DON'T GET THROWN OUT OF COURT: COMMON MISTAKES IN ESTABLISHING FEDERAL SUBJECT MATTER JURISDICTION

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In federal court, subject-matter jurisdiction is a magic bullet. Jurisdictional problems are particularly pernicious (to the verdict winner) or useful (to the verdict loser) because they can never be waived, the court must address any potential jurisdictional defect it notices, and an incurable jurisdictional defect requires the judgment to be thrown out. Below we review some common defects in federal subject-matter jurisdiction and potential ways to fix them.

This short article focuses on select jurisdictional defects and solutions. It is not a comprehensive guide to federal-court jurisdiction generally. For in-depth treatment of federal district courts' subject-matter jurisdiction, see Wright, Miller & Cooper, *Federal Practice and Procedure* §§ 3521-3740 (2009) and *Moore's Federal Practice* chapters 100-109 (2015).

I. WHY DEFECTS IN SUBJECT-MATTER JURISDICTION CAN DESTROY YOUR VICTORY (OR SAVE YOU FROM DEFEAT) IN FEDERAL COURT

At every stage of litigation, a federal court is required to confirm that it has jurisdiction, and to dismiss the claim if it lacks jurisdiction. *Arizonans for Official English v. Arizona,* 520 U.S. 43, 73 (1997). A court generally may not rule on the merits of a case without first determining that it has subject-matter jurisdiction. *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 93–102 (1998). If it appears that the court lacks subject-matter jurisdiction, it must dismiss the action. Fed. R. Civ. Proc. 12(h)(3).

This rule holds even on appeal, after final judgment has been entered. A federal appellate court is required to evaluate both its own jurisdiction and that of the district court. If the district court lacked jurisdiction, the appellate court must vacate the judgment:

> [E]very federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review, even though the parties are prepared to concede it…. And if the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it. When the lower federal court lacks jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit.

Arizonans for Official English, 520 U.S. at 73 (internal quotation marks, brackets and citations omitted).

Further, absence of jurisdiction is unwaivable. "A litigant generally may raise a court's lack of subject-matter jurisdiction at any time in the same civil action, even initially at the highest appellate instance." *Grupo Dataflux v. Atlas Global Grp., L.P.*, 541 U.S. 567, 576 (2004). Even if a jurisdictional defect is first discovered after trial or after judgment has been entered, it requires the case to be dismissed. *See, e.g., Grupo Dataflux,* 541 U.S. at 571-75 (appeal after jury trial; case must be dismissed for lack of subject matter jurisdiction because parties were not diverse); *American Fire & Casualty Co. v. Finn,* 341 U. S. 6 (1951) (similar). Jurisdiction cannot

be created by consent or estoppel, or "to account for the parties' litigation conduct." *Grupo Dataflux*, 541 U.S. at 576; *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982). Even a party that initially brought the case to federal court can attack jurisdiction. *E.g., Finn*, 341 U.S. at 16-18 (defendant that removed case to federal court could successfully challenge jurisdiction after losing trial).

Federal courts of appeals take these requirements seriously. Federal Rule of Appellate Procedure 28(a)(4) requires appellants to explain why the district court and court of appeals have subject matter jurisdiction. Many courts of appeals specifically require their staff to confirm the district court's subject-matter jurisdiction. It is not uncommon for a court of appeals to issue a *sua sponte* order requiring the parties to explain why the district court had subject matter jurisdiction, even when no one disputes it.

Whether you are trying to establish or defeat federal jurisdiction, meticulous attention to the jurisdictional requirements is critical. The following sections discuss some common jurisdictional problems that the authors have seen, and potential ways to fix them.

