

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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KEVIN HECKER,

Plaintiff,

v.

WIERZBA INSULATION LLC, and  
DEMILEC (USA) LLC,

Defendants.

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OPINION AND ORDER

12-cv-682-wmc

Rural Mutual Insurance Company moves to intervene in this case for purposes of seeking a declaratory judgment as to defendant Wierzba Insulation, LLC's entitlement to insurance coverage on plaintiff's claims. (Dkt. #15.) Because this motion does not conform with the requirements of Federal Rule of Civil Procedure 24, the court will deny it. In addition, for the reasons explained below, the allegations contained in plaintiff's complaint are wholly inadequate to determine whether this court has subject matter jurisdiction over this action. Accordingly, the court will require plaintiff to file (1) an amended complaint addressing these deficiencies; and (2) a brief explaining why the jurisdictional exceptions under CAFA do not apply

BACKGROUND

Plaintiff Kevin Hecker's complaint seeks to bring a class action pursuant to Federal Rule of Civil Procedure 23 on behalf of similarly-situated owners and residents of real property containing alleged defective spray polyurethane foam insulation ("SPF") that was designed, manufactured, marketed, supplied, or sold by defendants Demilec

(USA) LLC and Wierzba Insulation, Inc. (Dkt. #1.) Plaintiff alleges causes of action arising under state law (both Wisconsin and other states), and relies on this court's diversity jurisdiction pursuant to 28 U.S.C. § 1332(d) and the Class Action Fairness Act ("CAFA"), 28 U.S.C. §1711 *et seq.*

## OPINION

### **I. Rural Mutual Insurance Company's Motion to Intervene**

Federal Rule of Civil Procedure 24 governs intervention. In pertinent part, it requires that "[t]he motion must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought." Fed. R. Civ. P. 24(c). Since Rural Mutual failed to file a proposed pleading with its motion, the court will deny Rural Mutual's motion to intervene without prejudice to refile. Should Rural Mutual choose to refile its motion with the required pleading, the court at that time will consider the merits of the motion.

### **II. Order Requiring Amendment of Complaint and Jurisdictional Brief**

Even though defendants have not challenged whether this proposed class action is properly before this court, the court has an independent obligation to ensure subject matter jurisdiction exists. *See Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1193 (2010) (explaining that because jurisdiction is limited, federal courts "have an independent obligation to determine whether subject-matter jurisdiction exists, even when no party challenges it"); *see also Hukic v. Aurora Loan Servs.*, 588 F.3d 420, 427 (7th Cir. 2009)

("[I]t is always a federal court's responsibility to ensure it has jurisdiction."). Further, the party seeking to invoke federal jurisdiction bears the burden of establishing that jurisdiction is present. *Smart v. Local 702 Int'l Bhd. of Elec. Workers*, 562 F.3d 798, 802-03 (7th Cir. 2009).

Title 28 U.S.C. § 1332(d)(2) provides in pertinent part:

The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs, and is a class action in which--

(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;

(B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or

(C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

As best the court can discern, plaintiff relies on subsection (A) to establish diversity by alleging that *a* "member of a class of plaintiffs is a citizen of a State different from [a] defendant." Specifically, plaintiff alleges that he is a "resident" of Wisconsin. (Compl. (dkt. #1) ¶ 6.) In determining whether there is diversity of the parties, however, the Seventh Circuit has pointedly advised district courts to consider a party's citizenship, which depends on the domicile location rather than residence. *See, e.g., Winforge, Inc. v. Coachmen Industries, Inc.*, 691 F.3d 856, 867 (7th Cir. 2012) ("An allegation of residence is not sufficient to establish citizenship, which requires domicile."). Plaintiff should correct this in his amended complaint, but this is not the focus of the court's concern.

Plaintiff adequately alleges the citizenship of defendant Wierzba Installation Inc. as a citizen of Wisconsin, because it is a Wisconsin corporation with its principal place of business in Weston, Wisconsin. (Compl. (dkt. #1) ¶ 8; *see also* 28 U.S.C. § 1332(c)(1).) Since plaintiff is also a citizen of Wisconsin, however, plaintiff cannot satisfy the requirements of 28 U.S.C. § 1332(d)(2)(A) based on diversity of citizenship between himself and Wierzba because both are citizens of the same state.

Accordingly, whether diversity under CAFA exists depends on the citizenship of defendant Demilec (USA), LLC. Unfortunately, while the caption of the complaint describes Demilec (USA), LLC as “a Texas corporation,” and plaintiff treats it as a corporation in alleging its citizenship (Compl. (dkt. #1) ¶ 7), its name indicates that it is, in fact, a limited liability corporation, which is *not* a corporation for diversity purposes. Again, the Seventh Circuit has advised repeatedly that the state in which an LLC was formed and the location of its principal place of business is wholly irrelevant in deciding the citizenship of a limited liability company. *See, e.g.,* Hukic, 588 F.3d at 429. Instead, “the citizenship of an LLC is the citizenship of each of its members.” *Camico Mut. Ins. Co. v. Citizens Bank*, 474 F.3d 989, 992 (7th Cir. 2007).

As such, plaintiff will be required to file an amended complaint establishing subject matter jurisdiction by specifically alleging (1) that its LLC moniker is a misrepresentation of its actual corporate status; *or* (2) the names and citizenship of *each* member of Demilec (USA), LLC. In alleging the LLC’s citizenship, plaintiff should keep in mind that if the member or members are themselves limited liability entities, then the citizenship of those members and partners must also be alleged. *Meyerson v. Harrah’s E.*

*Chi. Casino*, 299 F.3d 616, 617 (7th Cir. 2002) (“[T]he citizenship of unincorporated associations must be traced through however many layers of partners or members there may be.”).

Among other factors, CAFA also provides certain discretionary and mandatory exceptions to a federal court’s exercise of jurisdiction depending on the portion of class members who are citizens of the state in which the action was filed, the citizenship of the defendants, and the state laws to be applied. 28 U.S.C. § 1332(d)(3), (4). Since the complaint lacks sufficient information from which the court can discern whether it should or must decline jurisdiction, plaintiff shall file an amended complaint, brief and any necessary accompanying materials explaining why these provisions do not apply on or before March 29, 2013; any response from defendants is due on or before April 10, 2013.

#### ORDER

IT IS ORDERED that:

- 1) Rural Mutual Insurance Company’s motion to intervene for purposes of seeking a declaratory judgment concerning available insurance coverage for defendant Wierzba Insulation, LLC (dkt. #15) is DENIED without prejudice to refiling;
- 2) plaintiff Kevin Hecker shall have until March 29, 2013, to file and serve an amended complaint containing good faith allegations sufficient to establish diversity of citizenship for purposes of determining subject matter jurisdiction under 28 U.S.C. § 1332(d) or face prompt dismissal for lack of subject matter jurisdiction; and

3) consistent with the opinion, plaintiff shall also file a jurisdictional brief and supporting materials on or before March 29, 2013, to which defendants may file a response, if any, on or before April 10, 2013.

Entered this 19th day of March, 2013.

BY THE COURT:

/s/

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WILLIAM M. CONLEY  
District Judge