

Properly Formed Unincorporated Associations Should Have Their Own Citizenship

by Donna Phillips Currault



Donna Phillips Currault is a member of Gordon, Arata, Montgomery, Barnett, McCollam, Duplants & Eagan, LLC, where she practices complex litigation, focusing on commercial and employment matters. She is an officer of the FBA New Orleans Chapter Board and a past Chair of the FBA's Labor & Employment Section.

When Congress authorized federal courts to exercise diversity jurisdiction of the First Judiciary Act of 1789, 1 Stat. 78, it said nothing about corporations.¹ Questions quickly arose regarding whether a corporation qualified as a “citizen” capable of suing and being sued in federal court. In one of the earliest cases to address the issue, *Bank of United States v. Deveaux*,² the Court recognized that a corporation was “certainly not a citizen” but nevertheless held that a corporation could invoke federal diversity jurisdiction when the corporation’s shareholders were all citizens of a different state from the defendants.³ With jurisdiction dependent on the citizenship of each shareholder, courts required specific averments of citizenship as to each stockholder⁴ and complete diversity between all stockholders, on the one hand, and all opposing parties, on the other hand.⁵

Even as the Court announced *Deveaux*, it struggled with its conclusion. During that same term, in *Hope Insurance Co. of Providence v. Boardman*,⁶ the Court wrote:

[A]s the individual members are constantly changing by the transfer of stock, it is impossible to ascertain at any precise moment who are the individuals who constitute the corporate body; and it would at any time be in the power of a corporation defendant to evade the jurisdiction of the court, by taking in a new member who should be of the same state with the plaintiff.

...

The reason of giving jurisdiction to the courts of the United States in cases between citizens of different states, applies with the greatest force to the case of a powerful moneyed corporation erected within, and under the laws of a particular state. If there was a probability that an individual citizen of a state could influence the state courts in his favour, how much stronger is the probability that they could be influenced in

favour of a powerful moneyed institution which might be composed of the most influential characters in the state. What chance for justice could a plaintiff have against such a powerful association in the courts of a small state whose judges perhaps were annually elected, or held their offices at the will of the legislature?

Bound by precedent, despite its concerns, the Court again held that the corporation’s citizenship was that of each of its stockholders.⁷

Not until *Louisville, Cincinnati & Charleston Railroad v. Letson*,⁸ did the Court overrule *Deveaux* and hold:

[A] corporation created by and doing business in a particular state, is to be deemed to all intents and purposes as a person, although an artificial person, an inhabitant of the same state, for the purposes of its incorporation, capable of being treated as a citizen of that state, as much as a natural person. . . . [and with regard to] the manner in which it can sue and be sued, it is substantially, within the meaning of the law, a citizen of the state which created it, and where its business is done, for all the purposes of suing and being sued.⁹

Later, in *Marshall v. Baltimore & Ohio Railroad*,¹⁰ the Court reasoned that a corporation should be considered a citizen of its state of incorporation because courts could presume that a corporation’s shareholders were citizens of the state of incorporation¹¹

During congressional debates in the effort to codify *Letson*, many argued that it did not further the goals of diversity jurisdiction (i.e., opening federal courts to those who might suffer from local prejudices against out-of-state parties) because a corporation could manipulate federal jurisdiction by choosing to incorporate in a state other than where it conducted nearly all of its business.¹² In 1958, over 100 years after *Letson*, Congress granted statutory citizenship to corporations, deeming them “a citizen of any State by which

it has been incorporated and of the State where it has its principal place of business.”¹³

Although Congress bestowed special citizenship status upon corporations, with few exceptions, it has not bestowed citizenship upon other business entities, such as partnerships, limited partnerships, joint-stock companies, limited liability companies, and similar entities.¹⁴ As a result, any unincorporated association is still subject to the *Deveaux* rationale, which bases the entity’s citizenship on that of each of its members.¹⁵ Over the years, the Court has had the opportunity to revisit the issue. For instance, in *Carden v. Arkoma Associates*,¹⁶ the Court was faced with the question of whether a limited partnership’s citizenship must be based on not only the citizenship of its general partners but also that of its limited partners. Refusing to apply *Letson* to other artificial entities, the Court noted that, when Congress adopted 28 U.S.C. § 1332(c), it addressed corporations only without providing for any other artificial entity although many new forms existed by 1958.¹⁷ Despite the fact that many unincorporated entities are similar to corporations, the Court concluded that Congress, not the Court, should decide which types of entities should be accorded citizenship: “Which of them is entitled to be considered a “citizen” for diversity purposes, and which of their members’ citizenship is to be consulted, are questions more readily resolved by legislative prescription than by legal reasoning.”¹⁸

