When Is a Foreigner Diverse?

Diversity Jurisdiction in Cases Involving Foreign Citizens and Businesses

By Hon. Geraldine Soat Brown

People, businesses, and transactions increasingly cross borders. When a dispute arises, lawyers need to know whether a federal court will have diversity jurisdiction over the ensuing lawsuit.

The globalization of the American economy and the expansion of international trade mean that lawsuits in American courts will increasingly involve foreign citizens and businesses. Because practitioners as well as courts have a duty to police the jurisdictional grounding of their cases, it is important to understand the jurisdiction of federal courts over disputes involving foreigners.

The Federal Courts Jurisdiction and Venue Clarification Act of 2011 (Clarification Act) amended the long-standing diversity jurisdiction statute, 28 U.S.C. § 1332, to clear up some, but not all, lingering questions about the authority of federal courts to adjudicate disputes involving resident aliens and corporations that are either incorporated or have a principal place of business overseas. Even with the amendment, however, federal jurisdiction over foreign citizens and businesses can be uncertain. Courts are still sorting out the effect of the Clarification Act, which did not become effective until Jan. 6, 2012.[1] Also, because Congress did not make the amendment retroactive, prior case law governs actions filed before the effective date.[2]

This article provides a guide to practitioners and courts facing these jurisdictional issues by discussing the jurisdictional basis for cases filed before and after the recent change to 28 U.S.C. § 1332. The article stresses points often overlooked in determining jurisdiction over cases involving foreign citizens and businesses. Finally, the article provides charts and hypotheticals to help in determining jurisdiction.

Constitutional Authority and the Diversity Statute

Article III, § 2 of the U.S. Constitution allows federal courts to adjudicate cases and controversies "between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."[3] To that constitutional bedrock, Congress added a statutory layer with the Judiciary Act of 1789, narrowing federal jurisdiction to civil actions in which a minimum sum was disputed (then only $500) and "an alien is a party, or the suit is between a citizen of the State where the suit is brought, and a citizen of another State."[4]

Early on, the Supreme Court interpreted the constitutional and statutory diversity rules as imposing important limitations on federal jurisdiction. First, in *Strawbridge v. Curtiss,* the Court determined that the statute generally requires "complete diversity" among the parties, i.e., that *every* party on one side of an action must be the citizen of a state different from that of *every* party on the opposing side.[5] Second, and key to understanding the limits on disputes involving foreigners, the Court in *Hodgson v. Bowerbank* concluded that the Constitution does not allow federal courts to hear an action solely between non-U.S. citizens.[6]

The modern diversity statute, codified at 28 U.S.C. § 1332, confers federal jurisdiction over disputes involving foreigners as parties in two circumstances. First, § 1332(a)(2) covers actions between "citizens of a State and citizens or subjects of a foreign state," with an important exception discussed later related to lawful permanent residents. Second, § 1332(a)(3) covers lawsuits between "citizens of different States and in which citizens or subjects of a foreign state are additional parties." Federal courts agree that the latter provision allows a limited exception to the complete diversity rule: if U.S. citizens are on both sides of a controversy and are diverse from each other, aliens, even from the same country, may be "additional parties" on opposing sides without destroying jurisdiction.[7] Historically, however, courts have read the statute, in line with *Strawbridge* and *Hodgson,* as not allowing an alien to sue another alien and a U.S. citizen as co-defendants in federal court.[8]

Lawful Permanent Resident Aliens

To understand the Clarification Act's changes to § 1332(a) related to resident aliens, it is worth reviewing the Act's history. One of the curious features of § 1332 as initially written was that it appeared to allow federal jurisdiction over disputes between two people living in the same state if one of them was a lawful permanent resident of the United States but a citizen of a foreign state. That changed in 1988 when Congress amended the diversity statute to add as a hanging paragraph at the end of § 1332(a) that "an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled."[9] This is often called the "resident alien proviso."[10]

