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Diversity Jurisdiction in the Second Circuit: The 'Tagger' Decision

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Federal diversity jurisdiction appears at first glance to be a straightforward concept: a citizen of one state can sue a citizen of another state in federal court. The grant of jurisdiction is in Article III of the Constitution and codified by statute, 28 U.S.C. §1332, which has been on the books since the first Judiciary Act of 1789. While this rule of jurisdiction is relatively uncontroversial when it concerns just citizens of the United States, add a foreign litigant to the mix, as subsections (a)(2) and (a)(3) of Section 1332 allow, and the legal analysis quickly becomes convoluted. A recent U.S. Court of Appeals for the Second Circuit decision sheds light on an obscure corner of this legal framework and clarifies what has been an open question in the circuit for the past 32 years.

In *Tagger v. Strauss Group Ltd.*, 951 F.3d 124 (2d Cir. 2020), the Second Circuit held that a permanent resident alien domiciled in New York cannot sue an alien corporation in diversity. According to the court, despite the plaintiff's status as a permanent resident he is still deemed an "alien" for purposes of the diversity statute, and therefore cannot be adverse to a foreign corporation. "[B]ecause federal courts do not have diversity jurisdiction over lawsuits between two foreign parties, we conclude that section 1332(a)(2) does not give the district court jurisdiction over a suit by a permanent resident against a non-resident alien."

> In 'Tagger,' the Second Circuit held that a permanent resident alien domiciled in New York cannot sue an alien corporation in diversity.

Why is this decision so important? The answer is simple: because jurisdictional defects cannot be waived in federal court. A federal court's subject-matter jurisdiction is vulnerable to attack at any point in the process, even after a judgment has been rendered. And it is the court's obligation as much as the individual litigant's to police the boundaries of its authority. So, getting the jurisdictional answer right at the outset of a case is vital to the success of that case.

The *Tagger* decision is tersely stated and does not indulge in a fulsome explication of the law. In order to appreciate the impact of this ruling, therefore, a quick overview of the statute and its interpretive history is in order.

Brief History of Diversity Jurisdiction

There are three buckets of diversity. The first, subsection (a)(1), provides

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for suits between "citizens of different States." Subsection (a)(2) allows for lawsuits between "citizens of a State and citizens or subjects of a foreign state"; and (a)(3) is a hybrid of (a)(1) and (a)(2) allowing suits between "citizens of different States and in which citizens or subjects of a foreign state are additional parties."

The touchstone of diversity jurisdiction has always been domicile. "An individual's citizenship within the meaning of the diversity statute, is determined by his domicile." *Palazzo v. Corio*, 232 F.3d 38, 42 (2d Cir. 2000). So far so good. But this test does not apply to foreigners resident or domiciled in the U.S. Historically, foreigners resident here—no matter how long or how strong their connection to this country—have not been considered citizens of a State for diversity purposes. Thus, since at least 1809, it has been the rule that a foreigner resident in the U.S. is not entitled to invoke the jurisdiction of the federal courts in order to resolve a dispute with other foreigners. *Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303 (1809).

This was the law until 1988. At that time Congress amended the diversity statute to deem permanent resident aliens citizens of the State where they live for purposes of diversity jurisdiction, and this is when things began to get complicated. This so-called "deeming clause" of the Judicial Improvements and Access to Justice Act was a step towards reconciling the domiciliary rule for citizens with the test for foreigners: foreign residents became "citizens" of a State for diversity purposes once they assumed permanent resident status. But while this law appeared on its face to *expand* the possibilities for permanent resident aliens, it in fact had a limiting effect. Thus, while historically a U.S. citizen domiciled in New York could always have sued a foreigner resident in New York, now, by force of the deeming clause, that foreigner, if a permanent resident, would be treated as a citizen of that State as well, thereby breaking diversity.

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But there was a significant question left unresolved by the new rule. What if the permanent resident was on the opposite side of a foreigner in federal court? If that permanent resident was now "deemed" a citizen of New York, did she not have diversity vis-à-vis that foreign entity or foreign citizen? That was what the U.S. Court of Appeals for the Third Circuit held in *Singh v. Daimler-Benz AG*, 9 F.3d 303 (3d Cir. 1993).