Other than for certain limited purposes such as the Class Action Fairness Act, 28 U.S.C. § 1332(d)(10), in the 60 years since Congress granted corporations citizenship status, it has not granted citizenship to other business entities, instead characterizing them all as unincorporated associations despite judicial invitation and other requests to recognize them as citizens in their own right.¹⁹ This congressional inaction has resulted in leaving courts to determine an unincorporated association’s ability to sue or be sued in federal court using the citizenship standard announced over 200 years ago in *Deveaux*. This rule is not only outdated, but often prevents out-of-state defendants from invoking federal diversity jurisdiction, which is the fundamental purpose of the federal diversity statute. For instance, an out-of-state citizen who owns a limited partnership interest or is a member of a limited liability company that has a dispute with that entity is only subject to suit in state court because, if he sues or is sued by the unincorporated association, his own citizenship destroys complete diversity because his citizenship is imputed to the entity. Likewise, in a derivative action involving an unincorporated association owned by two members of diverse citizenship, the suit cannot be brought in federal court because, regardless of realignment of the entity, complete diversity will be absent because both opposing members’ citizenships are imputed to the entity. These problems may be avoided if an unincorporated association is considered a citizen of that state of formation when properly formed under any state law that recognizes it as a separate legal entity.

The *Deveaux* rule also forces parties to incur unnecessary costs to research the citizenship of each of its members to determine whether diversity exists and wastes judicial resources due to the absence of a clear basis to determine whether diversity jurisdiction exists, which often is not raised until a post-judgment appeal.²⁰ As business entities have become more complex, the determination of their citizenship has likewise become more complicated. Unlike 200 years ago when natural persons were typically the shareholders of corporations, current business organizations often entail unincorporated associations having other unincorporated associations as

members, which unincorporated members may also be owned by other entities. So the inquiry does not end with a determination of the entity’s immediate members. The inquiry often requires research into ownership of its members’ members and those members’ members until a natural person or corporation is reached and citizenship is then imputed through the ownership chain to the unincorporated association. Because the ownership details of unincorporated associations are generally not publicly available, a defendant must either remove a case based on “information and belief”²¹ or obtain discovery in state court, if possible, before the removal period expires.²² The needless cost of discovery or investigation into the details of every member of an unincorporated association to discern the entity’s citizenship could be avoided by statutory recognition that an unincorporated association is a citizen in its own right, based on its place of formation and principal place of business, for purposes of diversity jurisdiction. Likewise, a statutory provision that determines citizenship based on objective factors such as state of incorporation and principal place of business avoids the waste of judicial resources that results from voiding a judgment when a nondiverse member of the unincorporated association is discovered on appeal.

While a business entity’s citizenship is critical for subject matter jurisdiction, it is also relevant to the personal jurisdiction analysis. “A court may assert general jurisdiction over corporations when their affiliations with the state are so ‘continuous and systematic’ as to render them essentially at home in the forum state.”²³ The “paradigm forum” is an “individual’s domicile,” or, for corporations, “an equivalent place, one in which the corporation is fairly regarded as at home.”²⁴ A corporation’s “home” mirrors its corporate citizenship, (i.e., state of incorporation) and principal place of business (i.e., its “nerve center”).²⁵

Relying on *Carden*, appellate courts universally hold that, for purposes of diversity jurisdiction, the citizenship of an unincorporated association, such as a limited liability company, is determined by the citizenship of all of its members.²⁶ But courts reject this analysis, however, when assessing general jurisdiction over an unincorporated association in the context of personal jurisdiction.²⁷ Relying on language in *Daimler AG v. Bauman*,²⁸ some courts have held that a limited liability company, like a corporation, is “at home” in its state of formation and state of its principal place of business, without regard to the citizenship or contacts of its members.²⁹ Other courts, however, have held that an unincorporated association is a citizen of its own state of organization and principal place of business, and yet others have held that an unincorporated association is a citizen of its state of formation, principal place of business and all states in which its owners are citizens.³⁰ The absence of statutory citizenship for unincorporated associations has thus resulted in some courts conflating the test for citizenship for purposes of diversity jurisdiction with the test for purposes of general personal jurisdiction, while others differentiate those issues and apply different tests.

