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STATELESS PARTNERS IN FEDERAL COURT

by Benjamin C. Aaron

Federal courts are courts of limited jurisdiction, meaning that they cannot hear every case that comes before them. There must be some basis for federal courts to exercise jurisdiction. Diversity jurisdiction is a familiar example: under 28 U.S.C. § 1332, federal courts have jurisdiction in cases where the amount in controversy exceeds $75,000 and is between citizens of different states.

But as we learned in law school, determining whether a federal court has diversity jurisdiction can be difficult. Regarding the amount in controversy: if the amount in controversy equals $75,000, is there diversity jurisdiction? (No. The amount in controversy must exceed $75,000.) What if a party is also seeking interest and costs? (Still no. Interest and costs are excluded.) Does the plaintiff's demand determine whether the amount-in-controversy requirement is satisfied? (Generally, yes, if the demand is made in good faith.)

Regarding diversity of citizenship: when do you determine a party's citizenship? (At the time the complaint is filed.) What does diversity mean? (Complete diversity: each plaintiff's citizenship must differ from each defendant's citizenship.)

Here is a hypothetical that you may not have considered: assuming that the amount-in-controversy requirement is met, can a federal court exercise diversity jurisdiction in a case involving a partnership with a partner who is a United States citizen living abroad? According to every circuit that has addressed the question, the answer is no.

The Third Circuit's decision in *Swiger v. Allegheny Energy, Inc.*, 540 F.3d 179 (3d Cir. 2008), provides a nice overview of the issue. In that case, the plaintiff filed suit in federal court against his former employer and his former employer's law firm, asserting a number of state-law claims. The plaintiff alleged that the federal court had diversity jurisdiction. The law firm moved to dismiss for lack of subject-matter jurisdiction because among the law firm's partners was a dual citizen of the United States and United Kingdom who was domiciled in the United Kingdom. The district court granted the law firm's motion and dismissed the case.

By way of background, the Third Circuit noted a few principles of diversity jurisdiction: natural persons are citizens of the state where they are domiciled. Corporations are citizens of both their state of incorporation and the state where they have their principal place of business. But for partnerships and unincorporated associations, courts look to the citizenships of all the partners or members to determine if there is diversity jurisdiction.

The Third Circuit noted another important principle: that § 1332 grants federal courts jurisdiction in cases involving citizens of different states. And under Supreme Court precedent, when a United States citizen is living abroad, the person is not domiciled in a particular state, so the person is "stateless" for purposes of diversity jurisdiction. *Swiger*, 540 F.3d at 184 (citing *Newman–Green, Inc. v. Alfonzo–Larrain*, 490 U.S. 826, 828 (1989)). As a result, "American citizens living abroad cannot be sued (or sue) in federal court based on diversity jurisdiction . . . ." *Id.*

In applying these principles to the facts in *Swiger*, the Third Circuit held that the law firm's stateless partner (a United States citizen living abroad) prohibited a federal court from exercising diversity jurisdiction in the case. The Third Circuit concluded, as earlier courts also had, that "if a partnership has among its partners any American citizen who is domiciled abroad, the partnership cannot sue (or be sued) in federal court based upon diversity jurisdiction." *Id.* (citations omitted). Because the law firm had a stateless partner, diversity jurisdiction was unavailable, and the district court's judgment dismissing the case was affirmed. (And in case you were wondering, the stateless partner's dual citizenship made no difference: alienage jurisdiction under § 1332(a)(2) was not available because, "'for purposes of diversity jurisdiction, only the American nationality of a dual national is recognized.'" *Id.* at 185 (quoting *Frett-Smith v. Vanterpool*, 511 F.3d 396, 400 (3d Cir. 2008)).)

The Seventh Circuit recently endorsed the reasoning in *Swiger* and held that "a partnership made up of at least one stateless citizen is itself stateless and cannot be sued in diversity." *Page v. Democratic Nat'l Comm.*, 2 F.4th 630, 637 (7th Cir. 2021). The court noted that "[e]very other circuit to have confronted the question has reached the same conclusion" and, in addition to *Swiger*, cited decisions from the First, Second, and Fifth Circuits. *Id.* at 637-38.

The upshot is that, according to every circuit that has addressed the issue, a federal court cannot exercise diversity jurisdiction in a case involving a partnership with a stateless partner. If you have a case in federal court involving an unincorporated association, be sure to look out for this issue.

And given that law firms are often organized as unincorporated associations, keep this potential jurisdictional issue in mind if a law firm is a party to a case in federal court. Besides the Third Circuit's decision is *Swiger* and the Seventh Circuit's decision in *Page* (which also involved a law firm), law firms appear in multiple cases recognizing this issue, including *Cresswell v. Sullivan & Cromwell*, 922 F.2d 60 (2d Cir. 1990), *Herrick Co., Inc. v. SCS Communications, Inc.*, 251 F.3d 315 (2d Cir. 2001), *Firefighters' Ret. Sys. v. Citco Grp. Ltd.*, 796 F.3d 520 (5th Cir. 2015), and *ISI Intern., Inc. v. Borden Ladner Gervais LLP*, 316 F.3d 731 (7th Cir. 2003).

Remember that the defense of lack of subject-matter jurisdiction is never waived and can be raised at any time, even on a court's own motion on appeal. And if there is no jurisdiction, the case must be dismissed. *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149 (1908), is a good example. There, the plaintiffs filed suit in federal court against a railroad company. The plaintiffs prevailed, and the railroad company appealed. Although no party had questioned jurisdiction, the Supreme Court stated that it had a duty to ensure that there was jurisdiction. After noting that there was no diversity of citizenship and no federal question, the court concluded that there was no jurisdiction, reversed the judgment, and remanded the case to the trial court with instructions to dismiss the case for lack of jurisdiction. The plaintiffs had to start over in state court. Do not let that happen in your case.

Whenever you have a case in federal court, you should be on the lookout for potential jurisdictional issues. And unincorporated associations (especially those with several partners or members) can easily destroy diversity and deprive a federal court of jurisdiction. Ensure that the federal court has jurisdiction. Otherwise, you may end up in state court.