In solving one problem, however, the 1988 amendment created another. By ascribing state citizenship to resident aliens, the amended statute arguably expanded the law to allow diversity jurisdiction even without diverse U.S. citizens on either side of a lawsuit, as the Third Circuit's 1993 decision in *Singh v. Daimler* illustrated. In *Singh,* the plaintiff was a citizen of India domiciled as a permanent resident in Virginia. The defendants were a German car manufacturer and its American distributor, which was a Delaware corporation with a New Jersey principal place of business. Under pre-1988 law, there would have been no federal jurisdiction. The foreign parties on each side of the dispute precluded complete diversity and could not qualify as "additional parties" under § 1332(a)(3) because there were not diverse U.S. citizens on both sides. Relying on the 1988 amendment, however, the Third Circuit concluded that the plaintiff's Indian citizenship was not to be considered and that diversity jurisdiction existed because the plaintiff was "a deemed citizen of Virginia suing an alien and a citizen of Delaware and New Jersey."[11]

The Third Circuit's view did not catch on with other appellate courts, eventually creating a three-way circuit split. In 1997, the D.C. Circuit concluded in *Saadeh v. Farouki* that there was no federal jurisdiction when a nonresident alien sued four defendants: a domestic corporation, a foreign married couple living in the United States as permanent residents, and the couple's foreign business. At the lawsuit's start, the court noted, there was no jurisdiction because there were aliens on both sides of the dispute—the plaintiff and the foreign business—without a U.S. citizen on each side. Later, however, the foreign business was dismissed (as well as the resident alien wife), leaving a lawsuit between a nonresident and a resident alien. At that point, using the Third Circuit's rubric, there would have been jurisdiction under § 1332(a)(2) because the lawsuit was between a "deemed" U.S. citizen and a foreign citizen. The D.C. Circuit reasoned, however, that because the "literal reading" of the proviso "would produce an odd and potentially unconstitutional result," the statute must be interpreted in light of the legislative history evincing congressional intent to limit rather than expand federal jurisdiction.[12]

Nearly a decade later, in *Intec USA, LLC v. Engle,* the Seventh Circuit chimed in. Intec was a limited liability company suing corporations incorporated in New Zealand, Australia, Brazil, and the United Kingdom. The citizenship of a limited liability company depends on the citizenship of its members, and Intec's members were citizens of both North Carolina and New Zealand. The Seventh Circuit disagreed with *Singh* and agreed with *Saadeh* that the 1988 amendment granted "every permanent-resident alien two citizenships." Thus, the court held that Intec's lawsuit ran afoul of Supreme Court precedent requiring complete diversity (*Strawbridge*) and prohibiting actions solely between aliens (*Hodgson*).[13]

But the Seventh Circuit also disagreed in part with *Saadeh,* rejecting the D.C. Circuit's view that the resident alien proviso "always defeats diversity jurisdiction." The Seventh Circuit explained that even before 1988, a Mexican citizen living as a permanent resident in California could sue a U.S. citizen domiciled in New York under § 1332(a)(2). But the 1988 amendment, the court reasoned, also allowed the Mexican permanent resident as an "imputed" citizen of a U.S. state to sue both the New Yorker *and* a Canadian citizen in federal court because the Canadian qualified under § 1332(a)(3) as an "additional party" to a dispute between citizens.[14]

In the 2011 Clarification Act, Congress removed the troublesome resident alien proviso.[15] To replace it, Congress added a subordinate clause to § 1332(a)(2) allowing federal jurisdiction of civil actions between "citizens of a State and citizens or subjects of a foreign state, *except that the district courts shall not have original jurisdiction under this subsection of an action between citizens of a State and citizens or subjects of a foreign state who are lawfully admitted for permanent residence in the United States and are domiciled in the same State*."[16] A House report reveals that the amendment was intended to respond to decisions like *Singh* that interpreted the language of the resident alien proviso as expanding federal jurisdiction.[17] The amendment also wiped out the Seventh Circuit's concern about "additional party" jurisdiction under § 1332(a)(3) by planting the language about permanent residents firmly in § 1332(a)(2).

Business Entities Have Citizenships, Too (Sometimes Many of Them)

Questions of citizenship can become particularly complex when one of the parties is a business organization. As *Intec* demonstrated, certain types of business organizations, like partnerships and LLCs, have the citizenship of *every* member.[18] For example, a partnership with 10 general partners or an LLC with 10 members has the citizenship of each of those partners or members and is deemed to be a citizen of every state in which a partner or member is a citizen. Moreover, each of the members of an LLC may itself be a partnership or LLC with its own partners or members. This allows for the creation of business entities with myriad citizenships.

