

# 7th Circuit not nitpicking on diversity statements

The 7th U.S. Circuit Court of Appeals has expressed its dissatisfaction with parties failing to follow 7th Circuit Rule 28(a)(1) in their briefs in regard to diversity of citizenship. Case in point is *Smoot v. Mazda Motors of America Inc.*, 469 F.3d 675 (2006).

In finding the briefs lacked the details required for diversity of citizenship under Circuit Rule 28(a)(1), the court stated:

"We direct the parties to show cause within 10 days why counsel should not be sanctioned for violating Rule 28(a)(1) and mistaking the requirements of diversity jurisdiction. We ask them to consider specifically the appropriateness, as a sanction, of their being compelled to attend a continuing legal education class in federal jurisdiction."

Posing the question of whether the court was being overly technical without justification, Judge Richard A. Posner, authoring the opinion, offered the question and the court's answer in these words: "Are we being fussy and nitpickers in trying (so far with limited success) to enforce rules designed to ensure that federal courts do not exceed the limits that the Constitution and federal statutes impose on their jurisdiction? But the fact that limits on subject-matter jurisdiction are not waivable or forfeitable — that federal courts are required to police their jurisdiction — imposes a duty of care that we are not at liberty to shirk. And since we are not investigative bodies, we need and must assure compliance with procedures designed to compel parties to federal litigation to assist us in keeping within bounds. Hence Rule 28 and hence the responsibility of lawyers who practice in the federal courts, even if only occasionally, to familiarize themselves with the principles of federal jurisdiction."

7th Circuit Rule 28, Briefs, provides, in pertinent part, as follows:

"Briefs must conform to Fed. R. App. P. 28 and the additional provisions in Circuit Rules 12(b), 30 and 52. The following requirements supplement those in the corresponding provisions of Fed. R. App. P. 28:

"(a) Appellant's Jurisdictional Statement.

"The jurisdictional statement in appellant's brief, see Fed. R. App. P.



## Federal Courts

By Jay S. Judge

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28(a)(4), must contain the following details:

"(1) If jurisdiction depends on diversity of citizenship, the statement shall identify the jurisdictional amount and the citizenship of each party to the litigation. If any party is a corporation, the statement shall identify both the state of incorporation and the state in which the corporation has its principal place of business. If any party is an unincorporated association or partnership the statement shall identify the citizenship of all members."

Magdalene Smoot sued Mazda Motors of America Inc. and Tokio Marine and Fire Insurance Co. Ltd. pleading a products liability cause of action on a *res ipsa loquitur* theory, suing in the Eastern District of Wisconsin. Smoot claimed injuries when the airbags in her one-year-old Mazda deployed when her auto struck a pothole or chunk of asphalt as she drove. She sued in federal court based upon diversity of citizenship.

The District Court for the Eastern District of Wisconsin barred Smoot's expert's opinion testimony that an airbag should not deploy when a car is traveling only 35 to 40 mph as a "naked unsubstantiated opinion" and granted summary judgment for Mazda.

The 7th Circuit affirmed, but did so only after chastising the presentation of the diversity of citizenship statement in the briefs. Posner initiated the court's discussion on the diversity statement issue:

"Before reviewing that ruling, we remark the confusion in the parties' briefs concerning the elements of the diversity jurisdiction. The jurisdictional

statement in the appellants' brief states that the federal district court's jurisdiction was based on diversity of citizenship 'and the jurisdictional amount of \$75,000.' In fact diversity jurisdiction depends on the jurisdictional amount's exceeding \$75,000, exclusive of interest and costs. 28 U.S.C. § 1332(a). The jurisdictional statement goes on to recite that the plaintiffs are citizens of Wisconsin (a proper jurisdictional allegation since the plaintiffs are natural persons) and that defendant Mazda 'is a foreign corporation incorporated under the laws of the State of California.' A corporation, however, has two places of citizenship: where it is incorporated, and where it has its principal place of business. 28 U.S.C. § 1332(c)(1). If Mazda's principal place of business is Wisconsin, diversity is destroyed.