Congress’ continued failure to recognize properly formed unincorporated associations as legal entities separate from their members by bestowing citizenship status upon them in their own right undermines the purpose of the diversity jurisdiction statute. It also forces the courts to ignore the separate legal status of properly formed unincorporated associations and apply an outdated fiction that any legal entity other than a corporation is no more than an aggregation of its members whose citizenships must be based on that of each of its members. This creates unnecessary cost to the parties, wastes judicial resources, and has resulted in inconsistent decisions applying

different standards to discern related issues. Accordingly, Congress should act to recognize that a properly formed legal entity has a separate existence from its individual members and grant citizenship to that entity for purposes of diversity jurisdiction. ☺

Endnotes

¹*Hertz Corp. v. Friend*, 559 U.S. 77, 84, 130 S. Ct. 1181, 1187-88 (2010).

²9 U.S. (5 Cranch) 61, 3 L.Ed. 38 (1809).

³*Id.* at 86, 91-92.

⁴*Breithaupt v. Bank of Georgia*, 26 U.S. (1 Pet.) 238, 239-40 (1828).

⁵*Commercial and Railroad Bank v. Slocomb, Richards & Co.*, 39 U.S. (14 Pet.) 60, 64 (1840). *Strawbridge v. Curtis*, 7 U.S. (3 Cranch) 267 (1806), announced the rule of complete diversity.

⁶9 U.S. (5 Cranch) 57, 60, 3 L.Ed. 36 (1809).

⁷*Id.* at 61.

⁸43 U.S. (2 How.) 497, 11 L.Ed. 353 (1844).

⁹*Id.* at 558.

¹⁰57 U.S. (16 How.) 314, 14 L.Ed. 953 (1853).

¹¹See *Hertz Corp.*, 559 U.S. at 85, 130 S. Ct. at 1188 (citing *Marshall v. Baltimore & Ohio R. Co.*, 16 How. 314, 327-28, 14 L.Ed. 953 (1854); *Louisville, C. & C.R. Co. v. Letson*, 2 How. 497, 11 L.Ed. 353 (1844)).

¹²S. Rep. No. 530, 72d Cong., 1st Sess., 2, 4-7 (1932), cited in *Hertz Corp. v. Friend*, 559 U.S. 77, 85-86 (2010).

¹³§ 2, 72 Stat. 415, cited in *Hertz Corp. v. Friend*, 559 U.S. 77, 88, 130 S. Ct. 1181, 1190 (2010); see also 28 U.S.C. § 1332(c)(1).

¹⁴28 U.S.C. § 1332(c)(1) specifies that (1) other than in a direct action, an insurer is considered a citizen of (a) the state of the insured, (b) its state of incorporation and (c) its principal place of business and (2) the legal representative of the estate of a decedent, infant or incompetent is deemed a citizen only of the same state of the decedent, infant or incompetent. For purposes of the Class Action Fairness Act and its related removal provisions, Congress deemed unincorporated associations to be citizens of the state of its principal place of business and the state under whose law it is organized. 28 U.S.C. § 1332(d)(10).

¹⁵*Americold Realty Trust v. Conagra Foods, Inc.*, 136 S.Ct. 1012, 1015 (2016) (Real Estate Investment Trust's citizenship based on the citizenship of each of its shareholders); *Carden v. Arkoma Associates*, 494 U.S. 185, 195-96, 110 S.Ct. 1015, 108 L.Ed.2d 157 (1990) (a limited liability partnership's citizenship determined by that of its partners, including limited partners); *Steelworkers v. R.H. Bouligny, Inc.*, 382 U.S. 145, 146, 86 S.Ct. 272, 15 L.Ed.2d 217 (1965) (Congress did not grant citizenship to union, so its citizenship determined by the citizenship of the workers affiliated with it); *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 457, 20 S.Ct. 690, 44 L.Ed. 842 (1900) (limited partnership, although possessing some characteristics of a corporation and a citizen by the law of the state creating it, "may not be deemed a 'citizen' under the jurisdictional rule established for corporations."); *Chapman v. Barney*, 129 U.S. 677, 682, 9 S.Ct. 426, 32 L.Ed. 800 (1889) (unincorporated joint-stock company's citizenship determined by that of its shareholders).

¹⁶494 U.S. 185, 110 S.Ct. 1015, 108 L.Ed.2d 157 (1990).

¹⁷*Carden*, 494 U.S. at 196-97, 110 S. Ct. at 1022.

¹⁸*Id.* at 197, 110 S. Ct. at 1022.

¹⁹See, e.g., American Bar Association Resolution No. 103B, adopted by House of Delegates on August 3-4, 2015, available at <https://www.americanbar.org/content/dam/aba/administrative/crsj/committee/aug-15-unincorporated-businesses.authcheckdam.pdf>; April 4, 2017, Report of the Commercial and Federal Litigation Section in Support of the ABA Resolution Concerning 28 USC § 1332, available at [https://www.nysba.org/Sections/Commercial_Federal_Litigation/ComFed_Display_Tabs/Reports/2017/ComFed_Report_on_28_USC_%C2%A7_1332_\(00103412@x9DDAB\).pdf.html](https://www.nysba.org/Sections/Commercial_Federal_Litigation/ComFed_Display_Tabs/Reports/2017/ComFed_Report_on_28_USC_%C2%A7_1332_(00103412@x9DDAB).pdf.html).

