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“Incorporating” Limited Partnerships into Federal Diversity Jurisdiction: Correcting *Carden v. Arkoma Associates*

Introduction

Federal courts are courts of limited jurisdiction.¹ Article III of the Constitution and various legislative acts, including the Judiciary Act of 1789, set forth the limits of their power.² The two most common types of federal jurisdiction are federal question and diversity of citizenship jurisdiction.³ Although federal question jurisdiction is a relatively clear limit on judicial power, diversity of citizenship has, at times, been an inconsistent standard. Federal subject matter jurisdiction is not a matter of

1 Federal district courts have original jurisdiction over three general areas of cases: 1) cases involving questions of federal law (commonly called federal question jurisdiction) 28 U.S.C. § 1331 (1982); 2) cases involving citizens of different states with a certain amount in controversy (commonly called diversity jurisdiction) 28 U.S.C. § 1332 (1982); and 3) cases involving questions of admiralty, maritime or prize issues, 28 U.S.C. § 1333 (1982). A detailed listing of the specific areas of original district court jurisdiction is codified in 28 U.S.C. §§ 1330-1366 (1982 & Supp. V 1987).

2 U.S. Const. art III, § 2, cl. 1 which states in relevant part: “The judicial Power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.”; Judiciary Act of 1789, ch. 20, 1 Stat. 73 (1789) (currently codified at 28 U.S.C. § 1332 (1982)).

3 See *supra* note 1. “Federal question jurisdiction” is codified at 28 U.S.C. § 1331 (1982) and grants federal district courts original jurisdiction over cases “arising under this Constitution, the Laws of the United States, and treaties made, or which shall be made, under their authority.” *Id.* The “arising under” language has been given different construction under the Constitutional grant of judicial authority set forth at U.S. CONST. art III, § 2 and 28 U.S.C. § 1331.

The seminal case construing “arising under” in the Constitutional sense is *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824). In *Osborn*, the Court stated:

We think, then, that when a question to which the judicial power of the Union is extended by the constitution, forms an ingredient of the original cause, it is in the power of the Congress to give the Circuit Courts jurisdiction of that cause, although other questions of fact or of law may be involved in it.

Id. at 823.

The Supreme Court has construed “arising under” in the statutory sense to mean:

[W]here it appears from the bill or statement of the plaintiff that the right to relief depends upon the construction or application of the Constitution or laws of the United States, and that such federal claim is not merely colorable, and rests upon a reasonable foundation, the District Court has jurisdiction under this provision.

Smith v. Kansas City Title & Trust Co., 255 U.S. 180, 199 (1921).

The “arising under” language has been limited where questions of federal law are merely “lurking in the background.” *Gully v. First Nat’l Bank*, 299 U.S. 105, 117 (1936). Furthermore, the federal question jurisdiction must be clear from a well pleaded complaint. *Louisville & Nashville R.R. v. Mottley Co.*, 211 U.S. 149 (1908).

judicial discretion,⁴ but requires that courts apply a system of jurisdictional statutes.⁵

These jurisdictional statutes are fundamental to the federal courts' exercise of power because federal courts cannot adjudicate cases without subject matter jurisdiction.⁶ Therefore, jurisdictional principles should keep in step with the changes in our society.⁷ Judicial discretion and multiple interpretations cannot stand up to the strictures of article III or the express jurisdictional grants from Congress.

Until recently, the federal courts employed two theories for establishing the citizenship of a limited partnership⁸ in order to determine diversity jurisdiction:⁹ mandatory consideration¹⁰ and real party in inter-

4 From early on, the Supreme Court has clearly mandated that federal subject matter jurisdiction (especially diversity jurisdiction) is a doctrine requiring strict adherence by the courts which can neither be waived nor stipulated to by the parties.

It is . . . well established that when jurisdiction depends upon diverse citizenship the absence of sufficient averments or of facts in the record showing such required diversity of citizenship is fatal and cannot be overlooked by the court, even if the parties fail to call attention to the defect, or consent that it may be waived.

Thomas v. Board of Trustees, 195 U.S. 207, 211 (1906).

5 Thomson v. Gaskill, 315 U.S. 442, 446 (1942) (When dealing with the issue of jurisdictional amount in a diversity case, the Court said: "[t]he policy of the statute conferring diversity jurisdiction upon the district court calls for its strict construction").

6 See FED. R. CIV. P. 8(a) which states in relevant part: "[a] pleading . . . shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends."

7 Such a progression on the part of the Supreme Court's analysis has taken place concerning corporations. Initially the Court discussed corporations by stating:

A corporation is composed of natural persons; it is a visible, tangible body; and although the whole collectively have faculties in law which the individuals have not, yet it does not follow that the whole body may not be seen, examined, sifted, and contemplated, as any other body of individuals having collectively a particular faculty. [citation omitted] The individuals hold their rights as members in their *natural*, and not in a *politic* capacity. A corporation is a mere collection of men having collectively certain faculties.

Bank of United States v. Deveaux, 9 U.S. (5 Cranch) 61, 64-5 (1809) (emphasis in original). As the Court's analysis progressed, it viewed corporations more substantively in *Marshall v. Baltimore & Ohio R.R. Co.*, 57 U.S. 314 (1853). When discussing the diversity standing of corporations in that case, the Court stated:

The inference, also, that such an artificial entity [as a corporation] 'cannot be a citizen,' is a logical conclusion from the premise which cannot be denied.

But a citizen who has made a contract, and has a 'controversy' with a corporation, may also say, with equal truth, that he did not deal with a mere metaphysical abstraction, but with natural persons; that his writ has not been served on an imaginary entity, but on men and citizens; and that his contract was made with them as the legal representatives of numerous unknown associates, or secret and dormant partners.

The necessities and conveniences of trade and business require that such numerous associates and stockholders should act by representation, and have the faculty of contracting, suing, and being sued in a factitious or collective name. But these important faculties, conferred upon them by state legislation, for their own convenience, cannot be wielded to deprive others of acknowledged rights. *It is not reasonable that those who deal with such persons would be deprived of a valuable privilege by syllogism, or rather sophism, which deals subtly with words and names, without regard to the things or persons they are used to represent.*

Marshall, 57 U.S. at 327-28 (emphasis added).

8 A limited partnership is:

A type of partnership comprised of one or more general partners who manage business and who are personally liable for partnership debts, and one or more limited partners who contribute capital and share in profits but who take no part in running business and incur no liability with respect to partnership obligations beyond contribution.

BLACK'S LAW DICTIONARY 836 (5th Ed. 1979).

9 "Diversity jurisdiction", as it will be used in this Note, means federal subject matter jurisdiction over cases between citizens of different states currently codified under 28 U.S.C. § 1332. Section 1332 states, in relevant part:

est.¹¹ Courts applying the mandatory consideration theory determine diversity on the basis of the citizenships of all partners, general and limited, in a limited partnership. Since the theory bars national-scope limited partnerships from federal courts, it prevents matters of national concern from being adjudicated in a national forum.¹²

In contrast, courts using the real party in interest theory determine the citizenship of a limited partnership based only on those partners that are real parties in interest. These real parties are defined on a case-by-case analysis of a state's limited partnership law concerning capacity to sue and be sued on behalf of the limited partnership. This is not to say that courts apply a different legal standard in each case. Rather, a determination is made from case to case concerning the limited partners' capacity to sue and be sued based on state limited partnership law.¹³ When courts apply the real party in interest theory in this manner, they generally find that the citizenship of general partners alone should be considered in making a determination of diversity jurisdiction. Therefore, limited partnerships in states like New York,¹⁴ where limited partners are specifically held not to be proper parties to a suit by or for the limited partnership, would have greater diversity potential than limited partnerships from states like Missouri,¹⁵ where limited partners are not specifically held to be improper parties to a suit by or for the limited partnership.

The Supreme Court recently unified the standard to be used to determine diversity citizenship of limited partnerships. In *Carden v. Arkoma Associates*,¹⁶ the Court upheld mandatory consideration as the proper standard to be used. In a 5-4 decision, Justice Scalia stated for the majority:

"(a) The district court shall have original jurisdiction of all civil actions . . . between
(1) citizens of different States." 28 U.S.C. § 1332(a)(1) (1982).