Determining the citizenship of a foreign corporation can also be complicated. Before 1958, domestic corporations were deemed citi-

zens only of their state of incorporation,[19] and foreign corporations were likewise deemed citizens only of their nation.[20] In 1958, in an effort to limit the scope of federal jurisdiction, Congress expanded the citizenship of corporations in § 1332(c)(1) to include "any State by which it has been incorporated and of the State where it has its principal place of business."[21]

The 1958 changes created a problem where foreign companies were concerned. Before 2011, § 1332(c)(1) did not use the term "foreign states." Instead, the statute used only the capitalized word "State," which is used elsewhere in § 1332 to refer to the domestic 50 states. As a consequence, the Fifth, Seventh, and Eleventh Circuits concluded that when a domestic corporation had a foreign principal place of business, that place of business did not matter for citizenship purposes; the corporation was a citizen only of its state of incorporation.[22]

The Seventh Circuit's decision, *MAS Capital, Inc. v. Biodelivery Sciences International Inc.,* provides a useful example of this approach. The plaintiff, MAS Capital, was incorporated in Nevada but had its principal place of business in Taiwan. The defendant was incorporated in Delaware with a principal place of business in New Jersey. If MAS Capital had dual citizenship, the court explained, neither of the two subsections in § 1332 addressing foreigners was "a comfortable fit" for jurisdiction: "Subsection (a)(2) doesn't work because MAS Capital has a domestic citizenship, and subsection (a)(3) because MAS Capital is not an 'additional party.'" Nevertheless, the court held that jurisdiction existed given the use of only the term "State" in § 1332(c)(1), meaning MAS Capital was solely a citizen of Nevada.[23]

Although decisions denying dual citizenship were true to the language of § 1332(c)(1) at the time, they produced a strange result. It is a long-standing principle, one the Supreme Court has repeatedly recognized, that a business incorporated in another country is considered a citizen of that country.[24] Even as the courts of appeal began to adopt the view that having a foreign place of business did not endow foreign citizenship on a domestic corporation, they continued to hew to this traditional analysis, treating foreign corporations as citizens of their nation of incorporation despite the reference in § 1332(c)(1) only to "State" of incorporation.[25] Thus, a foreign company incorporated abroad but operating principally in the United States had dual citizenship for diversity purposes, but a company incorporated domestically and operating abroad did not.[26]

In response to these problems, the Clarification Act added language to § 1332(c)(1) stating that "a corporation shall be deemed to be a citizen of every State *and foreign state* by which it has been incorporated and of the State *or foreign state* where it has its principal place of business . . . ."[27] Under this change, domestically incorporated companies with foreign principal places of business may be deemed dual citizens. According to the House report, the amendment will "result in a denial of diversity jurisdiction in two situations: (1) where a foreign corporation with its principal place of business in a state sues or is sued by a citizen of that same state, and (2) where a citizen of a foreign country (alien) sues a U.S. corporation with its principal place of business abroad." As the report reflects, Congress foresaw this denial of jurisdiction affecting only a "small range of cases" but nonetheless bringing "a degree of clarity to an area of jurisdictional law now characterized by conflicting approaches in the Federal courts."[28] The report noted that parties excluded from the federal courts can proceed in state courts.

The Clarification Act also made two additional—and less consequential—changes to § 1332(c)(1). First, "any State" of incorporation was replaced with "every State" of incorporation.[29] The House report gave the rationale for this change as well:

> Although corporations can incorporate in more than one state, the practice is rare. In applying the present wording of the subsection, most courts have treated such multi-state corporations as citizens of every state by which they have been incorporated. This section would codify the leading view as to congressional intent and treat corporations as citizens of every state of incorporation for diversity purposes.[30]

Second, the Clarification Act inserted the term "foreign states" into the special provision related to citizenship of insurance companies involved in direct actions.[31] This change will likely have minimal effect because the insurer provision was enacted in response to a direct action in which state law allows a plaintiff to sue an insurer for an insured's negligence without naming the insured as a defendant.[32] Before the amendment, the provision mattered only in states where direct actions were permitted, and that is no less true under the amendment.