²⁰E.g., *Americold Realty Tr. v. Conagra Foods, Inc.*, 136 S.Ct. 1012, 1017, 194 L.Ed.2d 71 (2016) (case dismissed for lack of subject matter jurisdiction on appeal after judgment rendered on the merits by district court); *Grupo Dataflux v. Atlas Glob. Grp., L.P.*, 541 U.S. 567, 582, 124 S.Ct. 1920, 1930, 158 L.Ed.2d 866 (2004) (dismissed case after trial based on lack of subject matter jurisdiction due to LLC's member's citizenship).

²¹*Lincoln Ben. Life Co. v. AEI Life, LLC*, 800 F.3d 99, 110-11 (3d Cir. 2015) (allowing a plaintiff to allege complete diversity of an LLC by alleging that none of its members is a citizen of X state rather than affirmatively alleging the citizenship of each member of the LLC); *Carolina Cas. Ins. Co. v. Team Equip., Inc.*, 741 F.3d 1082, 1087 (9th Cir. 2014) (when information necessary to establish diversity of citizenship is not reasonably available to a plaintiff, the plaintiff is permitted to plead jurisdictional allegations based on information and belief and without affirmatively asserting specific details regarding the citizenship of those defendants). *But see Settlement Funding, L.L.C. v. Rapid Settlements, Ltd.*, 851 F.3d 530, 536 (5th Cir. 2017) (party failed to allege diversity when it did not allege the citizenship of each member of the many LLC and partnership-litigants); *Harvey v. Grey Wolf Drilling Co.*, 542 F.3d 1077, 1080 (5th Cir. 2008) ("[T]he citizenship of a LLC is determined by the citizenship of all of its members."); *Am. Motorists Ins. Co. v. Am. Emp. Ins. Co.*, 600 F.2d 15, 16 (5th Cir. 1979) ("[T]he plaintiff's complaint must specifically allege each party's citizenship."); see also *Howery v. Allstate Ins. Co.*, 243 F.3d 912, 919 (5th Cir. 2001) ("[T]he party asserting federal jurisdiction must distinctly and affirmatively allege the citizenship of the parties.") (citations, quotations, and alterations omitted).

²²Absent bad faith, a case may not be removed based on diversity more than one year after commencement of the action. 28 U.S.C. § 1446(c)(1).

²³*Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919, 131 S. Ct. 2846 (2011).

²⁴*Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco Cty.*, 137 S. Ct. 1773, 1776 (2017) (citing *Goodyear Dunlop Tires Ops., S.A. v. Brown*, 564 U.S. 915, 924, 131 S. Ct. 2846, 2853 (2011)).

²⁵*BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1559 (2017) (no general jurisdiction because entity neither incorporated in nor based its principal place of business in the forum state); *Hertz Corp. v. Friend*, 559 U.S. 77, 92-93, 130 S. Ct. 1181, 1192 (2010) ("[P]rincipal place of business" refers to the place where the corporation's high level officers direct, control, and coordinate the corporation's activities.').

²⁶*Harvey v. Grey Wolf Drilling Co.*, 542 F.3d 1077, 1080 (5th Cir. 2008); *Gen. Tech. Applications, Inc. v. Exro Ltda.*, 388 F.3d 114, 120 (4th Cir. 2004); *GMAC Commercial Credit LLC v. Dillard Dep't Stores, Inc.*, 357 F.3d 827, 828-29 (8th Cir. 2004); *Rolling*

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tor over the years,” said Pauly. “I clerked for her during my first year after law school, and she has counseled me numerous times over the years about my career decisions and has been willing to help in any way she can to advance my career. She also flew to Chicago to speak at my wedding, which meant the world to me.”

“Before interning in her chambers after my first year of law school, I had never even worked in an office; all my prior work experience was in restaurants and on construction sites. She took me under her wing and encouraged me to take every opportunity I could to learn about the court, work on a variety of cases, and observe proceedings in front of other judges,” echoes Battles.

“Judge Irizarry affectionately refers to her clerk’s children as her grandclerks. She never forgets to ask how they are doing, or to fawn over their pictures. Her annual gathering of former clerks feels more like a big family reunion,” adds Chen. “Even now, nearly a decade after I clerked for her, Judge Irizarry never fails to send me a text message every Nov. 11 wishing me a happy Veterans Day. It is incredibly thoughtful and means the world to me—and is just one small example of how much she

cares about people.”