In light of *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806), § 1332 has been interpreted as requiring "complete diversity" between adverse parties. In *Strawbridge* the Court said, "each distinct interest should be represented by persons, all of whom are entitled to sue, or may be sued, in the federal courts. That is, that where the interest is joint, each of the persons concerned in that interest must be competent to sue, or liable to be sued, in those courts." *Strawbridge*, 7 U.S. (3 Cranch) at 267.

10 See *infra* notes 55-70 and accompanying text for a discussion of the mandatory consideration theory.

11 See *infra* notes 71-80 and accompanying text for a discussion of the real party interest theory.

12 See *infra* notes 125-27 and accompanying text for a discussion of how national-scope limited partnerships are not amenable to nor have the availability of diversity jurisdiction.

It should be noted that any mention of a limited partnership's non-access to federal court also contemplates that an adverse party would not be able to take a limited partnership to federal court. Further, such a litigant would suffer in the same manner as a limited partnership kept from federal adjudication.

13 Because the real party in interest test requires analysis of state law to determine capacity for suit, the test raises questions involving the choice of law doctrine of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) and general conflicts of law. The position advocated in this Note raises no such questions because it would establish a uniform federal standard for determining the citizenship of limited partnerships, alleviating the need to consult varying state laws.

14 See *Colonial Realty Corp. v. Bache & Co.*, 358 F.2d 178 (2d Cir. 1966) (construing New York law).

15 See *Stouffer Corp. v. Breckenridge*, 859 F.2d 75 (8th Cir. 1988) (construing Missouri law).

16 58 U.S.L.W. 4243 (1990).

We have never held that an artificial entity, suing or being sued in its own name, can invoke the diversity jurisdiction of the federal courts based on the citizenship of some but not all of its members.¹⁷

Considering the structure and national scope of the modern limited partnership, mandatory consideration is too confining and inequitable. Reliance on varying *state* laws to determine *federal* jurisdiction under the real party in interest test fails to provide limited partnerships with the equal treatment they deserve.¹⁸ As it did with corporations, Congress must develop a uniform *federal* standard for determining *federal* diversity jurisdiction over cases involving limited partnerships.

This Note advocates departing from both historical methods of analysis and using a new approach for determining diversity status of limited partnerships. This new approach calls for Congress to amend the diversity rules to consider a limited partnership a citizen of its state of organization and its principal place of business. Part I will trace the historical underpinnings of limited partnerships and diversity jurisdiction. Part II will analyze the two current methods of determining the citizenship of limited partnerships for diversity purposes. Part III will advocate that modern limited partnerships are, in fact, pseudo-corporations, and limited partners are analogous to corporate shareholders. Part IV will consider the supporting and countervailing policy considerations behind adopting a new theory for determining diversity for limited partnerships.

I. The Evolution of Limited Partnerships and Diversity Jurisdiction

A. *Limited Partnerships—Historically*

The modern limited partnership, with its potentially national scope, was not envisioned when the entity came into existence in France (*Commandite*) and Italy (*Accomandita*) in the 17th century.¹⁹ French businessmen introduced the entity to America during the French possession of Louisiana and Florida.²⁰ Original limited partnerships in Europe and America had a purpose and design different than that of today's limited partnerships.

Early limited partnerships were construed as trusts.²¹ Often, a general partner would have wealthy persons contribute to his enterprise. The investors enjoyed the possibility of profit but incurred no third party liability. These contributors then had a right to have their money managed by the general partner or entrepreneur.²² Therefore, early limited partners were, in fact, merely beneficiaries and construing them as partners was seen as a mistake: "[T]he person who is termed, in our system, the special [limited] partner, is not called a partner, at all, by jurists abroad. Neither is he a partner; and the [sic] considering him as such,

17 *Carden*, 58 U.S.L.W. at 4245.

18 *See supra* notes 4-5.

19 S. ROWLEY, *ROWLEY ON PARTNERSHIP* § 53.0, 550 (1960) [hereinafter ROWLEY]; F. TROUBAT, *THE LAW OF COMMANDATARY AND LIMITED PARTNERSHIP IN THE UNITED STATES* 34 (1853) [hereinafter TROUBAT].

20 ROWLEY, *supra* note 19, at 550.

21 TROUBAT, *supra* note 19, at 34.

22 *Id.* at 36.

from the name, may be, as it has been, productive of error, in the United States."²³ Others considered limited partners to be creditors of the general partner(s):

In this species of association, . . . the dominion and *jus formale* of the business vests in the general partner, who possesses the mastership, the exclusive and entire use of the *money* or *other property* intrusted to him, and of the business committed to his care; and the special [limited] partner is neither the master nor the joint possessor, but merely the *creditor* of the capital which he has contributed.²⁴

New York enacted the first state limited partnership provision in 1822.²⁵ The New York statute, as well as those passed by thirty other states, sought to create the limited liability necessary to make limited partnerships viable business alternatives.²⁶ The reason underlying such specific statutory provisions was the fear that, because limited partners shared in profits, they would become *de facto* general partners subject to unlimited personal liability.²⁷ This statutory limitation of liability was a significant and novel departure from the English and American common law of partnership.²⁸

The next step in the progression of limited partnership law was the drafting and presentation of the Uniform Limited Partnership Act (ULPA) in 1916.²⁹ When the ULPA was presented, limited partnerships were not safe investment alternatives because of the disparate treatment given to limited partnerships and limited partners under the various state statutes.³⁰ To this end, the ULPA contained seven features which protected limited partners.³¹ As early as half a century prior to the presentation of the ULPA, the Supreme Court of Connecticut set forth the policy which underlies limited partnership today:³²

²³ *Id.* at 35.

²⁴ *Id.* at 38 (emphasis in original).

²⁵ ROWLEY, *supra* note 19, at 550.

²⁶ *Id.*

²⁷ *Id.* See also UNIFORM LIMITED PARTNERSHIP ACT [hereinafter ULPA] § 1, official comment, 6 U.L.A. 561 (1916).

²⁸ Rowley, *supra* note 19, at 550. This law was considered a departure due to the fact that English and American common law did not recognize any *limited* partner or partnerships. See, e.g., Rowland v. Long, 45 Md. 439, 446 (1876):

[I]t is well settled, we think, that where two persons agree to carry on a trade or business for their mutual benefit, one to furnish the money and the other to perform certain labor and services, [Rowland and Long agreed to have only one of them be liable while the other only gave services to the entity] and each to share the profits to be derived from such trade or business, they become liable as partners to *third persons*, although in fact no partnership was contemplated by the parties themselves.

Id. (emphasis in original).

²⁹ See *supra* note 27.

³⁰ See ULPA, *supra* note 27, § 1, official comment. Because state courts misinterpreted specific state limited partnership acts, limited partners were not given limited liability and the investment was unsafe. To prevent such misinterpretation, there were two manifest assumptions behind the ULPA's presentation: 1) Public policy does not require that one who contributes capital to a business endeavor with limited or no control over the business should be placed in a position of personal liability; and 2) Persons in business should be able to bring in capital from outside investors with the ability to shield those investors from liability while remaining personally liable themselves. *Id.*

³¹ See ULPA, *supra* note 27, official comment.

³² The two most recent developments in limited partnerships have been the presentation of the REVISED UNIFORM LIMITED PARTNERSHIP ACT [hereinafter RULPA] in 1976 and 1985, see RULPA, 6

We find a clear general purpose and intent by the legislature to encourage trade by authorizing and permitting a capitalist to put his money into a partnership with general partners possessed of skill and business character only, without becoming a general partner or hazarding anything in the business except the capital originally subscribed.³³

Thus, the modern limited partner is little more than an investor, much like a corporate shareholder.³⁴

B. *Diversity—Historically*³⁵

When the delegates gathered in Philadelphia in 1787 to hammer out the provisions for a new constitution, the judicial power of the national government was of major concern. The absence of a strong, organized national judiciary was a weakness of the Articles of Confederation,³⁶ and all the proposals submitted to the convention provided for a national judicial system.³⁷ Only the comprehensive plan proposed by the State of Virginia, however, specifically conferred diversity jurisdiction by extending the power of the national judiciary to cases where "citizens of other States" were a party.³⁸ The Virginia plan received the bulk of the convention's attention. The convention, as a committee of the whole, considered Virginia's proposal for the federal judiciary.³⁹ While the language which emerged from the committee of the whole and went to the Committee of Detail vested diversity jurisdiction "to such other questions as may involve the national peace and harmony,"⁴⁰ it returned from the Committee as "controversies . . . between Citizens of different States, and between a State or the Citizens thereof and foreign States, citizens or

U.L.A. 220 (West Supp. 1989), as well as the birth of the Master Limited Partnership (MLP) business entity. See *infra* note 110 for a definition of a MLP. The RULPA was drafted to modernize the law of limited partnership. See RULPA prefatory note (1985). Structurally, RULPA clears up ambiguities in the ULPA and extends the powers of derivative actions to limited partners.