Noting that the appellants' jurisdictional statement failed to comply with Circuit Rule 28(a)(1), the court stated:

"To ensure that litigants in diversity cases attend carefully to the dual citizenship of corporations, our Circuit Rule 28(a)(1) requires the jurisdictional statement in a diversity case to specify both the state (or other jurisdiction) in which a corporate party is incorporated and the state in which its principal place of business is located. The appellants' jurisdictional statement violates our rule but more remarkably it does not so much as mention the second defendant, the Tokio Marine & Fire Insurance Company."

Also, finding the appellees' statement nonconforming, the court continued:

"The appellees' jurisdictional statement begins promisingly by stating that the appellants' jurisdictional statement 'is neither complete [n]or correct.' But neither, it turns out, is the appellees'. It does not mention the amount in controversy, erroneously alleged in the appellants' statement; and concerning citizenship it violates Rule 28(a)(1) by stating that the appellees are 'citizens of a different state' from the appellants, without indicating what state they are citizens of. It turns out that the insurance company is actually a citizen of a foreign country, so that the relevant provision of the diversity statute, unmentioned in either jurisdictional statement, is 28 U.S.C. § 1332(a)(2)."

Posner further explained that supplemental statements requested by the court failed to correct the deficiencies:

"We asked the parties to submit supplemental jurisdictional statements. The appellants' supplemental statement corrects the omission of Mazda's principal place of business (also California), but blunders with respect to the insurance company by stating that it is 'a corporation organized under the laws of Japan with a United States branch domiciled in the State of New York with its principal place of business located at 230 Park Ave, New York, N.Y. 10169.' The location of a branch office is irrelevant to diversity jurisdiction. But reference to 'domicile' and 'principal place of business' naturally raises the question, unaddressed in the statement, whether this branch might be a corporation having its principal place of business in New York, but incorporated elsewhere, such as Wisconsin. Appellees' supplemental jurisdictional statement repeats that the insurance company 'is a foreign corporation organized under the laws of Japan with a U.S. Branch. The principal place of business of the U.S. Branch is New York, New York.' The fact that 'Branch' is capitalized and its principal place of business alleged suggests that it might be a corporation, but at argument the appellees' lawyer said no, it's just a branch."

Further noting errors in the requested supplemental jurisdictional statement, the court continued:

"The appellees' supplemental jurisdictional statement contains two further errors. It says that the amount in controversy 'allegedly' exceeds \$75,000. Actually, as we know, the amount in controversy in the appellants' jurisdictional statement is \$75,000, not \$75,000 plus. In addition, the use of the words 'alleged' or 'allegedly' in this connection is erroneous. The amount in controversy in a diversity case is the stakes that the plaintiff or defendant alleges, and provided the allegation is not false to a 'legal certainty' the amount is taken as true for purposes of jurisdiction. E.g., *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 276-77, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977). In other words, 'When the complaint includes a number, it controls unless [the plaintiff's]

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recovering that amount [in the litigation] would be legally impossible. *Rising-Moore v. Red Roof Inns Inc.*, 435 F.3d 813, 815-16 (7th Cir. 2006). The appellees' use of 'allegedly' suggests an inclination to question whether the amount in controversy exceeds the jurisdictional minimum, but they do not pursue the point."

Posner expressed the 7th Circuit's consternation with the lack of specificity in jurisdictional statements in diversity cases sometimes encountered on appeal:

"But the lawyers have wasted our time as well as their own and (depending on the fee arrangements) their clients' money. We have been plagued by the carelessness of a number of the lawyers practicing before the courts of this circuit with regard to the required contents of jurisdictional statements in diversity cases. See, e.g., *BondPro Corp. v. Siemens Power Generation Inc.*, 466 F.3d 562 (7th Cir. 2006) (per curiam), and cases cited there."

Finding that, despite the errors,

there was diversity jurisdiction, the 7th Circuit explained:

"We are satisfied that the parties' errors in regard to the amount in controversy are harmless, given the severity of the injuries alleged. Besides unpleasant medical treatments for Mrs. Smoot that included her having to wear an orthopedic repositioning appliance on her jaw, she claims to have sustained permanent injuries consisting of TMJ pain, clicking, popping, and inability to open her mouth fully and eat and chew all varieties of foods, permanent scarring, and humiliation at work because she is a customer service representative and her injuries prevent her from speaking normally. (Her husband's claim is for loss of consortium.) We conclude that the district court had jurisdiction."

Finding there was diversity jurisdiction and that the district court's judgment for Mazda was proper, the 7th Circuit affirmed.