One final wrinkle. As noted at the outset, the Clarification Act is not retroactive; older decisions interpreting § 1332(c) are still good law for cases filed before that date. That became an issue in the Second Circuit's decision in *Bayerische Landesbank, New York Branch v. Aladdin Capital Mgmt. LLC,* which also highlights the potential difficulties in determining the citizenship of foreign business entities. The two plaintiffs were a German bank and its New York branch. Because the branch office was not separately incorporated, the plaintiffs were German citizens. The sole defendant was an LLC with only one member, but that member was itself an LLC with 10 members: four U.S. citizens domiciled domestically, four corporations with domestic incorporation and domestic principal places of business, a limited partnership with U.S. citizen partners domiciled in the United States, and—critically—a domestic corporation with its principal place of business in Tokyo, Japan. The Tokyo place of business threatened to defeat jurisdiction, because if the defendant included a member with foreign citizenship, the dispute would be between aliens.[33]

But the Second Circuit concluded that jurisdiction existed. The court first explained that the pre-2011 version of § 1332(c)(1) applied because the lawsuit was filed before Jan. 6, 2012. The court then chose to interpret that provision, as the Fifth, Seventh, and Eleventh Circuit had, not to grant dual citizenship to domestic corporations with foreign principal places of business. The court added, however, that there would have been no jurisdiction had the case been filed *after* the

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Clarification Act's effective date, because both the plaintiffs and the defendant would have been deemed aliens.[34]

Points to Remember

- An LLC has the citizenship of each member, and, unlike a corporation, an LLC has no independent citizenship under § 1332. In filing jurisdictional statements, lawyers must identify the citizenship of each member of an LLC. In 2007, the Seventh Circuit sanctioned a party $1,000 for its delay in providing the information needed to establish an LLC's citizenship.[35] This is not always an easy task: members of an LLC can include additional LLCs or other types of business entities, some of them potentially with foreign principal places of business. Moreover, determining whether a business entity formed in a foreign state should be treated as a corporation or an LLC for diversity purposes may require lawyers and judges to delve into the law of other countries.[36]
- The citizenship of a person is established not by residence but by domicile—in other words, by "the state in which a person intends to live over the long run."[37]
- U.S. citizens who are living abroad permanently are considered "stateless," meaning they have no state (or domestic) citizenship for purposes of §§ 1332(a)(2) or (3). This, in turn, means that if one of the parties is a U.S. citizen living abroad long term, diversity jurisdiction may be lacking.[38]
- Diversity jurisdiction is generally determined at the time an action is filed and does not change because of later events, with some exceptions.[39] The addition of parties to a lawsuit may in some circumstances divest a court of jurisdiction if the new parties are not diverse.[40] In addition, unnecessary parties can be dismissed from a case to preserve diversity. Thus, if diversity jurisdiction would be defeated by parties who are not indispensable to the action, jurisdiction can be acquired by dismissing them, even if jurisdiction did not exist when the action was filed. The same is true if the parties were essential at the start of the litigation but are dispensable at the time of dismissal.[41] As a rule, changes to a party's citizenship after a lawsuit is filed do not affect the determination of diversity jurisdiction.[42]

Charting Diversity Jurisdiction Over Lawsuits Involving Foreign Persons and Corporations

The charts below and on the following pages summarize the current state of the law on diversity jurisdiction over lawsuits involving foreign persons and corporations. The first two charts show the citizenship status of a party for natural persons and corporations under § 1332(a). The third chart provides hypothetical examples of lawsuits with foreign parties and answers whether diversity jurisdiction is proper. This is not, of course, a prediction of the outcome of any particular case.

Conclusion

It is imperative for courts and practitioners to ensure federal cases are securely rooted within federal jurisdiction, despite an ever-changing economic landscape. Companies around the world are globalizing rapidly, and people follow the internationalization of business across borders. While these shifts occur naturally for the companies and people involved, federal jurisdiction is not so intuitive. Although this article cannot be exhaustive of every type of case, it provides a starting point for federal lawyers considering the jurisdictional grounding of their particular case. ⊙