The original Tax Reform Act of 1986 was the impetus of the rise of the MLP. See Note, *Tax Reform 1986 Fuels the Rise of Master Limited Partnership*, 9 U. Bridgeport L. Rev. 217 (1988). The entity itself began in 1981. *Id.* at 218. Structurally, the MLP is a conglomerate of other partnerships. *Id.* It was originally used in the gas and oil industry; however, today the MLP is used in large real estate syndicates, shopping center developments and even in the procuring of shares of professional sports teams. *Id.* at 219.

33 Clapp v. Lacey, 35 Conn. 463, 466 (1868) (cited in ROWLEY, *supra* note 19, at 549).

34 See *infra* notes 104-09 and accompanying text.

35 For a more detailed treatment of this area, see Ball, *Revision of Federal Diversity Jurisdiction*, 28 ILL. L. REV. 356 (1933); Friendly, *The Historical Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483 (1928); Moore & Weckstein, *Diversity Jurisdiction: Past, Present and Future*, 43 TEX. L. REV. 1 (1964); Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1923).

36 THE FORMATION AND RATIFICATION OF THE CONSTITUTION: MAJOR HISTORICAL INTERPRETATIONS 149-51 (K. HALL, ed. 1987). See also M. FARRAND, THE FRAMING OF THE CONSTITUTION 50 (1913) ("There ought to be an organized federal judiciary which should have, in addition to that developed under the articles of confederation, jurisdiction in matters relating to foreigners or people of other states."); C. HUGHES, THE SUPREME COURT OF THE UNITED STATES 7-8 (1928) ("The experience under the Confederation amply demonstrated the necessity of defining and firmly establishing the Federal judicial power."); Moore & Weckstein, *supra* note 35, at 2.

37 Moore & Weckstein, *supra* note 35, at 2 n.3.

38 DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE AMERICAN STATES, (C. TANSILL, ed.), H.R. DOC. NO. 398, 69th Cong., 1st Sess. 955 (1927) [hereinafter DOCUMENTS]; Moore & Weckstein, *supra* note 35, at 2-3.

39 FARRAND, *supra* note 36, at 72.

40 *Id.* at 119; Moore & Weckstein, *supra* note 35, at 3.

subjects."⁴¹ Despite the extended debate that went into framing the diversity language, the revised language received little debate on the floor and was passed easily.⁴²

The framers believed diversity jurisdiction was necessary because they shared an over-arching concern that state courts dealt with citizens of other states unfairly.⁴³ However, public opinion at that time, as well as opinion today, has been mixed as to the desirability or even the necessity of federal diversity jurisdiction.⁴⁴

41 Farrand, *supra* note 36, at 155-56; Moore & Weckstein, *supra* note 35, at 3; DOCUMENTS, *supra* note 36, at 479.

42 FARRAND, *supra* note 36, at 155-56.

43 Bank of United States v. Deveaux, 9 U.S. (5 Cranch) 61, 87 (1809); F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT 8-9 (1928); L. LUSKY, BY WHAT RIGHT? 187 (1975); 2 SLATTERY, THE CONSTITUTION AND THE COURTS 133 (1906); Ball, *supra* note 35, at 357.

Chief Justice Marshall stated in *Deveaux*:

The judicial department was introduced into the American constitution under impressions, and with views, which are too apparent not to be perceived by all. However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states.

Deveaux, 9 U.S. (5 Cranch) at 87.

Madison said, "It may happen that a strong prejudice may arise in some states, against the citizens of others, who may have claims against them." 2 ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION 391 (1828) (cited in Ball, *supra* note 35, at 357).

These statements have also been construed as being indicative of a less than enthusiastic belief in the need for diversity. "The very form in which the argument is stated throws doubts on the sincerity of those propounding it. Madison does not point out any specific examples of prejudice, does not allege that any exist; Marshall even gives the innuendo that none do exist." Friendly, *supra* note 35, at 493.

No such doubts are readily apparent. The Constitution, by its very nature, was drafted with possibilities and fears in mind. The Framers were required to look to the future and predict its problems and the remedies therefor. To challenge the statements of Madison and Marshall because of a lack of "specific examples of prejudice," takes an unmerited academic approach to a pragmatic situation. Chief Justice Marshall was a part of the convention and knew of the debate surrounding the structure of the national judiciary and could very easily have sought to limit the clause through interpretation or even discredit it. Such was not done.

44 George Mason stated as one of his reasons for not signing the new Constitution:

The Judiciary of the United States is so construed and extended, as to absorb and destroy the judiciaries of the several States; thereby rendering laws as tedious, intricate and expensive, and justice as unattainable, by a great part of the community, as in England, and enabling the rich to oppress and ruin the poor.

2 M. FARRAND, RECORDS OF THE FEDERAL CONSTITUTION 638 (1911) (cited in Friendly, *supra* note 35, at 489).

Patrick Henry also prophesied doom:

I see arising out of that paper, a tribunal, that is to be recurred to in all cases, when the destruction of the state judiciaries shall happen; and from the extensive jurisdiction of those paramount courts, the state courts must soon be annihilated.

2 ELLIOT, *supra* note 41, at 397 (cited in Friendly, *supra* note 35, at 489).

Neither of these concerns is well-founded due to the concurrent nature of jurisdiction between states and the federal judiciary in diversity cases. Friendly, *supra* note 35, at 489.

However, while some advocate a limitation or even abolition of diversity, see Doub, *Time for Re-Evaluation: Shall We Curtail Diversity Jurisdiction?*, 46 A.B.A. J. 959 (1960); Rowe, *Abolishing Diversity Jurisdiction: The Silver Lining*, 66 A.B.A. J. 177 (1980), others argue for its retention, see Brown, *The Jurisdiction of the Federal Courts Based on Diversity of Citizenship*, 78 U. PA. L. REV. 179 (1929); Frank, *The Case for Diversity Jurisdiction*, 16 HARV. J. LEGIS. 403 (1979).

Congress specifically enacted provisions for diversity jurisdiction in the Judiciary Act of 1789⁴⁵ and narrowed the diversity language, pursuant to its constitutional power, to confer jurisdiction in cases where "an alien is a party, or the suit is between a citizen of the State where the suit is brought, and a citizen of another State."⁴⁶ This language tightened the power which the Convention had conferred on the national judiciary through the Constitution.⁴⁷

Originally, access to federal courts under diversity jurisdiction was a right reserved for individuals.⁴⁸ The Judiciary Act failed to define "citizen"⁴⁹ and the Supreme Court construed it narrowly, excluding entities such as corporations.⁵⁰ Half a century later, however, in *Marshall v. Baltimore & Ohio R.R. Co.*,⁵¹ the Court proclaimed a corporation to be a citizen of its state of incorporation.⁵²

45 The Judiciary Act of 1789, ch. 20, 1 Stat. 73 (1789) (currently codified at 28 U.S.C. § 1332 (1982)). See *infra* note 46.

46 *Id.* at 78. Congress has near plenary power to determine the jurisdictional power of district courts. See *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943) ("All federal courts, other than the Supreme Court, derive their jurisdiction wholly from the exercise of the authority to 'ordain and establish' inferior courts as conferred on Congress by Article III, § 1, of the Constitution").

47 Article III of the Constitution confers power on the federal judiciary in cases and controversies "between Citizens of different States."

