

*The challenges of litigation involving LLCs in federal court; ATTORNEYS SHOULD PROCEED WITH CAUTION as to citizenship of LLCs; IN PRACTICE The Daily Report (Fulton County GA)
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IN PRACTICE

BYLINE: SIMON MALKO

BODY:

LITIGATION IN federal court involving limited liability companies (LLCs) presents challenges for both plaintiff and defense attorneys because of the way federal courts determine the "citizenship" of LLCs for the purpose of federal diversity jurisdiction.

Unlike a corporation, which is deemed a "citizen" of the state where it is incorporated and where it has its principal place of business,ⁿ¹ the determination of an LLC's citizenship is far more complex. Specifically, an LLC is deemed a citizen of every state in which any member of the LLC is a citizen.

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To complicate matters, if any member of an LLC also is an LLC, the citizenship of the second LLC's members also is considered. ⁿ³ For example, assume XYZ, LLC has three members: an individual domiciled in Georgia, a Delaware corporation with its principal place of business in New York, and an LLC whose members are individuals domiciled in Texas and California. For the purposes of measuring diversity, XYZ, LLC would be deemed a "citizen" of Georgia, Delaware, New York, Texas and California. Many question the logic of this complex rule and argue that the citizenship of LLCs should be measured the same way as corporations.

However, until Congress amends the federal diversity statute, the foregoing rule remains the law of the land and attorneys litigating for or against LLCs will continue to face the challenges discussed below.

Challenges for defendant's counsel

When defending a client sued in state court by an LLC plaintiff, it is often difficult to determine whether the case can be removed to federal court based on diversity because

most complaints filed by LLCs do not allege the identity (much less the citizenship) of each of the plaintiff LLC's members. This puts the defense attorney in a difficult position. On the one hand, if the defense attorney removes the case without a reasonable basis, he or she can be subject to Rule 11 sanctions. On the other, the deadline to remove a case to federal court is normally 30 days after service.ⁿ⁴

There is an exception to that deadline if the case, as initially stated, is not removable. Under the exception, the 30-day removal window does not begin to run until the defendant receives some later pleading or discovery response that discloses that the case is removable.ⁿ⁵ A classic example would be a state court complaint involving citizens of different states but not demanding a specific dollar amount. If the plaintiff subsequently discloses in an interrogatory response that it is seeking greater than \$75,000, the 30-day window to remove would begin to run from receipt of that interrogatory response.

Many defense attorneys may assume that they can take advantage of this extended removal period if the complaint does not expressly allege the citizenship of the plaintiff LLC. They assume that they can wait until the discovery phase to request the identity and citizenship of the LLC plaintiff and, if the discovery response reveals complete diversity, they can remove the case at that time. That assumption may be wrong.

As one court explained, "an overwhelming majority of the courts that have considered this matter have concluded that the plaintiff's failure to allege a party's citizenship in the initial pleading does not prevent the thirty day removal period from commencing."ⁿ⁶ Instead, numerous courts in the Eleventh Circuit have held that, if there is any clue (in the complaint or from public information) that the case is removable, the 30-day removal period begins to run from service.ⁿ⁷

In light of these cases, a prudent defense attorney should research a plaintiff LLC at the outset of a case for any publicly available information about its members. For example, to the extent the plaintiff LLC is part of a publicly-traded family of companies, information about its members may be available in public SEC filings. Also, pleadings from prior lawsuits might reveal the LLC's citizenship. Failing to search for such publicly available information may result in the defendant being barred from removing a case after the initial 30-day removal period.

Challenges for plaintiff's counsel

When filing a lawsuit against an LLC, it may be impossible for the plaintiff's attorney to know the members of the LLC defendant. As a result, many plaintiffs have no choice but to sue a defendant LLC in state court. Even where the plaintiff's attorney has some basis for believing there might be diversity, he or she should proceed with care. The decision in *Ovadia v. Bloom* offers a cautionary tale about the potentially catastrophic consequences of making incorrect assumptions about diversity.ⁿ⁸

In that case, the plaintiff filed a lawsuit in federal court based on the mistaken assumption that there was complete diversity. The defendant LLC asserted "lack of subject matter jurisdiction" as an affirmative defense, but did not immediately move to dismiss. Instead, the defendant LLC litigated the case for several months and waited for the statute of limitations to expire. Thereafter, the defendant LLC moved to dismiss the case. The federal court granted that motion because subject matter jurisdiction is a defense that can never be waived. The plaintiff attempted to re-file her claim in state court, but the state court held that it was time-barred. Specifically, the court found that the limitations period was not tolled by the federal court action because the federal court never had original jurisdiction

over the case.

The Ovadia decision highlights the risk of making assumptions about citizenship. When filing a claim in federal court against an LLC defendant, a prudent plaintiff's attorney should confirm the citizenship of the defendant LLC's member in discovery prior to the expiration of the statute of limitations. This is especially true if the defendant LLC raises lack of subject matter jurisdiction as an affirmative defense.

Litigation in federal court involving LLCs presents a number of jurisdictional challenges. Until Congress amends the federal diversity statute to treat LLCs the same as corporations, defendant and plaintiff attorneys alike need to proceed with caution. DR

- [\[note 1\]](#) See 28 U.S.C. § 1332(c)(1).
- [\[note 2\]](#) See e.g., *C.T. Carden v. Arkoma Assocs.*, 494 U.S. 185, 110 S.Ct. 1015 (1990); *Mallory & Evans Contractors & Engineers, LLC v. Tuskegee University*, 663 F.3d 1304, 1305 (11th Cir. 2011).
- [\[note 3\]](#) See e.g., *Meyerson v. Harrah's East Chicago Casino*, 299 F.3d 616, 617 (7th Cir. 2002) ("the citizenship of unincorporated associations must be traced through however many layers of partners and members there may be").
- [\[note 4\]](#) See 28 U.S.C. § 1446(b)(1).
- [\[note 5\]](#) See 28 U.S.C. § 1446(b)(2)(C).
- [\[note 6\]](#) *Kuhn v. Brunswick Corp.*, 871 F. Supp. 1444 (N.D. Ga. 1994)
- [\[note 7\]](#) See e.g., *Crews v. National Boat Owners Assoc. Marine Insurance Agency Inc.*, Case No. 2:05-CV-1057-MEF, 2006 WL 902269 at * 3 (M.D. Ala., Apr. 6, 2006); *Bankston v. Illinois Int'l Insurance Co.*, 443 F. Supp. 2d 1380 (M.D. Ala. 2006); *Howard v. City of Atlanta*, Case No. 1:07-cv-0785-WSD, 2007 WL 3169707 (N.D. Ga., Oct. 25, 2007).
- [\[note 8\]](#) 756 So.2d 137 (Fla. 3rd DCA 2000).