Citizenship of Natural Persons

Nationality	Domicile	Citizenship	Authority
Domestic	Domestic	Domestic	*Robertson v. Cease,* 97 U.S. 646, 648-50 (1878).
Domestic	Foreign	Stateless—no state citizenship	*Newman-Green, Inc. v. Alfonzo-Larrain,* 490 U.S. 826, 828 (1989); *Buchel-Ruegsegger v. Buchel,* 576 F.3d 451, 455 (7th Cir. 2009); *Herrick Co., v. SCS Comm. Inc.,* 251 F.3d 315, 322 (2d Cir. 2001); *Coury v. Prot,* 85 F.3d 244, 250 (5th Cir. 1996); *Brady v. Brown,* 51 F.3d 810, 815 (9th Cir. 1995).
Foreign	Foreign or Unknown	Foreign	*See Karazanos v. Madison Two Assoc.,* 147 F.3d 624, 628 (7th Cir. 1998); *Rouhi v. Harza Eng. Co.,* 785 F. Supp. 1290, 1292 (N.D. Ill. 1992).
Foreign	Domestic (permanent resident)	If filed on or after Jan. 6, 2012, foreign and domestic. If filed before Jan. 6, 2012, depends on jurisdiction.	*H.K. Huillin Int'l Trade Co., Ltd. v. Kevin Multiline Polymer Inc.,* 907 F. Supp. 2d 284, 285-89 (E.D.N.Y. 2012); *Shovlin v. Careless,* No. C-12-1120 PJH, 2013 WL 3354544 at *6 (N.D. Cal. June 26, 2013).

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Endnotes

[1]Pub. L. No. 112–63, §§ 101-02, 205, 125 Stat. 758, 758-59, 764-65.

[2]*See Bayerische Landesbank, N.Y. Branch v. Aladdin Capital Mgmt. LLC,* 692 F.3d 42, 51 (2d Cir. 2012); *MB Fin., N.A. v. Stevens,* 678 F.3d 497, 498 (7th Cir. 2012).

[3]U.S. Const. art. III, § 2.

[4]Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78.

[5]7 U.S. (3 Cranch) 267, 267 (1806), *overruled in part by Louisville C. & C.R. Co. v. Letson,* 43 U.S. (2 How.) 497, 554-55 (1844) (holding that although *Strawbridge* previously was interpreted to require that all members of a corporation be citizens of the state in which the suit is brought, "[a] corporation created by a state to perform its functions under the authority of that state and only suable there, though it may have members out of the state, seems to us to be a person, though an artificial one, inhabiting and belonging to that state, and therefore entitled, for the purpose of suing and being sued, to be deemed a citizen of that state"); *see also Lincoln Prop. Co. v. Roche,* 546 U.S. 81, 89 (2005).

[6]9 U.S. (5 Cranch) 303, 303 (1809); *see also Mossman v. Higginson,* 4 U.S. (Dall.) 12, 14 (1800).

[7]*See, e.g.*, *Tango Music, LLC v. DeadQuick Music Inc.*, 348 F.3d 244, 245-46 (7th Cir. 2003) (collecting cases).

[8]*See, e.g.*, *Saadeh v. Farouki*, 107 F.3d 52, 55 (D.C. Cir. 1997) (collecting pre-1988 cases).

[9]Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 203, 102 Stat. 4642, 4646 (1988).

[10]*See, e.g.*, H.R. Rep. No.112-10, at 6 (2011).

[11]9 F.3d 303, 312 (3d Cir. 1993).

[12]107 F.3d 52, 53-61 (D.C. Cir. 1997)

[13]467 F.3d 1038, 1038-42 (7th Cir. 2006).

[14]*Id.* at 1043.

[15]Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112–63, § 101, 125 Stat. 758.

[16]28 U.S.C. § 1332(a)(2) (2011) (emphasis added).

[17]H.R. Rep. No. 112-10, at 7 (2011).

[18]*Carden v. Arkoma Assoc.,* 494 U.S. 185, 195-96 (1990) (holding that diversity jurisdiction in a suit involving an artificial entity depends on the citizenship of each member of the entity); *see also Grupo Dataflux v. Atlas Global Group, L.P.,* 541 U.S. 567, 584-85 n.1 (2004) (Ginsburg, J., dissenting) (stating that although the Supreme Court has never ruled on the issue, courts of appeal have held the citizenship of each member of an LLC is considered for diversity purposes).

[19]Jim Whitlatch, *Diversity Jurisdiction and Alien Corporations: The Application of Section 1332(c),* 59 Ind. L. J. 659, 659 (1984).