The Judiciary Act of 1789 curtailed that jurisdiction to be given to citizens of states other than the state where the suit was brought.

Current codification under 28 U.S.C. § 1332 (1982) retains the original language of the Constitution and confers jurisdiction in cases between Citizens of different States.

The difference in the two provisions is striking. For example, under the Judiciary Act, a citizen of New York would not be diverse to a citizen of Florida unless the suit was brought in New York or Florida. Suit in any other state would destroy diversity status. Such a suit in any state would still be diverse under 28 U.S.C. § 1332.

48 See *Bank of United States v. Deveaux*, 9 U.S. (5 Cranch) 61 (1809) in which the Court stated: Aliens, or citizens of different states, are not less susceptible of these apprehensions [which lead to a desire for "national tribunals"], nor can they be supposed to be less the objects of constitutional provision, because they are allowed to sue by a corporate name. That name, indeed, cannot be an alien or a citizen; but the *persons* whom it represents may be the one or the other; and the controversy is, in fact and in law, *between those persons* suing in their corporate character, by their corporate name, for a corporate right, and the *individual* against whom the suit may be instituted.

Id. at 87 (emphasis added).

49 Warren, *supra* note 35, at 89.

50 *Deveaux*, 9 U.S. (5 Cranch) at 86. Corporations were theoretically barred from federal diversity jurisdiction early in our nation's history. The Supreme Court, in *Deveaux*, held that a corporation was a citizen of every state in which any person associated with the enterprise, including a shareholder, was a citizen. *Id.* See *supra* note 7 for evolution of the Court's theory on diversity jurisdiction as it applies to corporations.

51 57 U.S. 314 (1853). While *Marshall* is considered the seminal case granting corporate citizenship for diversity purposes, it was preceded by and gave meaning to two other Supreme Court rulings. See *Rundle v. Delaware and Raritan Canal Co.*, 55 U.S. (14 How.) 80 (1852); *Louisville, Cincinnati and Charleston R.R. Co. v. Letson*, 43 U.S. (2 How.) 497 (1844).

52 The *Marshall* Court did so by creating the fiction that every shareholder of a corporation would be presumed a citizen of the corporation's state of incorporation. *Marshall*, 57 U.S. at 329. The Court reasoned that while logic and syllogism may deprive parties of the use of federal court, practical realities militate toward a "corporate" citizenship. See *id.* at 327-29. Corporate citizenship in the state of incorporation and the state of the corporation's principal place of business was legislatively granted in 1956.

Such corporate "citizenship" is codified in 28 U.S.C. § 1332(c). Section 1332(c) states, in relevant part:

(c) For purposes of this section . . . , a corporation shall be deemed a citizen of any state by which it has been incorporated and of the state where it has its principal place of business. 28 U.S.C. § 1332(c) (1982).

While the general rule for diversity jurisdiction in cases involving an unincorporated association requires consideration of the citizenship of all the association's members,⁵³ the Supreme Court has followed an alternative approach on two occasions—*Puerto Rico v. Russell & Co.* and *Navarro Savings Association v. Lee*.⁵⁴ These two cases recognize the necessity of construing associations based on substance and not merely form. Federal courts have construed diversity jurisdiction, as it applies to limited partnerships, in two distinct ways.

II. Two Current Theories on Determining Citizenship of Limited Partnerships for Purposes of Diversity Jurisdiction and Its Unification Under *Carden v. Arkoma Associates*

A. Mandatory Consideration

As far back as 1889, the Supreme Court discussed how diversity jurisdiction should be construed with respect to unincorporated associations.⁵⁵ In *Chapman v. Barney*,⁵⁶ the Court held that a joint stock company was not a citizen of its state of formation but was a citizen of every state in which one of its members was a citizen.⁵⁷ *Chapman* was affirmed later in *Great Southern Fire Proof Hotel Co. v. Jones*,⁵⁸ where the Court held that a limited partnership association⁵⁹ was a citizen of all the states in which one of its partners was a citizen.⁶⁰ These two early cases are the precedential underpinnings of the current "mandatory consideration" rule for unincorporated associations.

More recently, the Court has followed the *Chapman* rule in *United Steelworkers of America, AFL-CIO v. R.H. Bouligny, Inc.*⁶¹ In *Bouligny*, the Court held that a labor union was a citizen of all the states in which any of its members were citizens.⁶² The Court made its ruling based solely on judicial restraint with no evaluation of the practical arguments raised by the union.⁶³

53 See *Chapman v. Barney*, 129 U.S. 677 (1889) (Court held that without averments of the citizenship of all the members of a joint stock company, there can be no diversity jurisdiction). See also *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U.S. 449 (1900).

54 See *infra* notes 71-77 and accompanying text for a discussion of *Puerto Rico v. Russell*, 288 U.S. 476 (1933) (corporate diversity citizenship statute held to apply to Puerto Rican business association with clear character of a corporation) and *Navarro Savings v. Lee*, 446 U.S. 458 (1980) (business trust held to be citizen of state of trustee alone).

55 An unincorporated association is a "voluntary group of persons, without a charter, formed by mutual consent for purpose of promoting common enterprise or prosecuting common objective." BLACK'S LAW DICTIONARY 1373 (5th Ed. 1979).

56 129 U.S. 677 (1889).

57 *Id.* at 682.

58 177 U.S. 449 (1900).

59 The limited partnership association of *Great Southern* is different from the modern limited partnership in that the *Great Southern* association had only one class of partners while the modern limited partnership has two. See *Elston Inv. Ltd. v. David Altman Leasing Corp.*, 731 F.2d 436, 438 n.2 (7th Cir. 1984).

60 *Great Southern*, 177 U.S. at 457-58.

61 382 U.S. 145 (1965).

62 *Id.*

63 *Id.* at 153. The Court said:

Whether unincorporated labor unions ought to be assimilated to the status of corporations for diversity purposes, how such citizenship is to be determined, and what if any related

The seminal case applying mandatory consideration to determine the citizenship of a limited partnership for diversity purposes is *Carlsberg Resources Corp. v. Cambria Savings & Loan Association*.⁶⁴ In *Carlsberg*, the Third Circuit considered *sua sponte* whether diversity existed between the plaintiff, a limited partnership with one general partner, and the defendant, a state savings and loan association. In dismissing the claim for want of jurisdiction and refusing to follow the real party in interest theory embodied in *Colonial Realty Corp. v. Bache & Co.*,⁶⁵ the court said, "[w]ithout instruction from the [Supreme] Court that an identity of citizenship between a limited partner and opposing litigants does not destroy diversity, we are most reluctant to carve out an exception to the complete diversity standard and the traditional treatment of partnerships with respect to diversity jurisdiction."⁶⁶ *Carlsberg* has become the hallmark of mandatory consideration theory and has been cited and commented on extensively.⁶⁷

The doctrinal basis for mandatory consideration is a logical syllogism based on strict definitional analysis. A limited partnership is an un-

rules ought to apply, are decisions which we believe suited to the legislative and not the judicial branch, regardless of our views as to the intrinsic merits of petitioner's argument.

Id. (emphasis added).

64 554 F.2d 1254 (3d Cir. 1977).

65 358 F.2d 178 (2d Cir.), *cert denied*, 385 U.S. 817 (1966). See *infra* notes 78-79 and accompanying text for a discussion of *Colonial*.

66 *Carlsberg*, 554 F.2d at 1261-62. The court found several points of concern as it refused to follow *Colonial*. First, the court was concerned with reliance on Federal Rule of Civil Procedure 17(b) dealing with real parties in interest. Rule 17(b) states that a federal court shall look to state law to determine whether a party has capacity to sue and be sued. The court said that such a use of the Federal Rules to arguably expand the jurisdiction of the district court would be somewhat violative of Federal Rule Civil Procedure 82. *Carlsberg*, 554 F.2d at 1261. Rule 82 states in relevant part: "These rules shall not be construed to extend or limit the jurisdiction of the . . . district courts." FED. R. CIV. P. 82.

Second, the court believed that such a reliance on state law would place federal diversity in the hands of state legislators. "Also troubling would be the prospect of disparate treatment of litigants whose ability to vindicate their interests in federal courts . . . would be . . . dependant upon state law." *Carlsberg*, 554 F.2d at 1261.

