case is removed.

- When a plaintiff invokes federal jurisdiction by filing suit in federal court, the “general rule . . . has been that, on challenge, the diverse citizenship of the fictitious defendants must be established by the plaintiff in order to continue a federal court action.” *Lee v. Airgas-MidSouth, Inc.*, 793 F.3d 894, 899 (8th Cir. 2015)(citing 13F Charles Alan Wright, et al., *Federal Practice & Procedure* § 3642 (3d ed. 2009)).
- In contrast, “[i]n determining whether a civil action is removable on the basis of [diversity], the citizenship of defendants sued under fictitious names shall be disregarded.” 28 U.S.C. § 1441(b)(1). This is because “a plaintiff cannot protect his state action from federal jurisdiction by inserting a fictitious non-diverse John Does.” *Lee*, 793 F.3d at 899.

WHAT WE GET

- Plaintiffs are all citizens of the State of Colorado.
- Defendant, ABC company, was formed in the State of Wyoming and has its principal place of business in Salt Lake City, Utah. OR
- Plaintiff, ABC, Ltd, is a limited liability company formed in the State of Wyoming and has its principal place of business in Salt Lake City, Utah. OR
- Plaintiff, ABC, PC, is a professional corporation incorporated in the State of Wyoming and has its principal place of business in Salt Lake City, Utah.

IF NOT ADDRESSED BEFORE APPEAL

- Federal courts of appeal are limited to the record created in the district court.
- They do not take evidence.
- You cannot stipulate to Subject Matter Jurisdiction.
- If the appellate court cannot determine whether it has the power to act, it will either dismiss or remand to the district court to take evidence on the jurisdictional facts.

PARTIES SHOULD ESTABLISH JURISDICTIONAL FACTS EARLY

- Remand is expensive and time consuming.
- If you actually do not have federal jurisdiction, everything you did in the district court will be vacated.
- *Americold* had been going on for almost a decade when the Supreme Court affirmed the Tenth Circuit decision that they were in the wrong court.
- This is not a conversation you want to have with your client.

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Personal jurisdiction

If the court has the authority to hear the case, *power to control defendant* exists if:

- Authorized by statute, and
- Permissible under due process clause

Fed. R. Civ. P. 4(k)(1)(A)

(1) In General. Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant:

(A) who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located;

or

(C) when authorized by a federal statute.

State Long Arm Statutes

- Usually incorporate due process standard, so analysis is collapsed into one step
 - Must be authorized by statute, and
 - Permissible under due process clause

Utah Code Ann. § 78B-3-201(3)

. . . assert jurisdiction over nonresident defendants to the fullest extent permitted by the due process clause of the Fourteenth Amendment to the United States Constitution.

Utah does require specific acts:

78B-3-205. Acts submitting person to jurisdiction

....

- (1) the **transaction of any business** within this state;
- (2) **contracting to supply** services or goods in this state;
- (3) the **causing of any injury** within this state whether tortious or by breach of warranty;
- (4) the ownership, use, or possession of any **real estate** situated in this state;
- (5) **contracting to insure** any person, property, or risk located within this state. . . ;
- (6) with respect to actions of divorce, separate maintenance, or child support, having **resided**, in the marital relationship, within this state . . . ; or the commission in this state of the **act** giving rise to the claim . . . ; or
- (7) the commission of **sexual intercourse** within this state which gives rise to a paternity suit . . .

Fed. R. Civ. P. 4(k)(1)(C)

(1) In General. Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant:

(A) who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located;

or

(C) when authorized by a federal statute.

Section 5 of the Sherman Act – federal example

[If] the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, **whether they reside in the district in which the court is held or not**

15 U.S.C.A. § 5

Two Types of Personal Jurisdiction

- General Jurisdiction – “at home”
 - Subject to all types of claims
 - Claims need not be related to the forum state
- Specific Jurisdiction
 - Subject to the specific claim at issue
 - Claim must be related to the forum state

General Jurisdiction for Persons

- Domicile
- Presence
- Consent

Bottom Line for Corporations:

- General Jurisdiction only in:
 - Place of incorporation (or qualification)
 - Principal place of business

Current State for Corporations

- *BNSF (2017)* P injured working for railroad outside Montana – sues in Montana court
 - railroad incorporated in Delaware
 - principal place of business in Texas
 - 2,000 miles of Montana track (6% of total)
 - 2,100 Montana workers (less than 5% of total)
 - less than 10% of total revenue in Montana

BNSF – 2017 (Ginsburg)

- BNSF not “so heavily engaged in activity in Montana as to render it essentially at home in that State.”
- key inquiry not “the magnitude of the defendant’s in-state contacts,” but rather “an appraisal of a corporation’s activities in their entirety.”

Sotomayor dissent:

- criticizes the “comparative contacts analysis invented in *Daimler*” as inconsistent with *International Shoe*,
- “a jurisdictional windfall to large multistate or multinational corporations that operate across many jurisdictions.”

Bottom Line for Corporations:

- General Jurisdiction only in:
 - Place of incorporation (or qualification)
 - Principal place of business
- *Questions:*
 - Qualification to do business?

Specific Jurisdiction

- Minimum contacts
 - Purposeful direction of activities
 - Continuing relationships
 - Market exploitation
 - Harmful effects
 - Injuries arise from activities
- Exercise reasonable

Old Republic Insurance Company v. Continental Motors, Inc., 877 F.3d 895 (10th Cir. 2017)

- eBay seller in **Colorado** sells clothing, with parody of protected art work
- **English** copyright holder writes cease and desist letter to Ebay, **in California**
- Ebay blocks further sales
- Colorado Plaintiff files declaratory judgment action under Copyright Act in Colorado
- Copyright holder moves to dismiss – lack of personal jurisdiction
- Gorsuch finds harmful effects and no unfairness

Dudnikov, 514 F.3d 1063 (10th Cir. 2008)