II. DIVERSITY JURISDICTION

A. Background

Article III of the U.S. Constitution provides that the judicial power of the United States extends to, *inter alia*, controversies "between citizens of different states" and "between a state, or citizens thereof, and foreign states, citizens or subjects." U.S. Const. art. III § 2. Pursuant to this provision, the diversity statute, 28 U.S.C. § 1332, grants federal courts jurisdiction over suits in which the amount in controversy exceeds $75,000 and the dispute is between (a) citizens of different states, (b) citizens of a state and citizens or subjects of a foreign country (excluding lawful permanent residents domiciled in the same state), (c) citizens of different states in which citizens or subjects of foreign countries are additional parties, or (d) a foreign state as plaintiff and citizens of a state or of different states. 28 U.S.C. § 1332(a)(1)-(4).[1]

The general diversity statute is interpreted to require that every plaintiff be a citizen of a different state from every defendant. *Strawbridge v. Curtiss*, 7 U.S. 267 (1806); *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 553 (2005); *Cascades Dev. of Minn., LLC v. Nat'l Specialty Ins.*, 675 F.3d 1095, 1098 (8th Cir. 2012). This requirement is known as "complete diversity." Under the general diversity statute, the presence of even one non-diverse party destroys diversity jurisdiction. *See Exxon Mobil*, 545 U.S. at 554 ("Incomplete diversity destroys original jurisdiction with respect to all claims"); *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 829 (1989) (holding that "stateless" person destroyed diversity).

[1] This discussion applies to general diversity under section 1332(a)-(c). The Class Action Fairness Act has its own special set of rules for diversity jurisdiction. 28 U.S.C. § 1332(d). CAFA is a topic unto itself and we save it for another day.

These requirements give rise to a variety of common traps for the unwary.

B. Common Mistakes

1. Alleging residency instead of citizenship.

Section 1332 grants jurisdiction over controversies between "citizens" of different states (or, in some instances, "citizens or subjects" of foreign countries). But parties trying to invoke federal jurisdiction frequently allege residency instead of citizenship, whether through inadvertence or to gloss over the fact that a party is not in fact a citizen. Allegations of residency are insufficient.

"In order to be a citizen of a State within the meaning of the diversity statute, a natural person must both be a citizen of the United States *and* be domiciled within the State." *Newman-Green,* 490 U.S. at 828. Domicile requires not just residence, but intent to reside there permanently or indefinitely. *Gilbert v. David,* 235 U.S. 561, 569 (1915)..

Because residence is not the same thing as domicile, the complaint or notice of removal must allege citizenship, not residence. *Menard v. Goggan,* 121 U.S. 253 (1887). "When it comes to diversity jurisdiction, the words 'resident' and 'citizen' are not interchangeable" and the allegation that a party is a "resident" of a state is insufficient. *Reece v. Bank of New York Mellon,* 760 F.3d 771, 777 (8th Cir. 2014); *Taylor v. Appleton,* 30 F.3d 1365, 1367 (11th Cir. 1994) ("Citizenship, not residence, is the key fact that must be alleged in the complaint to establish diversity for a natural person.").

2. Failure to allege corporation's state of incorporation and principal place of business.

In general, a corporation is a citizen of every state or foreign country by which it has been incorporated and also of the state or foreign country where it has its principal place of business. 28 U.S.C. § 1332(c)(1). For this reason, both the principal place of business and all places of incorporation must be alleged. "In order to adequately establish diversity jurisdiction, a complaint must set forth with specificity a corporate party's state of incorporation *and* its principal place of business"; failure to do so makes the complaint "inadequate to establish diversity." *Dale v. Weller,* 956 F.2d 813, 815 (8th Cir. 1992) (citations omitted).

3. Failure to allege the appropriate amount in controversy.

To establish diversity jurisdiction, there must be not only complete diversity of the parties, but the matter in controversy must also exceed $75,000, exclusive of interest and costs. 28 U.S.C. § 1332. The standard for determining whether the jurisdictional amount in controversy requirement is met has been long established: unless recovery of an amount exceeding the jurisdictional minimum is legally impossible, the case belongs in federal court. *St. Paul Mercury Indem. Co. v. Red Cab Co*., 303 U.S. 283, 288-89 (1938); *Back Doctors Ltd. v. Metro. Prop. & Case. Ins. Co.*, 637 F.3d 827, 830 (7th Cir. 2011).