Third, the court was unable to follow *Colonial* due to the lack of guidance given by the Supreme Court in this area.

67 See *Stouffer Corp. v. Breckenridge*, 859 F.2d 75, 76-77 (8th Cir. 1988); *New York State Teachers Retirement Sys. v. Kalkus*, 764 F.2d 1015, 1018 (4th Cir. 1985); *Elston Inv., Ltd. v. David Altman Leasing Corp.*, 731 F.2d 436, 439 (7th Cir. 1984); *Trent Realty Assoc. v. First Fed. Sav. & Loan Assn.*, 657 F.2d 29, 32 (3d Cir. 1981).

The *Carlsberg* court noted the lack of commentary on the topic of diversity jurisdiction as it applies to limited partnerships. See *Carlsberg*, 554 F.2d at 1255 n.1. However, commentators have examined this area and more particularly the *Carlsberg* decision and not entirely with favor. See, e.g., Note, *Diversity Jurisdiction and Limited Partnerships*, 1977 B.Y.U. L. REV. 661; Comment, *Carlsberg Resources Corp. v. Cambria Savings and Loan Association: Diversity Jurisdiction and the Limited Partner*, 1978 DET. C.L. REV. 177; Comment, *Federal Courts—Diversity of Citizenship Jurisdiction—Limited Partnerships*, 16 DUQ. L. REV. 221 (1977-78); Comment, *Federal Civil Procedure—Diversity Jurisdiction*, 27 EMORY L.J. 165 (1978); Note, *Limited Partnerships in Diversity: The Effect of Rule 17(b) on Federal Jurisdiction*, 6 FORDHAM URB. L.J. 271 (1978); Note, *Diversity of Citizenship and the Limited Partnership: A "Real Party" Rule as Federal Common Law*, 71 IOWA L. REV. 235 (1985); Comment, *Carlsberg Resources v. Cambria Savings and Loan Ass'n: Limited Partners and Diversity Jurisdiction*, 13 TULSA L. REV. 304 (1977); Note, *Who are the Real Parties in Interest for Purposes of Determining Diversity Jurisdiction for Limited Partnerships?*, 61 WASH. U.L.Q. 1051 (1984).

incorporated association.⁶⁸ Mandatory consideration precedents deal with unincorporated associations.⁶⁹ Therefore, limited partnerships are subject to these precedents and are citizens, for diversity purposes, of every state in which any of their members are citizens. Mandatory consideration epitomizes "form over substance" reasoning. Today, this theory is followed by the Third, Fourth, Seventh and Eighth Circuits.⁷⁰

B. *Real Party in Interest*

Two Supreme Court cases indicate that, in certain circumstances, the mandatory consideration rule should not be used in favor of a more practical approach. *Puerto Rico v. Russell & Co.*⁷¹ involved Russell & Co., a Puerto Rican business association (*sociedad en comandita*), which the Territory of Puerto Rico sued for recovery of assessments to the company's lands. The Court held that the characteristics of the *sociedad en comandita* were so much like a corporation that it should be considered a corporation for diversity purposes.⁷² The Court reasoned that "[f]ictitious [as] that personality may be, in the sense that the fact that the corporation is composed of a plurality of individuals, themselves legal persons, is disregarded, but 'it is a fiction created by law with intent that it should be acted on as if true.'"⁷³

The Court dealt with an express business trust in *Navarro Savings Association v. Lee*.⁷⁴ In *Navarro*, a Massachusetts business trust lent \$850,000 to a Texas firm for a promissory note secured in part by the Navarro Savings Association. Navarro and the borrowing firm, as well as some of the beneficial owners, were Texas citizens. In determining whether diversity existed between the borrowing firm and the trust, the Court held that the citizenship of the trust was that of the trustee only. The citizenships of the beneficiaries were not considered.⁷⁵ The Court reasoned that since the beneficiaries were not liable and did not have capacity to sue, they should not be considered for diversity jurisdiction.⁷⁶ The Court stated that, "a federal court must disregard nominal or formal

68 Since the present alternatives are corporation or unincorporated association, the choice is simplistically easy. See *infra* note 115 for the distinction between limited partnerships and other unincorporated associations.

69 See *supra* notes 56-60 and accompanying text for a discussion of *Chapman* and *Great Southern Fire Proof Hotel Co.*

70 See *Stouffer Corp. v. Breckenridge*, 859 F.2d 75 (8th Cir. 1988); *New York State Teachers Retirement Sys. v. Kalkus*, 764 F.2d 1015 (4th Cir. 1985); *Elston Inv., Ltd. v. David Altman Leasing Corp.*, 731 F.2d 436 (7th Cir. 1984); *Trent Realty Assoc. v. First Fed. Sav. & Loan Assn.*, 657 F.2d 29 (3d Cir. 1981). Arguably this theory is also followed by the Ninth Circuit, see *Sage Investors v. Group W. Cable, Inc.*, 666 F. Supp. 186 (D. Ariz. 1986); *Windward City Center of Hawaii v. Transamerica Occidental Life Ins. Co.*, 613 F. Supp. 1216 (D. Haw. 1985).

71 288 U.S. 476 (1933).

72 Some of the corporate-like characteristics the Court cited were that the *sociedad* may purchase property, transact business, sue and be sued in its corporate name; its members do not have great personal interests in the entity's business; it is created by articles filed as public records; it endures beyond the withdrawal of some of its members; and management may be vested in those who participate with unlimited liability who may exclusively bind the entity. *Id.* at 481.

73 *Id.* at 479-80 (quoting *Klein v. Tax Supers.*, 282 U.S. 19, 24 (1926)).

74 446 U.S. 458 (1980).

75 *Id.*

76 *Id.*

[procedural] parties and rest jurisdiction only upon the citizenship of real parties to the controversy."⁷⁷

These two cases clearly show that the Supreme Court is not opposed to examining the substance of a given claim of jurisdiction. Other federal courts have shown similar acceptance of substance over form reasoning.

*Colonial Realty Corp. v. Bache & Co.*⁷⁸ was the first case to reach a federal court of appeals concerning limited partnerships and diversity. In *Colonial*, a Delaware corporation brought a diversity action against a New York limited partnership for negligently maintaining its securities margin account and for breach of contract. The court held that diversity of citizenship between Colonial Realty and the general partners of the limited partnership was sufficient to establish federal subject matter jurisdiction. The Second Circuit noted that New York's partnership law provided that a limited partner was "not a proper party to proceedings by or against the partnership."⁷⁹ This case is the precedential basis for the real party in interest analysis as it pertains to the citizenship of limited partnerships. *Russell, Navarro* and *Colonial* teach that mandatory consideration is not all-encompassing and can be set aside for a more practical approach.

Real party in interest analysis rests extensively on the legal and practical position of a limited partner as a passive contributor to the enterprise. It recognizes the limited partners' lack of capacity to control litigation, specifically, the lack of capacity to sue and be sued, as well as the limited partners' limited liability as to third parties. Today, the theory is followed by the Second and Fifth Circuits.⁸⁰

C. Carden v. Arkoma Associates' Unification

On February 27, 1990, the Supreme Court finally rectified the long-standing split between the circuits concerning the proper standard to apply to determine the citizenship of a limited partnership when determining diversity jurisdiction. In *Carden v. Arkoma Associates*,⁸¹ an Arizona limited partnership brought a contract action in diversity. Carden and Leonard Limes, Louisiana citizens, moved to dismiss because one of Arkoma's limited partners was a Louisiana citizen. The Eastern District

⁷⁷ *Id.* at 461.

⁷⁸ 358 F.2d 178 (2d Cir. 1966).

⁷⁹ *Id.* at 183 (citing N.Y. PARTNERSHIP LAW § 115 (McKinney 1988)).