Four years later, however, the District of Columbia Circuit reached a different conclusion, holding that while permanent residence would be relevant in a suit against a U.S. citizen alone, it could not count for suits against foreign citizens under Section 1332(a)(2). *Saadeh v. Farouki*, 107 F.3d 52 (D.C. Cir. 1997). In other words, if aliens were on both sides of the "v," resident or not, there could be no diversity. In 2006, the U.S. Court of Appeals for the Seventh Circuit weighed in on the side of the D.C. Circuit, at least on the fact scenario before it. *Intec USA, LLC v. Engle*, 467 F.3d 1038 (7th Cir. 2006).

The split in the circuits on this "alienage" question turned on competing approaches to the statutory construction. For the Third Circuit, the statutory language was unambiguous, and consequently there was no need to call on legislative history. The D.C. Circuit, while conceding that the language of the statute was clear, found all the same that a "literal" reading yielded a result inconsistent with Congress' intent to narrow the scope of diversity jurisdiction.

Also at stake in these cases was the constitutional implications of the new "deeming clause." Article III contains a grant of diversity jurisdiction that stands independent of the congressional pronouncements on the law. Because of the unique posture of the case before it, the *Singh* panel was able to sidestep the constitutional issue, treating it as an "intriguing issue for another day." Its analysis

made clear, however, that it did not consider the constitutional concern to be a serious impediment. The D.C. Circuit, on the other hand, envisioned "formidable constitutional difficulties" in the *Singh* court's interpretation and sought by its ruling to avoid any such potential problem.

The Second Circuit Weighs In

Since the Seventh Circuit's decision in 2006, and before *Tagger*, no other circuit court had addressed this knotty issue of statutory construction. In 2003, however, the Second Circuit confronted the question in the narrow context of a collateral attack on a final judgment resolving a suit between a permanent resident alien and a foreign corporation. *Steiner v. Atochem, S.A.*, 70 F. App'x 599 (2d Cir. 2003). Invoking "several distinguished commentators," the Second Circuit panel (including Judge Calabresi who sat on the most recent *Tagger* panel) acknowledged that the strict reading of the Third Circuit was sufficiently "reasonable" to justify affirmance.

At least one district judge in the circuit took the hint and, citing *Atochem*, found in favor of jurisdiction between resident and non-resident aliens. *Bank of India v. Subramanian*, 2007 WL 1424668 (S.D.N.Y. May 15, 2007); *see also Mor v. Royal Caribbean Cruises Ltd.*, 2012 WL 2333730 (S.D.N.Y. June 19, 2012). But most district judges in New York, free to construe the statute as they saw fit in the absence of formal guidance from the Second Circuit, chose instead to follow the D.C. Circuit in treating suits between aliens – resident or not – as outside the scope of the federal jurisdictional grant. *See, e.g., In re Calyon*, 2009 WL 1025995 (S.D.N.Y. Apr. 13, 2009).

To make matters even more complicated, Congress changed the statute yet again in 2011 with the Federal Courts Jurisdiction and Venue Clarification Act. This time the overarching "deeming" clause regarding permanent residence was eliminated, and a new provision was added just to subsection (a)(2): "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." This limiting language was designed to accomplish the same thing as the original deeming clause: blocking lawsuits between citizens of a State and permanent resident aliens domiciled in the same state. But curiously, the amendment did not explicitly confront the "alienage" question which had caused the circuit split in the first place.

The Second Circuit's recent ruling conclusively resolves the ambiguity and finally brings this circuit's view in line with that of the D.C. and Seventh Circuit on the alienage question. A foreign litigant cannot invoke diversity jurisdiction in a suit against another foreigner. That rule applies whether the foreign litigant is a permanent resident of the U.S. or not. But take note! Permanent residence does continue to count in suits against only U.S. citizens. For purposes of subsection (a)(2), a foreign litigant can sue a U.S. citizen, but not if the foreign litigant is a permanent resident domiciled in the same State. *See, e.g., Latour v. Columbia University*, 12 F.Supp.3d 658 (S.D.N.Y. 2014).

It remains to be seen whether the Third Circuit will adjust its 1993 position in light of the 2011 amendment. The removal of the overarching "deeming" provision and insertion of the new language only in subsection (a)(2) would appear to defeat one of the main rationales for that court's holding. But if it stands by its earlier construction of the statute, then there will be a definitive split in the circuits which will need to be resolved by the Supreme Court.