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Comments:

I understand that a new Rule 32.1 is being proposed, and that it will permit citation of unpublished opinions. I support this change. My reason is that I consider it totally unfitting for the courts to solve whatever manpower, etc., problems they have by imposing speech controls on lawyers & parties before them. It may not be unConstitutional (though I haven't done the work to figure out whether it is or not), but it's not proper. The parties & their lawyers should be able to refer to whatever they want to. If the courts have too much work to do for many opinions to be worth anything as precedent, then they should announce that they will give no weight whatsoever to unpublished opinions, even going so far as to say that anyone who cites an unpublished opinion is wasting his/her time. Most people would take that very broad hint & refrain. But for those who don't, no penalty is appropriate. (What happens now if someone cites an unpublished opinion? Are briefs actually rejected for that?)The solution to whatever staffing/time problems exist should not be to restrict the speech of the litigants and their lawyers.

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February 20, 2004

Peter McCabe, Secretary of the Committee
on Rules of Practice and Procedure
Administrative Offices of the U.S. Courts
One Columbus Circle
Washington, DC 20544

Re: Proposed Federal Rule 32.1 of Appellate Procedure

Dear Mr. McCabe:

Please consider this addendum to the on-line comment that I submitted earlier.

It occurred to me today to wonder to what extent sanctions have been imposed for violation of an existing local appellate rule precluding citation of unpublished non-precedential opinions. Aware that nine of the 12 judges on the U.S. Court of Appeals for the 7th Circuit had signed a letter opposing the new rule, I started looking for sanctions cases involving those 9 signatories.

In short order, I found a case that caused me to abandon my search. That case is *Meyerson v. Harrah's East Chicago Casino*, 299 F.3d 616 (7th Cir. 2002)(per curiam) (Posner, Kanne, & Evans, JJ)(copy enclosed). Here's what it says:

> Once more we find it necessary publicly to remind the bar of the existence and importance of 7th Cir. R. 28(a)(1), which requires parties to appeals in diversity cases to identify in their briefs the citizenship of each party to the appeal. . . .
>
> . . . .
>
> The egregious violation of Rule 28(a)(1) by the defendants, who unlike the plaintiff are represented by counsel, is sanctionable, and we shall therefore order the defendants to show cause why they should not be punished. We have repeatedly warned litigants that violation of the rule is sanctionable, and have on occasion imposed sanctions. See . . . *Blockley v. The Work Center, Inc.*, No. 99-1421, 2000 WL 973625 (7th Cir. Jul. 11, 2000)**(unpublished order)**. This may be an appropriate occasion.

299 F.3d at 617, 617-18 (some citations omitted; emphasis added).

It makes no sense to preclude litigants from citing unpublished opinions to the appellate courts of appeal, yet to allow such a court to cite an unpublished opinion as the basis for imposing sanctions. As my previous comment indicated, I favor allowing

litigants to cite whatever they want, including unpublished non-precedential opinions. In the event the Committee decides otherwise, however, I hope that they will at least provide that what's sauce for the geese is sauce for ganders. Courts that preclude litigants from citing unpublished opinions should themselves be barred from indulging in that practice, especially when imposing sanctions.

Sincerely yours,

Ashley Doherty

Enc. 0

Briefs and Other Related Documents

United States Court of Appeals,
Seventh Circuit.

Norman MEYERSON, Plaintiff-Appellant,
v.
HARRAH'S EAST CHICAGO CASINO, et al.,
Defendants-Appellees.

No. 01-1993.

Submitted June 27, 2002.
Decided July 11, 2002.

Pro se former employee sued former employer and three coworkers, alleging defamation. The United States District Court for the Northern District of Indiana, James T. Moody, J., granted summary judgment to employer and coworkers. Employee appealed. The Court of Appeals held that jurisdictional allegations by all parties were grossly inadequate to establish diversity jurisdiction.

Vacated and remanded.

West Headnotes

[1] Federal Courts ⚿313
170Bk313

Jurisdictional allegations by all parties in defamation action by pro se former employee against former employer and three coworkers were grossly inadequate to establish diversity jurisdiction; employee alleged state of his residence, but not of his citizenship, and did not identify citizenship of any defendants, and employer, an unincorporated association, did not indicate citizenship of its partners.

[2] Federal Courts ⚿282
170Bk282

Residence and citizenship are not synonyms and it is latter that matters for purposes of diversity jurisdiction.