⁸⁰ See *Carden v. Arkoma Assocs.*, 874 F.2d 226 (5th Cir. 1988), *rev'd*, 110 S.Ct. 1015 (1990); *Mesa Operating Ltd. Partnership v. Louisiana Intrastate Gas Corp.*, 797 F.2d 238 (5th Cir. 1986); *Colonial Realty Corp. v. Bache & Co.*, 358 F.2d 178 (2d Cir. 1966). Arguably this theory has support in the D.C. Circuit, see *Gordon-Maizel Constr. Co., Inc. v. Leroy Prod., Inc.*, 643 F. Supp. 188 (D.D.C. 1986) (holding real party in interest); *Conroy v. Winn*, 581 F. Supp. 1280 (D.D.C. 1984) (holding mandatory consideration); the Sixth Circuit, see *Bedill v. H.R.C Ltd.*, 522 F. Supp. 732 (D. Ky. 1981) (holding mandatory consideration); *Williams v. Sheraton Inns, Inc.*, 514 F. Supp. 22 (D. Tenn. 1980) (holding real party in interest); and the Tenth Circuit, see *Kansas Baptist Convention v. Mesa Operating Ltd. Partnership*, 703 F. Supp. 73 (D. Kan. 1989) (holding mandatory consideration); *Wroblewski v. Brucher*, 550 F. Supp. 742 (D. Okla. 1982) (holding real party in interest).

⁸¹ 58 U.S.L.W. 4243 (1990).

of Louisiana and the Fifth Circuit found diversity to be complete based on reference to the citizenship of Arkoma's general partners.⁸²

Justice Scalia, writing for the five-member majority, held fast to "the doctrinal wall of *Chapman v. Barney*"⁸³ and the mandatory consideration theory. In doing so, Scalia wrote, "[w]e adhere to our oft-repeated rule that diversity jurisdiction in a suit by or against the entity depends on the citizenship of 'all its members.'"⁸⁴

Justice O'Connor, writing for the four-member minority, based her opinion of a finding that "limited partners are not real parties to the controversy and, therefore, should not be counted for purposes of diversity jurisdiction."⁸⁵ O'Connor also points out that formal parties should not be used to obviate federal jurisdiction.⁸⁶ O'Connor then ties the case at bar to *Puerto Rico v. Russell & Co.*⁸⁷ In doing so, O'Connor takes the majority's premise that the *sociedad en comandita* was an "exotic creation of the civil law"⁸⁸ and answers that "it [the *sociedad*] is yet one of the many forms of the limited partnership descended from the ancient French *Societe* as is the modern limited partnership adopted in this country."⁸⁹ O'Connor concludes that treatment of a limited partnership as a non-entity in light of *Russell* "is justified neither by our precedents nor by historical and commercial realities."⁹⁰

Even Justice Scalia admitted that a congressional change might be in order. He stated:

The District Court there [*Boughligny*] had upheld removal because it could divine "no common sense reason for treating an unincorporated national labor union differently from a corporation," 382 U.S., at 146, and we recognized that that contention had "considerable merit," *id.*, at 150. We concluded, however, that "[w]hether unincorporated labor unions ought to be assimilated to the status of corporations for diversity purposes," *id.*, at 153, is "properly a matter for legislative consideration which cannot adequately or appropriately be dealt with by this Court," *id.*, at 147. In other words, having entered the field of diversity policy with regard to artificial entities once (and forcefully) in *Letson*, we have left further adjustments to be made by Congress."⁹¹

Therefore, Congress should see the limited partnership for what it is—a pseudo-corporation—the functional equivalent of a corporation for diversity purposes.⁹² Legislation to this end would relieve courts of the

82 *Id.*

83 *Carden*, 58 U.S.L.W. at 4244.

84 *Id.* at 4246 (quoting *Chapman v. Barney*, 129 U.S. 677, 622 (1889)).

85 *Id.* (O'Connor, J. dissenting).

86 *Id.* at 4247 (O'Connor, J. dissenting) (quoting *Wormley v. Wormley*, 21 U.S. (8 Wheat.) 421, 451 (1823)).

87 288 U.S. 476 (1933).

88 *Carden*, 58 U.S.L.W. at 4244 (quoting *United Steelworkers of America, AFL-CIO v. R.H. Boughligny, Inc.*, 382 U.S. 145, 151 (1965)).

89 *Carden*, 58 U.S.L.W. at 4249 (O'Connor, J. dissenting).

90 *Id.*

91 *Id.* at 4246.

92 Of course, it may be necessary for the federal courts to act first and have Congress follow their lead. See *supra* note 7 for the evolution of corporate diversity status.

constraints of the unmerited, simplistic reasoning underlying the mandatory consideration theory, and the need to search each case for a state law basis for applying the real party in interest theory. Such legislation would allow courts to honestly treat the limited partnership as the modern, sophisticated business entity which it is.

III. Limited Partnerships: Pseudo-Corporations

While the rules governing the determination of diversity of citizenship in federal courts are aimed at limiting federal courts' jurisdiction,⁹³ these rules should recognize the true structure of business entities in the modern business world.⁹⁴ The limited partnership in the United States is now a strong, viable alternative to the corporation. Furthermore, the volume of business and the sheer number of limited partnership interests have greatly increased in the last ten years.⁹⁵ Congress should therefore modify the diversity rules to recognize that a limited partnership, while not a corporation, is a hybrid form⁹⁶ of unincorporated business entity worthy of distinctive treatment for diversity purposes.

A. Filing Requirement

At the most basic level, a limited partnership is like a corporation in that it must file a certificate of limited partnership with the appropriate office in the state where the limited partnership is organized. This filing requirement is set forth in both the ULPA and the Revised Uniform Limited Partnership Act (RULPA).⁹⁷

93 See *supra* notes 4-5.

94 See *supra* note 7.

95 Originally, limited partnerships in the United States were used in real estate as well as oil and gas ventures. Limited partnerships today, however, are used in areas ranging from these traditional areas to research and development, equipment leasing, racehorse ownership and motion pictures. See generally G. HAIGHT, *THE NEW LIMITED PARTNERSHIP INVESTMENT ADVISOR: A GUIDE TO SUPERIOR RETURNS THROUGH TODAY'S LIMITED PARTNERSHIPS* (1987) [hereinafter *SUPERIOR RETURNS*].

The financial scope of limited partnerships has also grown in this decade due, in part, to the expanded use of MLPs. Predictions indicated that 1988 would be the first year of decline in the sale of limited partnership interests since 1975. *Partnership Sales Surge Seen Ending*, 165 J. OF ACCT. 18 (Apr. 1988). Sales in 1987 reached \$13.5 billion with MLPs accounting for \$2.9 billion themselves. *Id.* Forbes reported that according to *The Stanger Report*, "the bible of tax shelters," there had been \$11 billion in MLP interests sold to the public since 1981. Rudnitsky, *Old Vinegar in New Bottles*, 138 FORBES, Oct. 20, 1986, at 36.

As far as membership, a table from Barrons in 1985 listed five MLPs that were currently operating. Those five had total limited partnership units of 281,142,021. Tell, *Hottest Thing in Oil: A Look at Master Limited Partnerships*, 65 BARRONS, Oct. 7, 1985, at 20. See also Barker, *Another Part of the Forest: A Fresh Growth of Limited Partnerships*, 66 BARRONS, Jan. 23, 1986, at 13 (discussing ITT's initial public offering of five million limited partnership units that immediately began trading on the New York Stock Exchange).

Further, partnership interests have begun their own over-the-counter market similar to NASDAQ. National Partnership Exchange or NApEX is a service based in St. Petersburg, Florida that matches partnership sellers with partnership buyers. See generally Vinocur, *The Market of Secondhand Partnership Shares*, 67 BARRONS, Feb. 23, 1987, at 66.

96 See *Mesa*, 797 F.2d at 240 ("A limited partnership is also neither corporation nor association but a similar hybrid." [Analogizing to *Navarro Savings Ass'n v. Lee*, 446 U.S. 485 (1980)]).

