



Establishing Diversity Jurisdiction:

Or How to Keep Your Case in the Court of Appeals and Yourself out of Trouble

By Brian Paul ¹

If you've never read the Seventh Circuit's cases on establishing diversity jurisdiction, you might rethink your summer reading list. You see, the Court of Appeals has been (how to put this?) *disenchanted* with the bar's performance as of late. In case after case the story is more or less the same: lawyer appeals in what is ostensibly an action within the diversity jurisdiction and files a jurisdictional statement, which is palpably deficient; Court asks that the deficient jurisdictional statement be corrected; the lawyer flubs the jurisdictional statement; fed up, the Court voices its frustration in a published opinion — and that's if the lawyer is lucky. *See, e.g., Smoot v. Mazda Motors of Am., Inc.*, 469 F.3d 675 (7th Cir. 2006) (lawyers ordered to consider whether they should be compelled to attend a course on federal jurisdiction); *BondPro Corp. v. Siemens Power Generation, Inc.*, 466 F.3d 562 (7th Cir. 2006) (\$1,000 sanction); *Mortgage Elec. Registration Sys., Inc. v. Estrella*, 390 F.3d 522 (7th Cir. 2004) (lawyers chastised and appeal dismissed); *Belleville Catering Co. v. Champaign Market Place, L.L.C.*, 350 F.3d 691 (7th Cir. 2003) (judgment vacated, case remanded for dismissal, and counsel ordered to litigate without charge going forward); *Hart v. Terminex Int'l*, 336 F.3d 541 (7th Cir. 2003) (vacated and remanded for dismissal — after eight years of litigation); *Meyerson v. Showboat Marina Casino P'ship*, 312 F.3d 318 (7th Cir. 2002) (Meyerson II) (vacated with instructions to remand to state court, and lawyers ordered to show cause why they shouldn't be fined and suspended); *Cin. Ins. Co. v. E. Atl. Ins. Co.*, 260 F.3d 742 (7th Cir. 2001) (counsel reprimanded); *Prof'l Serv. Network, Inc. v. Am. Alliance Holding Co.*, 238 F.3d 897 (7th Cir. 2001) (lawyers directed to show cause why appeal should not be dismissed); *Guar. Nat'l Title Co. v. J.E.G. Assocs.*, 101 F.3d 57 (7th Cir. 1996) (vacated and remanded for dismissal); *Am.'s Best Inns, Inc. v. Best Inns of Abilene, L.P.*, 980 F.2d 1072 (7th Cir. 1992)(same). One may not agree with the blunt language in some of these opinions, *see, e.g., Smoot*, 469 F.3d at 682-83 (Evans, J., concurring), but one can't quibble with their basic message: diversity jurisdiction must be affirmatively and precisely established according to a rather technical set of rules, and, like it or not, it's our job as officers of the Court to know — and follow — those rules. The purpose of this article is help the bar in that effort.

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But first a word about why this issue matters. Federal courts are courts of limited jurisdiction as defined by the Constitution and Congress. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). When jurisdiction is absent, dismissal is required; a federal court has no discretion to hear a case that doesn't belong there in the first place. See *Belleville Catering*, 350 F.3d at 693. The problem (the virtue of our system, really) is that the federal judiciary is not subject to direct check by the other branches of government, so judges must make "every reasonable effort" to police themselves in the use of their own power. *Wis. Knife Works v. Nat'l Metal Crafters*, 781 F.2d 1280, 1282 (7th Cir. 1986). Circuit Rule 28, which governs the contents of jurisdictional statements, is simply a tool designed to assist the Court in satisfying this nondelegable duty. See *Smoot*, 469 F.3d at 678.