This determination is ordinarily based on the state of affairs at the time the operative complaint was filed (or when the case was removed). *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 473-74 & n.6 (2007): *Johnson v. Wattenbarger*, 361 F.3d 991, 993 (7th Cir. 2004). Factual allegations made in the middle of litigation do not impact subject matter jurisdiction. *See Sarnoff v. Am. Home Prods.*, 798 F.2d 1075, 1078 (7th Cir. 1986) ("the relevant time for determining whether the [amount in controversy] requirement was satisfied was when the complaint was filed, not almost two years later when the motion for summary judgment was filed."), *overruled on other grounds*, *Hart v. Schering-Plough Corp.*, 253 F.3d 272 (7th Cir. 2001).

Disputes over amount in controversy most frequently arise in connection with cases removed from state court. The defendant removes, alleging more than $75,000 is at stake, and the plaintiff moves to remand, contending that is not true. A plaintiff may expressly disclaim damages over $75,000, but the disclaimer is only effective if it is binding (such as through a stipulation limiting the amount of recovery). *BEM I, L.L.C. v. Anthropologie, Inc.*, 301 F.3d 548, 552 (7th Cir. 2002). Similar disputes arise in connection with determining whether more than $5 million is at stake where the Class Action Fairness Act is the basis for federal jurisdiction. *See, e.g. Standard Fire Ins. Co. v. Knowles,* 133 S. Ct. 1345, 1348 (2013) (named plaintiff could not prevent federal-court jurisdiction under CAFA by stipulating that class would not seek over $5 million in damages, because named plaintiff had no authority to bind proposed class); *Dart Cherokee Basin Operating Co., LLC v. Owens*, 135 S. Ct. 547 (2014)(notice of removal need only include a plausible allegation that the amount in controversy exceeds the jurisdictional threshold).

4. Failure to allege citizenship of all members of artificial entity other than corporation.

An artificial entity, other than a corporation, is a citizen of every state where any of its members are citizens. *Carden v. Arkoma Assocs.,* 494 U.S. 185, 195–96 (1990). To allege diversity, the complaint or notice of removal must allege the citizenship of all of the association's members. *Mallory & Evans Contractors & Eng'rs, LLC v. Tuskegee Univ.*, 663 F.3d 1304, 1305 (11th Cir. 2011); *Delay v. Rosenthal Collins Grp., LLC*, 585 F.3d 1003, 1005 (6th Cir. 2009).

Because businesses come in many different forms of organization, it is important to focus specifically on a party's form of business. For example, in *Tuck v. United Services Automobile Association,* 859 F.2d 842 (10th Cir. 1988), the parties incorrectly believed in the trial court that defendant insurer was a corporation. Thus it would have been a citizen only of its states of incorporation and principal place of business. On appeal, it was discovered to be an unincorporated association, making it a citizen of every state where any of its members was a citizen. Worse, one member was a citizen of the same state as plaintiff – destroying diversity. The court of appeals remanded to determine whether there was a way to amend the complaint to eliminate non-diverse parties. It directed the district court to consider whether to sanction defense counsel for allowing the action to proceed when they should have known the parties were not diverse.