97 See ULPA, *supra* note 27, § 2; RULPA, *supra* note 32, § 201.

Initially, this formality would seem to be insignificant. However, filing is the *means by which a limited partnership comes into existence*.⁹⁸ Courts will not declare an entity a *de facto* limited partnership based on the decision of one or more of the partners to not participate in the management or control of the partnership's business.⁹⁹ Like a corporation that is given its existence by statute, a limited partnership is a creature of legislative enactment.¹⁰⁰

Further, under the ULPA, the certificate of limited partnership that must be sworn out includes, among other things, the amount and character of property contributed by each limited partner.¹⁰¹ This provision is similar to the requirement that a corporation's capital structure be included in its Articles of Incorporation.¹⁰²

This filing provision, while seemingly only procedural, "creates" a limited partnership in the same way Articles of Incorporation "create" a corporation. A limited partnership is a creature of legislative enactment while a general partnership is a creature of personal acquiescence.¹⁰³

98 This is unlike a general partnership which is a consensual relationship that can come into existence without any filing or even a written partnership agreement. See *In re Wolsky*, 53 B.R. 751 (D.N.D. 1985); *In re Toomey*, 34 B.R. 35 (S.D. Fla. 1983).

99 Under the ULPA, filing is a condition precedent to the creation of any limited partnership. See, e.g., *Grenada Bank v. Willey*, 705 F.2d 176 (6th Cir.), cert. denied, 464 U.S. 849 (1983) (Tennessee Law); *Heritage Hills v. Zion's First Nat'l Bank*, 601 F.2d 1023 (9th Cir. 1979) (Arizona Law); *Peerless Mills, Inc. v. American Tel. & Tel. Co.*, 527 F.2d 445 (7th Cir. 1975) (New York Law); *Files v. United States*, 352 F.2d 339 (4th Cir. 1965) (Maryland Law); *United States v. Coson*, 286 F.2d 453 (9th Cir. 1961) (Nevada Law); *Bergeson v. Life Ins. Corp. of America*, 265 F.2d 227 (10th Cir.), cert. denied, 360 U.S. 932 (1959) (Utah Law); *Direct Mail Specialist, Inc. v. Brown*, 673 F. Supp. 1540 (D. Mont. 1987); *In re Westover Hills Ltd.*, 46 B.R. 300 (D. Wyo. 1985); *Ruth v. Crane*, 392 F. Supp. 724 (E.D.Pa. 1975), aff'd, 564 F.2d 90 (3d Cir. 1977); *Franklin v. Rigg*, 143 Ga. App. 60, 237 S.E.2d 526 (1977); *Inland Real Estate Corp. v. Christoph*, 107 Ill. App.3d 183, 437 N.E.2d 658 (1981); *Atlanta Stove Works v. Keel*, 255 N.C. 421, 121 S.E.2d 607 (1961); *Voudouris v. Walter E. Heller & Co.*, 560 S.W.2d 202 (Tex. Civ. App. 1977); *Wisniewski v. Johnson*, 233 Va. 141, 286 S.E.2d 223 (1982); *Dwinell's Cent. Neon v. Cosmopolitan Chinook Hotel*, 21 Wash. App. 929, 587 P.2d 191 (1977). The RULPA specifically provides that filing of a Certificate of Limited Partnership is necessary to form a limited partnership. See RULPA, *supra* note 32, § 201.

100 See REVISED MODEL BUSINESS CORPORATION ACT [hereinafter RMBCA] §§ 2.01, 2.03 (1984); DEL. CODE ANN. tit. 8, § 101 (1983). This is unlike general partnerships which are merely governed by state law and do not owe their existence to state law. See UNIFORM PARTNERSHIP ACT [hereinafter UPA] § 6(1), 6 U.L.A. 1, 22 (1914). "A partnership is an association of two or more persons to carry on as co-owners a business for profit." *Id.* (emphasis added). Conversely, limited partnerships must conform to state law to exist, see ULPA, *supra* note 27, § 1; RULPA, *supra* note 32, § 201, and are then also governed by state law.

101 See ULPA, *supra* note 27, § 2.

102 The analogy goes further in that the Delaware Corporation statute requires delineation, like the ULPA, of the capital structure of the respective entities. Compare ULPA, *supra* note 27, § 2 with DEL. CODE ANN. tit. 8, § 102 (1988). The newer statutes, such as the RMBCA and the RULPA, create a more streamlined approach to registration by omitting the capital structure. Compare RULPA, *supra* note 32, § 201 with RMBCA § 2.02.

103 Simply stated, this comparison can be seen by the statutory definitions of these two business entities. A general partnership is "an association of two or more persons to carry on as co-owners a business for profit." UPA, *supra* note 100, § 6. Conversely, a limited partnership is "a partnership formed by two or more persons under the provisions of Section 2, having as members one or more general partners and one or more limited partners." ULPA, *supra* note 27, § 1 (emphasis added). The RULPA also adds the statutory obligation to the definition. See RULPA, *supra* note 32, § 101(7).

B. *Passivity—Lack of Control of the Business*

Another characteristic which both limited partnerships and corporations have is the investor's lack of participation in the conduct of the business. From the early stages of development of the limited partnership entity, a limited partner was considered merely an investor.¹⁰⁴ Today, in the same manner, a limited partner is not brought on board for his business expertise or savvy, but is brought on to give the partnership capital in the form of cash, property or services.¹⁰⁵

A limited partner is not given a choice of whether to be involved in the management of the business.¹⁰⁶ The essence and benefit of being a *limited* partner is the *limited* liability that accompanies such a position. As stated in the ULPA, "[a] limited partner shall not become liable as a general partner unless . . . he takes part in the control of the business."¹⁰⁷ The RULPA has an analogous provision.¹⁰⁸

The restriction against participation in the workings of the business is even more restrictive than that placed on a shareholder of a corporation. A shareholder can be an officer or director of a corporation or both. Often, directors *must* hold shares in the corporation.¹⁰⁹ General partners, on the other hand, have no legal or practical restrictions on their business activities. This business participation restriction makes a limited partner analogous to a corporate stockholder and thereby tightens the analogy between limited partnerships and corporations.

C. *Security Status—MLPs*

One of the most compelling reasons for recognizing a limited partnership as a pseudo-corporation is the status of limited partnership interests as securities under federal securities law. Associated with this status is the evolution of the publicly traded master limited partnership (MLP).¹¹⁰

104 See *supra* notes 19-34 and accompanying text for a discussion of the history of limited partnerships.

105 See RULPA, *supra* note 32, § 101(2).

106 See ULPA, *supra* note 27, § 7; RULPA, *supra* note 32, § 303. It is true that a limited partner can also be a general partner. However, his/her involvement in the business is in the capacity of a general partner and not a limited partner. See ULPA, *supra* note 27, § 12.

107 ULPA, *supra* note 27, § 7. See, e.g., *Kellis v. Ring*, 92 Cal. App.3d 854, 155 Cal. Rptr. 297 (1979); *In re Estate of Hall*, 517 Pa. 115, 535 A.2d 47 (1987).

108 RULPA, *supra* note 32, § 303.

109 In a practical sense, ownership of, or at least connection with, stock in a corporation is *necessary* to be elected to the board of directors. This is due to the fact that voting for corporate directors is based on ownership of shares of stock.

110 A master limited partnership (MLP) is a conglomerate of limited partnerships. See *supra* note 8 for the definition of a limited partnership. A master limited partnership can be formed in three ways: roll-up, roll-in, roll-out.

A roll-up MLP "raises capital through the issuance of securities (master limited partnership units) and uses these funds to acquire the interests of several smaller limited partnerships." *SUPERIOR RETURNS*, *supra* note 95, at 7. This organization is used primarily in the oil and gas industry. *Id.*

A roll-in MLP "uses proceeds from primary offerings to purchase new or additional investment assets themselves rather than limited partnership interest." *Id.* This organization uses the market as a funding source and is greatly analogous to a syndicate situation. *Id.*

A roll-out MLP "is similar to a corporate divestiture." *Id.* This organization is used to spin off divisions of corporations. A corporation will set up a MLP and then sell a division's assets to the MLP. *Id.*

A limited partnership interest is an investment contract "security" as defined by the Supreme Court in *SEC v. Howey*.¹¹¹ Conversely, general partnership interests are not usually considered securities.¹¹² Therefore, the two interests are distinct and unique. A general partner is an integral part of the business and his interest does not meet the investment/non-participation requirements of the investment contract analysis. Conversely, a limited partner is merely a source of capital like a corporate shareholder and his interest does meet the *Howey* investment contract definition.