An appellant typically has to file a statement of jurisdiction twice. The first is at the time that the notice of appeal is filed (preferred) or within seven days thereafter (acceptable). See Cir. R. 3(c)(1). This filing is called a "docketing statement." If for some reason the appellant's docketing statement is not complete and correct, the appellee must file its own docketing statement within 14 days after the filing of the appellant's. *Id.* The second statement of jurisdiction goes in the appellant's opening brief. Fed. R. App. P. 28(a)(4); Cir. R. 28(a). This statement is called a "jurisdictional statement," which, for simplicity's sake, is the term this article uses to refer to both "docketing" and "jurisdictional" statements. If the appellant's jurisdictional statement is "complete and correct," the appellee must say so — literally — in its response brief. See Cir. R. 28(b). If, on the other hand, the appellant's jurisdictional statement is "not complete and correct," the appellee must tell that to the Court — again, literally in its response brief — and then provide a top-to-bottom run down of jurisdiction. *Id.*



More is required of a jurisdictional statement than just the facts supporting the district court's jurisdiction, see Cir. R. 28(a)(2) and (3), but because diversity jurisdiction is where most lawyers seem to slip up, it will be our focus here. "If jurisdiction depends on diversity of citizenship, the statement shall identify the jurisdictional amount and the citizenship of each party to the litigation." Cir. R. 28(a)(1). Let's take these in reverse order.

Citizenship

The point of identifying the citizenship of "each party to the litigation" is to ensure that the right level of diversity exists. "Complete" diversity is required in most cases, which means

all plaintiffs must be citizens of different states than all defendants. See *Strawbridge v. Curtiss*, 7 U.S. 267, 267 (1806). "Minimal" diversity, meaning diversity of citizenship between two or more claimants without regard to the circumstance that other rival claimants may be cocitizens, is allowed in some cases, for example, those that fall under the Class Action Fairness Act. See 28 U.S.C. § 1332(d)(2); *Hart v. FedEx Ground Package Sys. Inc.*, 457 F.3d 675, 676-77 (7th Cir. 2006).

Parties to litigation take varying forms, and the rules for establishing citizenship vary accordingly. An individual is a citizen of the state in which he is "domiciled," that is, "the state he considers his permanent home." *Galva Foundry Co. v. Heiden*, 924 F.2d 729, 730 (7th Cir.

1991). An individual's residence is not necessarily his domicile; a person can have more than one residence, but he can have only one domicile. See *Williamson v. Osenton*, 232 U.S. 619, 625 (1914); see also *Wachovia Bank, N.A. v. Schmidt*, 546 U.S. 303, 126 S.Ct. 941, 951-52 (2006). Don't tell the Court, then, that a party is "a resident of Florida." It can get your appeal dismissed. See *Guar. Nat'l*, 101 F.3d at 58-59; *Am.'s Best Inns*, 980 F.2d at 1074. Use the proper term of art: tell the Court that the Floridian "is domiciled in Florida."



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A corporation is a citizen of the state (1) in which it is incorporated and (2) of the state where it has its principal place of business. 28 U.S.C. § 1332(c)(1). Both must be identified in the jurisdictional statement. Cir. R. 28(a)(1). The first is self explanatory. As for the second, the Seventh Circuit uses the “nerve center” test, which requires a search for the corporation’s “brain”—usually found where the corporation has its headquarters. *See Wis. Knife Works*, 781 F.2d at 1282. Do not assert that a corporation is a citizen of a particular state because it “does business” there (as in *Cincinnati Insurance*). Investigate the facts and then use the proper terms of art: identify the company’s state of incorporation and the state of its “principal place of business.” *See* Cir. R. 28(a)(1); 28 U.S.C. § 1332(c)(1).

But what if the corporation isn’t an inc., a co., or a corp.? What if it’s a P.C. or a nonprofit or membership corporation? The same rule applies: “for purposes of diversity jurisdiction a corporation is a corporation is a corporation” – it doesn’t matter what kind.” *Hoagland ex rel. Midwest Transit, Inc. v. Sandberg, Phoenix & Von Gontard, P.C.*, 385 F.3d 737, 739 (7th Cir. 2004)(citations omitted). *See also Wise v. Wachovia Sec., LLC*, 450 F.3d 265, 267 (7th Cir. 2006).