Attorneys that fail to pay attention to these rules can stumble into a world of hurt. For example, in *Belleville Catering Co. v. Champaign Market Place, LLC*, 350 F.3d 691, 692 (7th Cir. 2003), the parties proceeded all the way through a jury trial and up to the Seventh Circuit before the deficiencies in subject matter jurisdiction were noted. The court of appeals vacated the district court judgment and blasted both parties' counsel for their "insouciance toward the requirements of federal jurisdiction [which] has caused a waste of time and money. *Id.* at 694. Further, the court explained that the "[t]he costs of a doomed foray into federal court should fall on the lawyers who failed to do their homework, not on the hapless clients" and urged the lawyers to try the case over for free. *Id.*

Change may be afoot, however, on diversity jurisdiction rules pertaining to LLC's and other artificial entities. The ABA House of Delegates recently passed a resolution urging Congress to amend the federal diversity rules so that unincorporated entities would be treated like incorporated ones. As it stands, unincorporated entities are considered to be residents of each and every state in which one of their members resides. That requires, for example, a plaintiff considering a suit against a LLC in federal court to determine the citizenship of all the members of the LLC before filing the complaint. In some cases, that information is readily available to plaintiffs' counsel. Other times it is not, and the only good way to determine it is through discovery. The chicken-and-egg problem is clear. The ABA's proposed new approach, if adopted by Congress, would eliminate that problem and help unsuspecting attorneys avoid the wrath of angry appellate court judges such as in *Belleville Catering*. For more on this topic, see Carl A. Aveni, *ABA House of Delegates Urges Change to Diversity Statute*, Litigation News (Oct. 30, 2015)

The courts of appeals have split on whether a trust is a citizen of every state where any of its members are citizens. Some hold that a trust's citizenship is based on the citizenship of the trustees, and other courts have held that it is based on the citizenship of the beneficiaries (analogous to members). The Supreme Court has granted certiorari to decide the question. *Americold Logistics LLC v. Conagra Foods, Inc.*, No. 14-1382 (argument scheduled for January 19, 2016).

5. Naming a state or state agency as a party.

"[A] State is not a 'citizen' for purposes of the diversity jurisdiction." *Moor v. Cnty. of Alameda*, 411 U.S. 693, 717 (1973). A government agency that is an "arm or alter ego" of a State is similarly not a citizen of the State for purposes of diversity. *Id.* at 718; *e.g., Public School Retirement System v. State Street Bank & Trust Co.*, 640 F.3d 821, 826 (8th Cir. 2011) (affirming orders remanding case, after removal, back to state court; plaintiff state agency was not a citizen of a state).

6. Misunderstanding or ignoring the citizenship of a minor

A minor normally takes her parents' domicile. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48 (1989). Further, a party suing as representative of a minor takes the

infant's citizenship. 28 U.S.C. § 1332(c)(2). These general rules can create problems if the child is born in the United States to parents who do not intend to remain in the U.S. or cannot legally do so. With minor exceptions, a child born in the United States is a United States citizen under the Fourteenth Amendment. However, if the parent is not domiciled in a state, the child taking that same domicile would also not be domiciled in any state, and so would not qualify as a "citizen" of any state for diversity purposes – despite being a U.S. citizen and living her entire life in one state. Because the child would not be a citizen, the mere presence of such a child as a party would destroy diversity under the complete-diversity requirement.

To avoid foreclosing access to federal courts, some courts hold that when a child is born to parents who are not easily defined as citizens of a state (such as migrants), the child is presumed to be domiciled in the state of her birth. *E.g.*, *Gregg v. Louisiana Power and Light Company*, 626 F.2d 1315, 1316 (5th Cir. 1980).

7. Failing to allege citizenship at time of removal in notice of removal.

To remove a case to federal court based on diversity jurisdiction, the parties must be diverse when the complaint is filed and when the case is removed. *Caterpillar, Inc. v. Lewis,* 519 U.S. 61, 73-74, 77-78 (1996); *Gibson v. Bruce,* 108 U.S. 561, 563 (1883). Thus a notice of removal must allege the parties' citizenship *at two different times*: when the plaintiffs initiated the action in state court and when the defendants filed the notice of removal in federal court. *Reece v. Bank of New York Mellon,* 760 F.3d 771, 776-78 (8th Cir. 2014).