[3] Federal Courts ⚿282
170Bk282

Fact that firm is licensed to do business in state does not mean that it is citizen of that state for purposes of diversity jurisdiction.

[4] Federal Courts ⚿302
170Bk302

In case of firm that is not a corporation, its citizenship for purposes of diversity jurisdiction is citizenship of its owners, partners, or other principals.

[5] Federal Courts ⚿302
170Bk302

Citizenship of unincorporated associations, for purposes of diversity jurisdiction, must be traced through however many layers of partners or members there may be.

[6] Federal Civil Procedure ⚿2843
170Ak2843

Violation of Seventh Circuit rule requiring parties to appeals in diversity cases to identify in their briefs the citizenship of each party to appeal is sanctionable. U.S.Ct. of App. 7th Cir.Rule 28(a)(1), 28 U.S.C.A.

***616** Norman Meyerson, Farmington, MI, for Plaintiff-Appellant.

Nicholas Anaclerio, Jr., Querrey & Harrow, Chicago, IL, for Defendant- Appellee

Before **POSNER**, KANNE, and EVANS, Circuit Judges.

PER CURIAM.

Once more we find it necessary publicly to remind the bar of the existence and importance of 7th Cir. R. 28(a)(1), which requires parties to appeals in diversity cases to identify in their briefs the citizenship of each party to the appeal. See, e.g., *Wild v. Subscription Plus, Inc.*, 292 F.3d 526, 528 (7th Cir.2002); *Cincinnati Ins. Co. v. Eastern Atlantic Ins. Co.*, 260 F.3d ***617** 742, 747-48 (7th Cir.2001). And likewise we must once again enjoin upon bench and bar alike the importance of

scrupulous adherence to the limitations on the subject-matter jurisdiction of the federal courts.

[1][2][3][4][5] The plaintiff brought this suit, pro se, against his former employer, Harrah's East Chicago Casino, and three of the casino's employees, charging defamation and basing federal jurisdiction, necessarily, on diversity. His complaint alleged that he "resides in the State of Michigan," but residence and citizenship are not synonyms and it is the latter that matters for purposes of the diversity jurisdiction. *McMahon v. Bunn-O-Matic Corp.*, 150 F.3d 651, 653 (7th Cir.1998). In addition, the complaint does not indicate the citizenship of any of the defendants. It does identify Harrah's as an unincorporated business licensed by the State of Indiana to conduct river-boat gambling in the state, but of course the fact that a firm is licensed to do business in a state does not mean that it is a citizen of that state. Moreover, in the case of a firm that is not a corporation, its citizenship is the citizenship of its owners, partners, or other principals. And even if none of them is (and if the plaintiff is) a Michigander, if any of the other defendants are, that would defeat the complete diversity that is required for diversity jurisdiction. But that is completely obvious to anyone with the slightest familiarity with federal jurisdiction, and the subtler point, though not so subtle that it should have escaped the attention of the defendants' lawyers, is that the citizenship of unincorporated associations must be traced through however many layers of partners or members there may be. E.g., *Carden v. Arkoma Associates,* 494 U.S. 185, 110 S.Ct. 1015, 108 L.Ed.2d 157 (1990); *Wild v. Subscription Plus, Inc., supra,* at 528; *Indiana Gas Co. v. Home Insurance Co.*, 141 F.3d 314 (7th Cir.1998), rehearing denied, 141 F.3d 314, 320 (1998). Failure to go through all the layers can result in dismissal for want of jurisdiction. E.g., *Guaranty National Title Co. v. J.E.G. Associates,* 101 F.3d 57 (7th Cir.1996).

The defendants' filings in the district court did not fill any of the gaps in the plaintiff's jurisdictional allegations. Harrah's did indicate that its correct legal name is not as alleged but instead is "Showboat Marina Casino Partnership," but it did not indicate the citizenship of the partners.

Despite the gross inadequacy of the jurisdictional allegations, the district judge proceeded to the merits and granted summary judgment for the defendants, precipitating this appeal. The appellant's opening brief contains no jurisdictional statement and should therefore not have been accepted for filing at all. The appellees' brief does contain a jurisdictional statement, but so far as bears on the existence of diversity jurisdiction states only that the district court "had diversity jurisdiction over this action." This is a gross violation of our Rule 28(a)(1). There is no reply brief.

We are vacating the judgment and remanding the case to the district court for further proceedings consistent with this opinion. That court may decide to give the plaintiff an opportunity to file an amended complaint showing that there is diversity jurisdiction after all. Otherwise the suit must be dismissed without prejudice to its being refiled in state court.