A different rule applies to associations that are unincorporated. They are considered citizens of the state or states in which each of their members are citizens. *See Carden v. Arkoma Assocs.*, 494 U.S. 185, 195-96 (1990); *accord Market St. Assocs. Ltd. P’ship v. Frey*, 941 F.2d 588, 589-90 (7th Cir. 1991); *see also* Cir. R. 28(a)(1) (“If any party is an unincorporated association or partnership, the [jurisdictional] statement shall identify the citizenship of all members.”). But what about limited partnerships—do the limited partners count? Yes, the citizenship of *each* member counts. *See Carden*, 494 U.S. 185; *accord Guar. Nat’l*, 101 F.3d at 58; *Am.’s Best Inns*, 980 F.2d at 1073. How about limited liability companies? Same answer: each member counts. *See Cosgrove v. Bartolotta*, 150 F.3d 729, 731 (7th Cir. 1998). “Well,” you ask, “what if I represent a LLC that has scores of members?” Again, each member counts. *See, e.g., Hicklin Eng’g, L.C. v. Bartell*, 439 F.3d 346, 347-48 (7th Cir. 2006) (65 members). And not only that, citizenship must be traced back through however many layers of members there are. *See Meyerson v. Harrah’s East Chicago Casino*, 299 F.3d 616, 617 (7th Cir. 2002) (per curiam). So if

the LLC client has a member that is itself a LLC, *its* members would have to be identified and their citizenship stated. *See, e.g., Wise*, 450 F.3d at 267. And if one of *those* members is, say, a partnership, the members of the partnership would have to be identified, as would each member’s citizenship, and so on until reaching a dead end, usually with an individual or a corporation. *See also Wachovia Bank*, 546 U.S. 303 (national banks are citizens only of the states in which their main offices are located); *Navarro Sav. Ass’n v. Lee*, 446 U.S. 458 (1980) (citizenship of a trust is the citizenship of the trustee or trustees).

This rule not only tends to multiply the number of states in play, it can lead to some rather peculiar results. Suppose a limited partnership law firm is organized under the laws of Illinois and has its only office in Chicago, but all of the firm’s members are domiciled just across the border in northern Indiana. Under *Carden* there’s no such thing as an “Illinois limited partnership” for purposes of diversity jurisdiction. “There are only partners, each of which has one or more citizenships,” *Guar. Nat’l*, 101 F.3d at 59, which, in this example, would be Indiana. Another odd result spawned by the *Carden* rule is that members who want to sue their respective unincorporated associations (think derivative suit) probably can’t do so in federal court, for the member’s citizenship qua plaintiff counts on both sides of the “v.” *See, e.g., Bankston v. Burch*, 27 F.3d 164, 168-69 (5th Cir. 1994); *Whalen v. Carter*, 954 F.2d 1087, 1095 (5th Cir. 1992); *Buckley v. Control Data Corp.*, 923 F.2d 96, 97 (8th Cir. 1991). But, alas, these are issues for Congress to address, not the courts. *See Carden*, 494 U.S. at 196-97.

Two last points about citizenship. First, lay your cards on the table. An unincorporated association has the right to stay tight-lipped about the identity of its members, “but one consequence is lack of access to federal courts under the diversity jurisdiction.” *Meyerson II*, 312 F.3d at 321. “It is impossible to determine diversity of citizenship without knowing who the persons in question are.” *Am.’s Best Inns*, 980 F.2d at 1073; *see also Belleville Catering*, 350 F.3d at 693. A perceived reluctance to supply essential details – such as someone’s name – supports an inference that jurisdiction doesn’t exist. *See Guar. Nat’l*, 101 F.3d at 59.