[20]*See Nat'l S.S. Co. v. Tugman,* 106 U.S. 118, 121 (1882).

[21]Act of July 25, 1958, Pub. L. No. 85-554, § 2, 72 Stat. 415.

[22]*See Mas Capital Inc. v. Biodelivery Sciences Int'l Inc.,*

Citizenship of Corporations

Place of Incorporation	Principal Place of Business	Citizenship	Authority
Domestic	Domestic	Domestic	See 28 U.S.C. § 1332(c)(1); *Lincoln Property Co. v. Roche*, 546 U.S. 81, 88-89 (2005).
Domestic	Foreign	If filed on or after Jan. 6, 2012, foreign and domestic. If filed before Jan. 6, 2012, weight of authority is domestic only.	See *Bayerische Landesbank, N.Y. Branch v. Aladdin Capital Mgmt. LLC*, 692 F.3d 42, 51 (2012).
Foreign	Foreign	Foreign	See *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 585 (2004); *JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd.*, 536 U.S. 88, 91-92 (2002).
Foreign	Domestic	Both domestic and foreign	*Slavchev v. Royal Caribbean Cruises, Ltd.*, 559 F.3d 251, 254 (4th Cir. 2009); *Peninsula Asset Mgmt. (Cayman) Ltd. v. Hankook Tire Co.*, 509 F.3d 271, 272-73 (6th Cir. 2007); *Creaciones Con Idea, S.A. de C.V. v. Mashreqbank PSC*, 232 F.3d 79, 82 (2d Cir. 2000); *Nike Inc. v. Comercial Iberica De Exclusivas Deportivas, S.A.*, 20 F.3d 987, 990 (9th Cir. 1994); *Chick Kam Choo v. Exxon Corp.*, 764 F.2d 1148, 1152-53 (5th Cir. 1985); *Rowell v. Franconia Minerals Corp.*, 706 F. Supp. 2d 891, 896 (N.D. Ill. 2010).

524 F.3d 831, 832-33 (7th Cir. 2008); *Torres v. Southern Peru Copper Corp.*, 113 F.3d 540, 543 (5th Cir. 1997); *Cabalceta v. Standard Fruit Co.*, 883 F.2d 1553, 1559-61 (11th Cir. 1989).

[23]*Mas Capital Inc.*, 524 F.3d at 832-33.

[24]*See, e.g.*, *JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd.*, 536 U.S. 88, 91-92 (2002); *Nat'l S.S. Co.*, 106 U.S. at 121.

[25]*See Slavchev v. Royal Caribbean Cruises, Ltd.*, 559 F.3d 251, 254 (4th Cir. 2009); *Peninsula Asset Mgmt. (Cayman) Ltd. v. Hankook Tire Co., Ltd.*, 509 F.3d 271, 272-73 (6th Cir. 2007); *Creaciones Con Idea, S.A. de C.V. v. Mashreqbank PSC*, 232 F.3d 79, 82 (2d Cir. 2000); *Nike Inc. v. Comercial Iberica De Exclusivas Deportivas, S.A.*, 20 F.3d 987, 990 (9th Cir. 1994); *Chick Kamk Choo v. Exxon Corp.*, 764 F.2d 1148, 1152-53 (5th Cir. 1985); *Rowell v. Franconia Minerals Corp.*, 706 F. Supp. 2d 891, 896 (N.D. Ill. 2010).

[26]*See Rowell*, 706 F. Supp. 2d at 896 (discussing the interplay of *MAS Capital* and Supreme Court precedent about foreign incorporation).

[27]28 U.S.C. § 1332(c)(1) (emphasis added).

[28]H.R. Rep. No. 112-10, at 9 (2011).

[29]28 U.S.C. § 1332(c)(1).

[30]H.R. Rep. No. 112-10, at 10 (2011).