[6] The egregious violation of Rule 28(a)(1) by the defendants, who unlike the plaintiff are represented by counsel, is sanctionable, and we shall therefore order the defendants to show cause why they should not be punished. We have repeatedly warned litigants that violation of ***618** the rule is sanctionable, see, e.g., *Professional Service Network, Inc. v. American Alliance Holding Co.,* 238 F.3d 897, 903 (7th Cir.2001), and have on occasion imposed sanctions. See *Wild v. Subscription Plus, Inc., supra,* at 928; *Cincinnati Ins. Co. v. Eastern Atlantic Ins. Co., supra,* 260 F.3d at 747- 48; *Blockley v. The Work Center, Inc.,* No. 99-1421, 2000 WL 973625 (7th Cir. Jul. 11, 2000) **(unpublished** order). This may be an appropriate occasion.

VACATED AND REMANDED, AND ORDER TO SHOW CAUSE ISSUED.

299 F.3d 616, 53 Fed.R.Serv.3d 1067

Briefs and Other Related Documents (Back to top)

. 2001 WL 34134262 (Appellate Brief) Brief and Argument of Defendants-Appellees Showboat Marina Casino Partnership, Roy Guasch, Patti Merriman and Michael Darley (Aug. 27, 2001)

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United States Court of Appeals,
Seventh Circuit.

Shaun R. JOHNSON, Plaintiff-Appellant,
v.
Officer Ruben RIVERA, Officer Matthew Martinez, Officer Geoffrey Howard, and Officer William Pellegrini, Defendants-Appellees.

No. 99-2093.

Argued Nov. 7, 2001.
Decided Nov. 29, 2001.

State prisoner brought § 1983 action against prison officials, arising out of alleged beating incident. The United States District Court for the Northern District of Illinois, Ruben Castillo, J., granted prison officials' motion to dismiss, and prisoner appealed. The Court of Appeals, Flaum, Chief Judge, held that Illinois tolling statute applied to Illinois prisoner's action, and thus two-year limitations period was tolled while prisoner completed administrative grievance process pursuant to the Prison Litigation Reform Act (PLRA).

Reversed and remanded.

West Headnotes

[1] Federal Courts ⚿425
170Bk425

[1] Federal Courts ⚿427
170Bk427

Section 1983 does not contain an express statute of limitations, so federal courts adopt the forum state's statute of limitations for personal injury claims; since the chronological length of the limitation period is interrelated with provisions regarding tolling, revival, and questions of application, federal courts must also borrow the forum state's tolling rules, including any equitable tolling doctrines. 42 U.S.C.A. § 1983.

[2] Federal Courts ⚿427
170Bk427

A federal court applying Illinois limitations period in a § 1983 action must toll the statute of limitations if a statutory prohibition exists that prevents a plaintiff's cause of action. 42 U.S.C.A. § 1983; S.H.A. 735 ILCS 5/13- 216.

[3] Federal Courts ⚿427
170Bk427

Illinois tolling statute applied to Illinois prisoner's § 1983 action against prison officials, arising out of alleged beating incident, and thus two-year limitations period was tolled while prisoner completed administrative grievance process pursuant to the Prison Litigation Reform Act (PLRA), where prisoner alleged that he filed administrative grievance pursuant to Illinois Department of Corrections procedures, but prison official destroyed grievance, and that prisoner and his family repeatedly inquired of Department about status of grievance. 42 U.S.C.A. § 1983; Civil Rights of Institutionalized Persons Act, § 7(a), 42 U.S.C.A. § 1997e(a); S.H.A. 735 ILCS 5/13-216.

[4] Federal Courts ⚿427
170Bk427

A federal court relying on the Illinois statute of limitations in a § 1983 case must toll the two-year limitations period while a prisoner exhausts the administrative grievance process, as required under the Prison Litigation Reform Act (PLRA). 42 U.S.C.A. § 1983; Civil Rights of Institutionalized Persons Act, § 7(a), 42 U.S.C.A. § 1997e(a); S.H.A. 735 ILCS 5/13-216.

***519** Michael J. Summerhill (argued), Skadden, Arps, Slate, Meagher & Flom, Chicago, IL, for Plaintiff-Appellant.

John A. Ouska (argued), Cook County State's Atty's Office, Chicago, IL, for Defendants-Appellees.