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Second, jurisdiction should be stated affirmatively and precisely. Refrain from saying things like “the defendant corporation is not a citizen of Wisconsin” (as in *Meyerson II* and *Wisconsin Knife Works*), or “none of the defendant’s members are citizens of Illinois” (as in *Terminex International and America’s Best Inns*), or “the plaintiff is a citizen of a state other than Indiana” (as in *Wild v. Subscription Plus, Inc.*, 292 F.3d 526 (7th Cir. 2002)), or—and this is just asking for trouble—“the parties are citizens of different states” (as in *Wise* and *BondPro Corp. v. Siemens Power Generation, Inc.*, 463 F.3d 702 (7th Cir. 2006)). Try something like this instead: “Defendant XYZ, Inc. is incorporated in Delaware and has its principal place of business in New York”; “Plaintiff ABC LLP has three members (A, B, and C Jones) all of whom are individuals domiciled in California”; and so forth.

Amount in Controversy

Establishing diversity of citizenship is only half the battle. The other half is establishing that “the matter in controversy exceeds the sum or value of \$75,000, exclusive of interests and costs . . .” 28 U.S.C. § 1332(a). “The amount *in controversy* is whatever is required to satisfy the plaintiff’s demand, in full, on the date suit begins.” *Hart v. Schering-Plough Corp.*, 253 F.3d 272, 273 (7th Cir. 2001) (emphasis in original). Note the phrase “on the date suit begins.” Diversity jurisdiction depends on the state of things at the time the action is brought in federal court. See *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 570 (2004). Post-removal (or if the action was originally brought in federal court, post-filing) events neither divest nor invest a federal court with diversity jurisdiction. See *id.* at 568-82; *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 293 (1938). So, for instance, the fact that the plaintiff may ultimately lose at trial and wind up with less than the threshold amount (indeed, even that there’s a good chance this will occur) does not terminate jurisdiction that was proper at the outset. *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 448 (7th Cir. 2005).

When a plaintiff sues in federal court and the complaint sets forth the amount in controversy, only a “legal certainty” that the claim is actually worth less than the minimum forecloses

jurisdiction. See *St. Paul Mercury*, 303 U.S. at 289; accord *Gardynski-Leschuck v. Ford Motor Co.*, 142 F.3d 955, 957 (7th Cir. 1998). The rule is slightly more complicated in actions filed in state court and subsequently removed to federal court. If the plaintiff has alleged a number in the complaint, that number is treated as presumptively correct “on the assumption that a plaintiff would not fabricate the amount in controversy to meet the federal diversity jurisdiction requirements and then file her suit in state court relying on the defendant to remove the case to federal court.” *Smith v. Am. Gen. Life & Accident Ins. Co.*, 337 F.3d 888, 892 (7th Cir. 2003). But what if the plaintiff hasn’t alleged a number in her complaint? The burden is then on the removing party—the party that is pushing for federal jurisdiction—to set out the facts necessary to carry the case over the threshold. See, e.g., *Rising-Moore v. Red Roof Inns, Inc.*, 435 F.3d 813, 815 (7th Cir. 2006).

If the allegations going to the amount in controversy are contested, the proponent of jurisdiction must prove those facts by a preponderance of the evidence. *Meridian Sec. Ins. Co. v. Sadowski*, 441 F.3d 536, 543 (7th Cir. 2006). (Some cases equate “preponderance of the evidence” with “reasonable probability,” *Shaw v. Dow Brands, Inc.*, 994 F.2d 364, 366 (7th Cir. 1993), but the Seventh Circuit “banished [that phrase] from our lexicon” in 2006 with its decision in *Meridian Security*, 441 F.3d at 543.) As with most things judicial, the amount in controversy must be established with “competent proof,” *McNutt v. GM Acceptance Corp.*, 298 U.S. 178, 189 (1936), which is to say, by submitting admissible evidence, *Meridian Sec.*, 441 F.3d at 542. The Seventh Circuit has suggested several ways to do this: “by contentions interrogatories or admissions in state court; by calculation from the complaint’s allegations; by reference to the plaintiff’s informal estimates or settlement demands; or by introducing evidence, in the form of affidavits from the defendant’s employees or experts, about how much it would cost to satisfy the plaintiff’s demands.” *Meridian Sec.*, 441 F.3d at 541-42 (citations omitted). Once the facts have been established, though, uncertainty about whether the plaintiff’s damages will ultimately exceed the minimum is effectively resolved in favor of the removing party. *Id.* at 543. For “[o]nly if it is ‘legally certain’ that the recovery (from plaintiff’s perspective) or cost of complying with the judgment (from defendant’s) will be less than the jurisdictional floor may the case be dismissed.” *Id.*; see also *Rising-Moore*, 435 F.3d at 815-16.