Failure to do so is a statutory defect that ordinarily prompts remand back to state court. *See Caterpillar,* 519 U.S. at 73-74. It will not defeat *jurisdiction* if the parties are completely diverse (*e.g.* through dismissal of the non-diverse party) by the time judgment is entered. *Caterpillar,* 519 U.S. at 77.

C. Denying jurisdictional allegations and never having them proved

The burden is on the party asserting jurisdiction to prove the facts supporting it. *McNutt v. Gen. Motors Acceptance Corp.,* 298 U.S. 178, 189 (1936); *Kokkonen v. Guardian Life Ins. Co.,* 511 U.S. 375, 377 (1994). If plaintiff's "allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof." *McNutt,* 298 U.S. at 189.

Thus when the complaint's jurisdictional allegations are denied in the answer but not proved at trial, the court lacks jurisdiction. In *McNutt,* "[T]he allegation in the bill of complaint as to jurisdictional amount was traversed by the answer. The court made no adequate finding upon that issue of fact, and the record contains no evidence to support the allegation of the bill. There was thus no showing that the District Court had jurisdiction and the bill should have been dismissed upon that ground." 298 U.S. at 190; *Roberts v. Lewis,* 144 U.S. 653, 657–58 (1892) (same).

This rule can create a trap for the defendant. Defendants sometimes do not know whether the complaint's citizenship allegations are true, and say so in the answer. The statement of lack of information has the effect of a denial. Fed. R. Civ. Proc. 8(b)(5). When the defendant lacks information as to the truth of plaintiff's citizenship allegations, but wants to be in federal court, the defendant should consider obtaining the plaintiff's citizenship in discovery and putting the evidence of the diverse citizenship into the record.

III. FIXING DEFECTIVE ALLEGATIONS OF JURISDICTION

You've discovered a jurisdictional problem, but you want to be in federal court. How can you cure it? There are several ways.

First, a statute specifically authorizes the pleadings to be amended, even on appeal, to correct defective jurisdictional allegations. "Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts." 28 U.S.C. § 1653. *See Reece v. Bank of New York Mellon,* 760 F.3d 771, 778 (8th Cir. 2014) (deeming pleadings amended to cure defective jurisdictional allegations where plaintiffs provided satisfactory evidence of citizenship).

This rule applies not only to complaints, but notices of removal. "If a party fails to specifically allege citizenship in [its] notice of removal, the district court should allow that party to cure the omission, as authorized by § 1653." *Corporate Mgmt. Advisors, Inc. v. Artjen Complexus, Inc.,* 561 F.3d 1294, 1297 (11th Cir. 2009) (internal quotation marks omitted). However, section 1653 only applies when the jurisdictional facts actually existed and the complaint (or notice of removal) incorrectly described them, not when the facts themselves did not support jurisdiction. It "addresses only incorrect statements about jurisdiction that actually exists, and not defects in the jurisdictional facts themselves." *Newman-Green,* 490 U.S. at 830-31.

Second, if the pleadings do not sufficiently allege jurisdiction, the court may "review the record to find evidence that diversity jurisdiction exists." *Williams v. Best Buy Co., Inc.,* 269 F. 3d 1316, 1320 (11th Cir. 2001).

Third, if evidence establishing jurisdiction is not in the record but appears to exist, the court may allow supplementation of the record to establish the jurisdictional facts. *See, e.g., Dale v. Weller,* 956 F.2d 813, 815 (8th Cir. 1992) (remanding for district court to determine jurisdictional facts); *Cabalceta v. Standard Fruit Co.,* 883 F.2d 1553, 1555 (11th Cir. 1989) (allowing parties to supplement record with evidence of jurisdictional facts).

Fourth, the court may sometimes dismiss a nondiverse party if he or she is not "indispensable" and no party would be prejudiced. *Newman-Green,* 490 U.S. at 837-38. The power to dismiss only the nondiverse party and thereby preserve jurisdiction is to be exercised "sparingly." *Id.*