***520** Before FLAUM, Chief Judge, and **POSNER** and KANNE, Circuit Judges.

FLAUM, Chief Judge.

Pursuant to Federal Rule of Civil Procedure 12(b)(6), the district court dismissed Plaintiff-Appellant Shaun Johnson's claim as untimely, and Johnson appeals. For the reasons stated herein, we reverse.

I. Background

In reviewing a motion to dismiss, we accept all facts alleged in the complaint as true and draw all reasonable inferences in the light most favorable to the plaintiff. *See Crenshaw v. Baynerd*, 180 F.3d 866, 868 (7th Cir.1999). Johnson is an inmate in the Cook County Department of Corrections. On December 22, 1995, the toilet in Johnson's cell malfunctioned. One day later, with the toilet still inoperable, Johnson summoned Officer Ruben Rivera to request use of the prison's shared facility. Officer Rivera allowed Johnson's cellmate to utilize the common area toilet, but detained Johnson in his cell. Rivera refused to let Johnson leave because Johnson had acted inappropriately when the toilet broke on the previous day. Johnson informed Officer Rivera that he planned to file a grievance regarding Rivera's conduct, at which time Rivera became enraged and called four additional officers. Officers Rivera, Matthew Martinez, Geoffrey Howard and William Pellegrini (collectively "Defendants") then beat Johnson, who subsequently required medical treatment.

Johnson filed a grievance concerning the attack and placed the completed form in his cellblock mailbox pursuant to Department of Corrections procedures. However, Pellegrini removed and destroyed Johnson's grievance. For the next year, Johnson and his family repeatedly inquired about the status of his grievance, but neither Johnson nor his family received a response from the prison's grievance officer.

On June 24, 1998, Johnson filed in federal court a pro se complaint requesting relief for the December 23, 1995 beating. Defendants moved to dismiss the complaint as time-barred by the applicable statute of limitations, and the district court granted Defendants' motion. The district court ruled that Johnson filed his complaint outside the two-year statute of limitations period for § 1983 actions in Illinois, and Johnson could advance no legitimate reason for the delay. The district court noted that the Prison Litigation Reform Act ("PLRA") requires prisoners to exhaust administrative remedies before filing suit under § 1983, and acknowledged that Illinois tolls the statute of limitations when a cause of action is "statutorily prohibited." However, the district court reasoned that Johnson should have realized the futility of the grievance process and filed his claim anyway.

Johnson offers two arguments on appeal. First, he claims that the district court should have tolled the statute of limitations pursuant to 735 ILCS 5/13-216 because the PLRA required Johnson to exhaust his administrative remedies before filing suit. Alternatively, Johnson contends that the district court should have equitably tolled the statute of limitations while he pursued administrative remedies within the Department of Corrections. [FN1]

> FN1. We need not reach the issue of federal equitable tolling principles in this context because we agree with Johnson that the Illinois tolling statute applies in this case. *See Tyler v. Runyon*, 70 F.3d 458, 464 n. 6 (7th Cir.1995).

II. Discussion

A motion to dismiss under Rule 12(b)(6) challenges the sufficiency of a complaint ***521** for failure to state a claim upon which relief may be granted. *See* Fed.R.Civ.P. 12(b)(6); *Autry v. Northwest Premium Services, Inc.*, 144 F.3d 1037, 1039 (7th Cir.1998). Whether a district court correctly dismissed a complaint is a question of law that we review de novo. *Id.*

[1] Section 1983 does not contain an express statute of limitations, so federal courts adopt the forum state's statute of limitations for personal injury claims. *Wilson v. Garcia*, 471 U.S. 261, 276, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985); *Ashafa v. City of Chicago*, 146 F.3d 459, 461 (7th Cir.1998). In Illinois, the limitations period for § 1983 cases is two years. *Kalimara v. Illinois Dep't of Corrections*, 879 F.2d 276, 277 (7th Cir.1989). Moreover, because "the chronological length of the limitation period is interrelated with provisions regarding tolling, revival, and questions of application," federal courts must "also borrow[ ] the state's tolling rules--including any equitable tolling doctrines." *Smith v. City of Chicago Heights*, 951 F.2d 834, 839-40 (7th Cir.1992). In this case, the relevant tolling statute states,

> When the commencement of an action is stayed by an injunction, order of court, *or statutory prohibition*, the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action.