Judge Irizarry is keenly aware of her privileged position as a trailblazer for women of color. A dedicated mentor to students and attorneys alike, Judge Irizarry is an active member of many bar and judicial associations. Judge Irizarry has participated in many CLE programs as well as programs to foster diversity within the legal profession at all levels, particularly in the federal courts. She is a fellow of the New York State Bar Foundation and was president of the Association of Hispanic Judges from 1997 to 2002. She also has served on the Eastern District’s Criminal Justice Act Panel Committee, where she spearheaded the implementation of a mentoring program to increase the diversity of qualified applicants to the Criminal Justice Act Panel.

“Diversity matters,” she asserts. “It matters to our communities. It matters to the litigant who comes to court full of fear and anxiety and is immediately comforted by seeing someone who looks like her. I am living proof that others like me of color who grew up poor can achieve their dreams.” ☉

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Greens MHP, L.P. v. Comcast SCH Holdings LLC, 374 F.3d 1020, 1022 (11th Cir. 2004); *Handelsman v. Bedford Village Assocs. Ltd. P’ship*, 213 F.3d 48, 51 (2d Cir. 2000); *Cosgrove v. Bartolotta*, 150 F.3d 729, 731 (7th Cir. 1998).

²⁷“The concepts of subject-matter and personal jurisdiction . . . serve different purposes, and these purposes affect the legal character of the two requirements.” *Tennessee Ins. Guar. Ass’n v. Penguin Random House, LLC*, 271 F. Supp. 3d 959, 965 (M.D. Tenn. 2017) (citation omitted); *Mountain Funding, LLC v. Blackwater Crossing, LLC*, 2006 WL 1582403, at *3 (W.D.N.C. June 5, 2006) (“The practice of disregarding [an unincorporated association] as an entity and looking to the citizenship of its members is only used to determine whether a court has diversity for subject matter jurisdiction.... This principle has not been applied to personal jurisdiction, which presents distinct due process issues.”). Different considerations are implicated in assessing subject matter jurisdiction versus personal jurisdiction. Subject matter jurisdiction restricts federal power and implicates considerations under Article III while personal jurisdiction flows from the Due Process Clause and is a matter of individual liberty. *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702, 102 S. Ct. 2099, 2104, 72 L.Ed.2d 492 (1982).

²⁸134 S. Ct. 746, 754, 187 L.Ed.2d 624 (2014) (looking to the unincorporated entity’s states of formation and principal place of business, as done for corporations, to assess general jurisdiction).

²⁹See, e.g., *Shell Rocky Mountain Prod., LLC v. Ultra Res., Inc.*, 415 F.3d 1158, 1162 (10th Cir. 2005) (finding a Delaware limited liability company with its principal place of business in, Texas to be a citizen of both Delaware and Texas); *Duncanson v. Wine & Canvas IP Holdings LLC*, 2017 WL 6994541, at *2 (S.D. Ind. Apr. 20, 2017) (exercising personal jurisdiction over LLCs by finding it “at home” in its state of incorporation); *Finn v. Great Plains Lending, LLC*,

2016 WL 705242 at *3 n.3 (E.D. Pa. Feb. 23, 2016) (considering unincorporated entity’s state of formation and principal place of business in personal jurisdiction analysis); *Allen v. IM Solutions, LLC*, 83 F. Supp. 3d 1196, 1203-04 (E.D. Okla. 2015) (applying Daimler and Goodyear to find that an LLC was at home for general jurisdictional purposes in the state of its organization and the state where it has its principal place of business).

³⁰*Johnson v. Columbia Props. Anchorage, LP*, 437 F.3d 894, 899 (9th Cir. 2006); *General Tech. Applications, Inc. v. Exro Ltda*, 388 F.3d 114, 121 (4th Cir. 2004); *GMAC Commercial Credit LLC v. Dillard Dep’t Stores, Inc.*, 357 F.3d 827, 828 (8th Cir. 2004); *Rolling Greens MHP v. Comcast SCH Holdings*, 374 F.3d 1020, 1022 (11th Cir. 2004); *Belleville Catering Co. v. Champaign Market Place, LLC*, 350 F.3d 691, 692 (7th Cir. 2003); *Handelsman v. Bedford Village Assoc. Ltd. P’ship*, 213 F.3d 48, 51 52 (2d Cir. 2000); *Allen v. IM Sols., LLC*, 83 F.Supp.3d 1196, 1204 (E.D. Okla. 2015).