[31]The special rules for direct actions against insurers are in § 1332(c):

> (1) . . . in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of (A) every State and foreign state of which the insured is a citizen, (B) every State and foreign state by which the

Hypotheticals Involving Foreigners and Diversity Jurisdiction Under 28 U.S.C. § 1332(a)

Lawsuit	Federal Jurisdiction Under 28 U.S.C. § 1332(a)?
Mexican national domiciled in Mexico v. Canadian national domiciled in Canada	No. *See Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303, 303 (1809).
Mexican national domiciled in Mexico v. U.S. national domiciled in California	Yes. *See* 28 U.S.C. § 1332(a)(2).
Mexican national lawfully permanently residing in the United States and domiciled in California v. U.S. national domiciled in California	No. *See* 28 U.S.C. § 1332(a)(2).
Mexican national domiciled in Mexico v. U.S. national domiciled in California & Canadian national domiciled in Canada	No. *See Saadeh v. Farouki*, 107 F.3d 52, 55 (D.C. Cir. 1997) (collecting cases).
Mexican national living in Mexico v. U.S. national domiciled in Canada	No. *See Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 828 (1989).
Mexican national domiciled in Mexico and U.S. national domiciled in New York v. Mexican national domiciled in Mexico and U.S. national domiciled in California	Yes. *See* 28 U.S.C. § 1332(a)(2); *Tango Music, LLC v. DeadQuick Music, Inc.*, 348 F.3d 244, 245-46 (7th Cir. 2003).
Mexican national domiciled in Mexico and U.S. national domiciled in New York v. Canadian national domiciled in Canada and U.S. national domiciled in New York	No. *See Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806).
LLC formed under California law with principal place of business in California v. U.S. national domiciled in New York and Canadian national domiciled in Canada	Depends on the citizenship of the members of the LLC. If there are no New York citizens and no foreign citizens as members, then diversity jurisdiction is proper under § 1332(a)(3).
Corporation incorporated in Nevada and principal place of business in China v. corporation incorporated in China and principal place of business in China	If filed on or after Jan. 6, 2012, no diversity jurisdiction. *See* § 1332(c)(1). If filed prior to Jan. 6, 2012, then weight of authority suggests jurisdiction exists under § 1332(a)(2). *See Bayerische Landesbank, N.Y. Branch v. Aladdin Capital Mgmt. LLC*, 692 F.3d 42, 51 (2d Cir. 2012).

insurer has been incorporated and (C) the State or foreign state where it has its principal place of business; and (2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

[32]H.R. Rep. No. 112-10, at 10-11 (2011) (discussing these types of actions).

[33]692 F.3d 42, 45-51 (2d Cir. 2012).

[34]*Id.* at 49-51.

[35]*See Thomas v. Guardsmark, LLC,* 487 F.3d 531, 534-35 (7th Cir. 2007).

[36]*See Fellowes Inc. v. Changzhou Xinrui Fellowes Office Equipment Co.,* No. 12-3124, 2014 WL 3583082, at *2-3 (7th Cir. July 22, 2014); *White Pearl Inversiones S.A. (Uruguay) v. Cemusa Inc.,* 647 F.3d 684, 686-87 (7th Cir. 2011).

[37]*Heinen v. Northrop Grumman Corp.*, 671 F.3d 669, 670 (7th Cir. 2012).

[38]*Newman-Green Inc. v. Alfonzo-Larrain,* 490 U.S. 826, 828 (1989); *Buchel-Ruegsegger v. Buchel,* 576 F.3d 451, 455 (7th Cir. 2009).

[39]*Grupo Dataflux v. Atlas Global Grp., L.P.*, 541 U.S. 567, 569-70 (2004); *Freeport-McMoran Inc. v. K N Energy Inc.,* 498 U.S. 426, 428 (1991).

[40]*See, e.g., Am. Fiber & Finishing, Inc. v. Tyco Healthcare Grp, LP,* 362 F.3d 136, 140 (1st Cir. 2004) (collecting cases); *Estate of Alvarez v. Donaldson Co.,* 213 F.3d 993, 994-95 (7th Cir. 2000).

[41]*Grupo,* 541 U.S. at 572.

[42]*See Smith v. Sperling,* 354 U.S. 91, 93 n. 1 (1957).

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[17]*Brown*, *supra,* 306 P.3d 948 (shortening statute of limitations from three years to six months); *Gandee v. LDL Freedom Enters. Inc.,* 293 P.3d 1197 (Wash. 2012) (en banc) (shortening statute of limitations from four years to 30 days).