[2][3] 735 ILCS 5/13-216 ("section 13-216")

(emphasis added). There can be no question that a federal court applying Illinois law must toll the statute of limitations if a "statutory prohibition" exists that prevents a plaintiff's cause of action. Here, such a statutory prohibition exists. The PLRA requires exhaustion of administrative remedies prior to filing suit under § 1983. *See* 42 U.S.C. § 1997e(a) (2000). According to the statute,

> no action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

Id. See also Smith v. Zachary, 255 F.3d 446 (7th Cir.2001). While this circuit has yet to rule on the precise relationship between § 1997e and the Illinois tolling statute, other circuits have concluded that federal courts should toll state statutes of limitations while inmates exhaust their administrative remedies under § 1997e. *See Brown v. Morgan*, 209 F.3d 595, 596 (6th Cir.2000); *Harris v. Hegmann*, 198 F.3d 153, 157-59 (5th Cir.1999); *see also Cardenas v. Washington*, 2001 WL 690472, 2001 U.S.App. LEXIS 14056 (7th Cir. June 19, 2001) **(unpublished)** (acknowledging Brown and Harris, but not deciding the issue for this court); *Scanlon v. Drew*, 2000 WL 1070943, 2000 U.S.App. LEXIS 18776 (7th Cir. July 31, 2000) **(unpublished)** (same).

It is not difficult to see why the Illinois tolling statute applies in such cases. Tolling statutes are designed to avoid a "procedural catch 22," in which a statute or court order prevents a potential plaintiff from properly filing a cause of action. Two examples illustrate the procedural complexities cured by tolling statutes. In *Doe v. Bobbitt*, 698 F.Supp. 1415 (N.D.Ill.1988), *rev'd on other grounds*, 881 F.2d 510 (7th Cir.1989), the plaintiff discovered facts sufficient to survive a motion to dismiss only after the district court lifted a two-year discovery ban. The court identified a situation in which the plaintiff could risk Rule 11 sanctions by filing an unfounded claim within the limitations period or wait until after the limitations period and file a well-grounded complaint. Because this was the type of procedural morass that tolling statutes are designed to prevent, the court suspended the prescriptive period during the discovery stay. *Id.* at 1419.

***522** Similarly, in *Board of Education v. Wolinsky*, 842 F.Supp. 1080 (N.D.Ill.1993), the district court considered a claim brought under § 504 of the Rehabilitation Act. Like the PLRA, the Rehabilitation Act requires plaintiffs seeking recovery under § 504 to exhaust certain administrative remedies before filing suit. The district court relied upon section 13-216 and held that the "exhaustion requirement is in effect a stay of an action by statutory prohibition." *Id.* at 1085. The court thus tolled the statute of limitations, giving the plaintiff time to exhaust the requisite administrative remedies before filing suit. *Id.*

[4] The procedural morass identified by courts in other contexts is equally relevant to the case before us. The "catch 22" in this case is self-evident: the prisoner who files suit under § 1983 prior to exhausting administrative remedies risks dismissal based upon § 1997e; whereas the prisoner who waits to exhaust his administrative remedies risks dismissal based upon untimeliness. We thus hold that in the ordinary case, a federal court relying on the Illinois statute of limitations in a § 1983 case must toll the limitations period while a prisoner completes the administrative grievance process.

That does not end our inquiry, however, because this is not the ordinary case. Here, Johnson never completed the prison's grievance process. The district court held that even if section 13-216 applied, "it became clear well within the limitations period that Johnson would not obtain satisfaction via the prison's administrative procedures." *Johnson v. Rivera*, No. 98 C 3907, slip op. at 2 (N.D.Ill. Apr. 1, 1999). The district court cites no authority for this proposition, which, in our view, does not address Johnson's allegations that Officer Pellegrini destroyed his grievance and that Johnson's repeated inquiries to the grievance board proved unavailing. Given that we must accept all well-pleaded facts in Johnson's complaint as true, *see Crenshaw*, 180 F.3d at 868, we cannot set aside Johnson's assertions of misconduct by the defendants. [FN2]

> FN2. We are mindful of the potential for fraud in the present context, whereby prisoners could feign compliance with grievance procedures to avoid statute of limitations problems. However, there are other, more appropriate methods to prevent such malfeasance. For example, the district court could allow limited discovery on the issue of

Johnson's attempt to file a grievance in the Department of Corrections.

III. Conclusion

For the foregoing reasons, we REVERSE the decision of the district court and REMAND for proceedings consistent with this opinion.

272 F.3d 519

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