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Multi-claim, multi-party litigation complicates things, but the basic rules are still quite simple. If an individual plaintiff brings several claims against a single defendant, the amount in controversy is generally determined by aggregating the plaintiff's claims, *Clark v. State Farm Mut. Auto. Ins. Co.*, 473 F.3d 708, 711 (7th Cir. 2007), even if they arise from separate transactions or occurrences. *Edwards v. Bates County*, 163 U.S. 269, 273 (1896). But when there is more than one plaintiff suing a single defendant, the general rule is that the claims of each plaintiff must exceed the jurisdictional minimum. *Clark*, 473 F.3d at 711. The same is true when a single plaintiff sues multiple defendants who are severally (as opposed to jointly) liable: the jurisdictional minimum must be met with respect to each individual defendant. *Middle Tenn. News Co. v. Charnel of Cin., Inc.*, 250 F.3d 1077, 1081 (7th Cir. 2001). So although one plaintiff who has eight claims worth \$10,000 each against one defendant would meet the amount-in-controversy requirement, eight plaintiffs seeking \$10,000 each against one defendant would not. Nor would one plaintiff seeking \$10,000 from each of eight severally liable defendants.

Punitive damages may be counted toward the amount in controversy, *Clark*, 473 F.3d at 711-12, as may attorneys' fees, *Schering-Plough*, 253 F.3d at 274—but not always. Too high of a punitive-to-compensatory ratio will force a court to dismiss if the punitive damages form a "necessary component" of the amount claimed to be in controversy and the court "is convinced to a legal certainty" that this ratio is unobtainable. *Smith*, 337 F.3d at 894. Attorneys' fees are factored in if they are part of the plaintiff's "damages," a matter that depends on federal law. *Schering-Plough*, 253 F.3d at 274. Fees incurred *after* the case is brought to federal court, however, will not be factored in. If, for example, the plaintiff incurred fees pursuing his demand before filing suit, and if those fees were compensable by statute, they could push the amount in controversy past the \$75,000 mark. *Id.*

A final issue is how to measure claims for equitable relief. The Seventh Circuit follows the "either viewpoint" rule, which requires an examination of "the pecuniary result to either party which the judgment would directly produce." *McCarty v. Amoco Pipeline Co.*, 595 F.2d 389, 393, 395 (7th Cir. 1979). Imagine a suit in which the plaintiff claims the defendant's newly built lighthouse violates local zoning laws and must be torn down. If the plaintiff wins an injunction, the cost to the

defendant of demolishing the structure would likely exceed the jurisdictional minimum. But what is the value of the matter in controversy to the plaintiff? Perhaps *de minimus*, but difficult to measure, in any event. However, because the amount in controversy is met from the defendant's viewpoint, a federal forum would still be available.

The above is obviously just a summary of the rules on establishing diversity jurisdiction. A full treatment of this issue fills hundreds of pages in the cases and treatises. *See, e.g.*, 15 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ch. 102 (3d ed. 2006); 13B & 14 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE ch. 3 (Vol. 13B, 2d ed. 1984; Vol. 14, 3d ed. 1998). For every rule there is an exception (well, almost every rule), and there are exceptions to the exceptions, so be sure to do your homework before signing off on any jurisdictional statement.

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