[18]*Clark v. Renaissance W. LLC*, 307 P.3d 77 (Ariz. Ct. App. 2013) (plaintiff presented evidence that it would cost him approximately $22,800 to arbitrate under defendant's agreement, which was impossible on plaintiff's low, fixed income); *see also Chavarria v. Ralphs Grocery Co.,* 733 F.3d 916 (9th Cir. 2013) (defendant-employer required apportionment of fees between it and employee regardless of merits, effectively pricing out almost any employee from dispute resolution).

[19]*Russell v. Citigroup Inc.,* 748 F.3d 677 (6th Cir. 2014) (arbitration agreement governing "all employment-related disputes" did not require the employee to arbitrate a case already pending in court when he signed the agreement); *Tomkins v. Amedisys Inc.,* No. 12-cv-1082, 2014 WL 129401 (D. Conn. Jan. 13, 2014) (invalidating a self-executing arbitration agreement containing a class action ban sent to a group of employees after they had filed a putative class action against their employer).

[20]*Piekarski v. Amedisys Ill. Inc.,* 4 F. Supp. 3d 952 (N.D. Ill. 2013) (nullifying self-executing arbitration agreement that defendant sent to class members during stay of case in attempt to moot class claims); *see also O'Connor v. Uber Techs. Inc.,* No. 13-cv-3826, 2014 WL 1724503 (N.D. Cal. May 1, 2014) (refusing to enforce arbitration agreement issued after the commencement of litigation that would require drivers to accept it in order to continue participation in car service).

[21]*Garcia v. Wachovia Corp.,* 699 F.3d 1273 (11th Cir. 2012) (holding that defendant waived its right to arbitration because the district court twice invited it to file motions to compel arbitration but defendant did so only after *Concepcion* was decided, defendant substantially invoking the litigation machinery and conducting extensive discovery, and plaintiffs would suffer substantial prejudice if the case was sent to arbitration).

[22]*In re Pharm. Benefit Managers Antitrust Litig.,* 700 F.3d 109 (3d Cir. 2012) (factors determining waiver include the length of time between filing of complaint and motion to compel arbitration; whether defendant sought resolution on the merits prior to moving to compel; whether defendant gave prior notice of its intent to arbitrate or raise it as a defense in answering the complaint; whether defendant attended pre-trial conferences without objection) (citing *Hoxworth v. Blinder, Robinson & Co.,* 980 F.2d 912 (3d Cir. 1992)).

[23]*Cole v. Jersey City Med. Ctr.,* 72 A.3d 224 (N.J. 2013) (finding defendant waived arbitration by litigation for nearly two years, participating in extensive discovery, filing a dispositive motion, and failing to raise the arbitration issue until only a few days before trial, the court found the delay and additional cost plaintiff would have faced by switching to arbitration on the eve of trial was sufficient to constitute prejudice).

[24]*See, e.g., Edwards v. First Am. Corp.,* 289 F.R.D. 296 (C.D. Cal. 2012) (holding that defendants waived arbitration right by litigating the case for several years, including two motions to dismiss, two class certification motions, a Ninth Circuit appeal, a petition for certiorari, and extensive discovery); *Lewis v. Fletcher Jones Motor Cars Inc.,* 205 Cal. App. 4th 436 (Ct. App. 2012) (holding that defendant-dealer waived right to compel arbitration by failing to raise arbitration issue until five months after plaintiff-customer commenced the action, and after defendant filed three demurrers and two motions to strike, responded to four sets of discovery and refused to extend plaintiff's motion to compel deadline); *In re Cox Enters. Inc. Set-Top Cable Television Box Antitrust Litig.,* No. 12-md-2048, 2014 WL 2993788 (W.D. Okla. July 3, 2014) (finding defendant's motion to compel arbitration was untimely because it was brought after defendant made ample use of discovery and sought summary judgment in an attempt to dispose of the case).

[25]*Sacks v. DJA Auto.*, No. 12-cv-284, 2013 WL 210248 (E.D. Pa. Jan. 18, 2013) ("Defendant... seeks to have both its proverbial cake and eat it too: it only wants arbitration if it does not win on summary judgment. Taken together, I find that defendant's failure to move to compel arbitration, its motion for summary judgment seeking dismissal of plaintiff's claims on their merits and its participation in discovery and settlement negotiations are sufficient to constitute a waiver of its right to elect arbitration.").