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THE “COMPLETE DIVERSITY” REQUIREMENT FOR FEDERAL JURISDICTION: TIME TO CORRECT THIS 210-YEAR-OLD ERROR

by E. Donald Elliott

As a Yale Law professor, I have been teaching introductory civil procedure for over 30 years. Diversity jurisdiction as interpreted by the US Supreme Court never made sense; even first-year law students could see that. The only plausible purpose for diversity jurisdiction in the federal courts is to avoid the possibility of a “home court advantage” for in-state litigants. But how can the default rule requiring complete diversity ever achieve that result? The prevailing rule mandating complete diversity requires that no plaintiff and no defendant are from the same state in order to get into federal court, whereas “minimal diversity” would provide that it is enough for federal jurisdiction if any parties on opposite sides of the “v.” are from different states.

For those who puzzle over complete versus minimal diversity, a brilliant 2014 law review article, *Complete Diversity and the Closing of the Federal Courts*,¹ provides what the Germans call an “*aha-Erlebnis*,” a sudden flash of insight that causes one to say to himself, “oh now, I understand.”² The authors argue that the correct meaning of the Diversity Jurisdiction Clause of the Constitution is to require only minimal diversity. That one reform would change everything.

In a system requiring complete diversity, modern pleading rules providing liberal joinder³ make it relatively easy for a plaintiffs’ lawyer to avoid an unbiased federal court and bring suit in a state court. About three quarters of the states (38 out of 50) elect judges in one form or another,⁴ and presumably elected state judges are more sensitive to popular sentiment than appointed federal judges. Even first-year law students quickly see the problem: complete diversity may result in an unbiased state forum for the one plaintiff and one defendant who are both from the forum state, but what about all the other parties who are from out of state? Even forty-five years later, I still remember my own law school civil procedure teacher, the great civil procedure expert James William Moore, author of *Moore’s Federal Practice* treatise, struggling unsuccessfully to explain to skeptical law students why it was fair to require all of the other out-of-state defendants to face trial in a state court just because one of their number was from that state.

¹ Charles J. Cooper and Howard C. Nielson, Jr., *Complete Diversity and the Closing of the Federal Courts*, 37 HARV. J. LAW & PUB. POLICY 295 (2014) (hereafter, “Cooper & Nielson”).

² “Aha-Erlebnis n (*literally*) an ‘aha-experience.’ An experience which gives a sudden insight, solution or answer to a problem that has troubled someone for some time.” <https://en.m.wiktionary.org/wiki/Aha-Erlebnis>.

³ See FED.R.CIV.P. 20(a)(1) (“(a) Persons Who May Join or Be Joined.

(1) Plaintiffs. Persons may join in one action as plaintiffs if:

(A) they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and

(B) any question of law or fact common to all plaintiffs will arise in the action.”).

⁴ AMERICAN BAR ASSOCIATION, Fact Sheet on Judicial Selection Methods In the States (2002), https://www.americanbar.org/content/dam/aba/migrated/leadership/fact_sheet.authcheckdam.pdf.

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Under a regime requiring complete diversity, all that a plaintiffs' lawyer needs to do to stay out of federal court is to add a party plaintiff with the same citizenship as one of the defendants (or add another defendant with the same citizenship as one of the plaintiffs), and bingo, the case remains in state court. On the other hand, under a regime requiring only minimal diversity, which is generally *not* the rule in the United States today, it would be enough to remove a case filed in state court to federal court if even one defendant was from out of state and thus of different citizenship than one plaintiff. This matters because some state court judges have admitted that they see their role as redistributing wealth from out-of-state corporations to in-state voters.⁵ Plus the Framers were concerned not only about the reality of in-state bias, but also the "perception of bias," as Cooper & Nielson demonstrate.⁶ The literature on so-called Judicial Hellholes shows there is at the very least a perception among corporate defendants that they can't get a fair shake in certain state jurisdictions.⁷

The Framers were wise enough to foresee this problem, and diversity jurisdiction in a relatively neutral federal court was their solution to the problem of state-court bias, actual or perceived. The glitch came in a poorly-reasoned Supreme Court case in 1806, *Strawbridge v. Curtiss*, 7 U.S. 267 (1806) (an opinion later recanted by its own author, Chief Justice Marshall).⁸ In that case, the Court admitted that the language of the Diversity Jurisdiction Clause of the Constitution was broad enough to be interpreted to be satisfied by *either* minimal or complete diversity. The Court then went on, however, to create a presumption that Congress intends to require complete diversity unless it specifies that minimal diversity is sufficient. The Court was probably correct in holding that the *language* of the Diversity Jurisdiction Clause (federal "judicial Power shall extend to ... Controversies ... between Citizens of different States")⁹ was sufficiently ambiguous to contemplate either minimal or complete diversity, but as Cooper & Nielson show conclusively to my mind, the *purpose* of the Clause—to provide assurance of both the reality and the appearance of a fair tribunal—can only be effectuated by interpreting minimal diversity as sufficient.

Admittedly, it is hard to fix an error by the Supreme Court that has stood for over 210 years. But in recent years, Congress has begun to right this wrong turn by using its power to draft legislative provisions that require only minimal diversity—for example, the 2005 Class Action Fairness Act.¹⁰ More recently, in 2016, one of the aforementioned law review article's authors gave wonderfully lucid testimony to the Subcommittee on the Constitution and Civil Justice of The House Committee on the Judiciary explaining why fairness, and the perception of fairness, require a federal forum when out-of-state defendants are sued.¹¹

Maybe someday Congress or the courts will finally get this right. And I'll be able to stop having to try to explain the indefensible to first-year law students.

⁵ "As long as I am allowed to redistribute wealth from out-of-state companies to in-state plaintiffs, I shall continue to do so. Not only is my sleep enhanced when I give someone else's money away, but so is my job security, because the in-state plaintiffs, their families and their friends will re-elect me." Richard Neely, former Justice, West Virginia Supreme Court, in RICHARD NEELY, *THE PRODUCT LIABILITY MESS: HOW BUSINESS CAN BE RESCUED FROM THE POLITICS OF STATE COURTS* 4 (1988). For empirical evidence, see also Alexander T. Tabarrok and Eric A. Helland, *The Effect of Electoral Institutions on Tort Awards* (Independent Institute Working Paper, Sept. 1, 1999) (empirical data from 75,000 tort cases shows "partisan elected judges, have an incentive to redistribute wealth from out-of-state defendants (non-voters) to in-state plaintiffs (voters)"), http://www.independent.org/pdf/working_papers/01_electoral.pdf.

⁶ Cooper & Nielson at 295 and n.3 (citing Hamilton in *THE FEDERALIST* NO. 80, at 477 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

⁷ AMERICAN TORT REFORM FOUNDATION, *JUDICIAL HELLHOLES 2016-2017*, <http://www.judicialhellholes.org/wp-content/uploads/2016/12/JudicialHellholes-2016.pdf>.

⁸ *Louisville, Cincinnati & Charleston Railroad Co. v. Letson*, 43 U.S. (2 How.) 497, 555 (1844).

⁹ U.S. CONST., Art. III, § 2.

¹⁰ Pub.L. 109-2, 119 Stat. 4-14, codified at 28 U.S.C. §§ 1332(d), 1453, and 1711-15.

¹¹ Testimony of Charles J. Cooper on "Exploring Federal Diversity Jurisdiction" Before the Subcommittee on the Constitution and Civil Justice of The House Committee on the Judiciary (Sept. 13, 2016), <https://judiciary.house.gov/wp-content/uploads/2016/09/Cooper-Testimony-09.13.2016.pdf>.