On a deeper level, the 1980s spawned the growth of the MLP and the public trading of limited partnership interests.¹¹³ Further, an extensive, national public market for partnership interests, including national exchange trading has been created.¹¹⁴ With these recent developments, the limited partnership has emerged as *the* new business enterprise and should be seen as a unique business entity for diversity purposes rather than being grouped under the generic category of "unincorporated association."¹¹⁵

D. *Lack of Capacity to Sue and Be Sued—Derivative Actions*

Under the ULPA, limited partners do not have capacity to sue or be sued on behalf of the partnership.¹¹⁶ This restriction is expressly provided in the ULPA and can be inferred from the RULPA provision that limited partners are not liable for the debts of the partnership.¹¹⁷

The RULPA goes a step further and allows limited partners to initiate derivative claims on behalf of the partnership.¹¹⁸ The RULPA's grant

111 328 U.S. 293 (1946). As set out in *Howey*, an investment contract is a "security" when there is an "invest[ment] [of] money in a common enterprise with the expectation [of] a profit solely through the efforts . . . of some one other than themselves." *Id.* at 298-99. Limited partners fit nicely into this definition in that they invest money with the general partner(s) in an enterprise common to all. Limited partners expect profits, and any generation of profits is made by the general partners' running of the business. See, e.g., *Bosco v. Serhant*, 836 F.2d 271 (7th Cir. 1987), *cert. denied sub nom. Baranski v. Chicago Mercantile Exch.*, 108 S.Ct. 2824 (1988); *Luce v. Edelstein*, 802 F.2d 49 (2d Cir. 1986).

112 *Williamson v. Tucker*, 645 F.2d 404, 423-24 (5th Cir.), *cert. denied*, 454 U.S. 897 (1981) (court held that where one retains control over investment there is not the reliance on others required under *Howey* and its progeny).

113 See generally Vinocur, *Master Partnerships, REITs Both Gain From Tax Reform*, 66 BARRONS, Oct. 26, 1988, at 78; Schiffres, *Real-estate Deals That Still Work*, 101 U.S. NEWS & WORLD REPT., Sept. 27, 1988, at 59; Sonenclar, *To Catch a Rising Star*, 155 FINANCIAL WORLD, June 24, 1986, at 46. See *supra* note 110.

114 See *supra* note 110.

115 The key difference between the limited partnership and other unincorporated associations (general partnership, labor union, joint stock company) is the class structure involved. Limited partnerships have two classes of partners, general and limited. Each of these classes have distinct duties and liabilities. The others have only one class of members. All members of the other associations have analogous duties and liabilities and therefore stand apart from the hierarchy of the limited partnership. This hierarchy is greatly similar to the corporation/shareholder hierarchy.

116 This is the basis for the real party in interest theory. See *supra* notes 71-80 and accompanying text. See also note 66 for a discussion of Fed. R. Civ. P. 17(b) and real party analysis as it relates to procedural rules.

117 See ULPA, *supra* note 27, § 26; RULPA, *supra* note 32, § 303.

118 See RULPA, *supra* note 32, §§ 1001-1004. General partners have no such right in a general partnership due to the aggregate nature of the association. See UPA, *supra* note 100, commissioner's prefatory note. This creates the logical impossibility of a general partner having to sue himself so as to sue the partnership as a whole, due to the joint and several liability of general partners. See UPA,

of derivative power of limited partners is greatly similar to the Revised Model Business Corporation Act's provisions for shareholder derivative proceedings.¹¹⁹

Thus, in this particular legal area, the posture of a limited partner is identical to a corporate shareholder. Neither have capacity to sue or be sued by third party creditors, and both have capacity to sue on behalf of their respective organization derivatively. Again, the limited partnership resembles a corporation more than any other unincorporated associations.

Based on these common threads, there is a strong basis in law for calling a limited partnership a pseudo-corporation and granting it a status for diversity purposes that is comparable to a corporation's status.

IV. Diversity Determination Based on State of Organization and Principal Place of Business—Policy Considerations

This Note argues that, for purposes of diversity jurisdiction, a limited partnership is a pseudo-corporation and should be viewed as the functional equivalent of a corporation in determining its citizenship. Thus, as an "entity," a limited partnership's citizenship should be determined by its state of organization and its principal place of business.¹²⁰ The supporting and countervailing policy concerns surrounding the adoption of such a rule are considered below.

A. Supporting Policy Considerations

As argued above, today's limited partnership is, to a great extent, analogous to a corporation.¹²¹ Given the modern status of the limited partnership as a business entity, Congress should give it a unique posture in determining diversity jurisdiction.¹²² This argument is not intended to suggest that a limited partnership is a corporation. There certainly are differences. However, between the extremes of corporations on the one side and the generic category of unincorporated associations on the other, the practical status of limited partnerships falls nearer the corporate end of the spectrum.¹²³ Like corporations, limited partnerships are groupings of people. Such groupings, however, should not be "labeled" according to considerations of mere form with no consider-

¹¹⁹ *supra* note 100, § 15. *Cf. Sertich v. Moorman*, 159 Ariz. 311, 767 P.2d 34 (1988). Further, a partner cannot sue for the partnership individually due to the prohibition of a partner having authority to submit a partnership claim to arbitration or reference. *See UPA, supra* note 100, § 9.

¹¹⁹ *See* RMBCA § 7.40. This limited partners' right to bring derivative claims against the limited partnership itself creates an "entity" definition for a limited partnership. This is contrary to the unincorporated association "aggregate" theory.

¹²⁰ One way of achieving this end would be the addition of 28 U.S.C. § 1332(e) which could read: (e) *For purposes of this section and section 1441 of this title, a limited partnership, filed and existing in compliance with applicable state law, shall be deemed a citizen of its state of organization and the state of its principal place of business.*

¹²¹ *See supra* notes 93-120 and accompanying text.

¹²² Of course, when discussing the possible prejudice to limited partnerships in not allowing them access to federal court, there is a possible commensurate prejudice to parties seeking adjudication against a limited partnership.

¹²³ *See supra* note 115 for discussion of the distinction between limited partnerships and other unincorporated associations.

ation of substance, as corporations were historically classified.¹²⁴ When viewed practically, and not on the basis of academic definitions, the true corporate-like nature of limited partnerships is obvious.

Further, with the advent of MLPs, limited partnerships can now be conglomerates with hundreds of limited partners.¹²⁵ While many limited partnerships of expanded size are national in concern, they are effectively barred from a national forum to adjudicate their causes.¹²⁶

The same evolution that took place with corporations,¹²⁷ has taken place with limited partnerships. There has been confusion in the courts; there has been strict definitional analysis. The final step in the evolution toward a more appropriate treatment of limited partnership diversity is for Congress to recognize the national scope of limited partnerships, their evolved similarities with corporations and legislate that a limited partnership's citizenship for diversity jurisdictional purposes is its state of organization and its principal place of business.

In a practical sense, limited partners are not a factor in a limited partnership's business relationships. Limited partners do not take part in control of the business and third parties are rarely exposed to these people.¹²⁸ Instead, third parties deal almost exclusively with general partners. Thus, it is reasonable for third parties to rely on their relationships with general partners because they know limited partners are not liable to them, absent extraordinary circumstances.¹²⁹ Accordingly, the ULPA specifically provides that limited partners are not proper parties in an action by or against the limited partnership.¹³⁰ *A fortiori* they should not be considered when determining diversity.

Due to this exclusive reliance on general partners, third parties would not be prejudiced if limited partners were not considered in determining the limited partnership's citizenship for diversity purposes. Most large limited partnerships have relatively few general partners and those parties do not change.¹³¹ Therefore, their identity is readily ascertainable. Conversely, the identity of limited partners, especially in large MLPs, is not as readily ascertainable.¹³² This places a third party in a

124 See *supra* note 7.

125 See *supra* note 95. See *infra* note 126.

126 The more national in membership a limited partnership becomes, the more it should be allowed access to the federal courts due to the national nature of its membership. The ironic twist of this, however, is that as a limited partnership's membership grows the very forum that should be opened to it is closed due to the current tests for a limited partnership's citizenship.

127 See *supra* note 7.

128 RULPA, *supra* note 32, § 303 gives a list of activities in which limited partners can engage without being considered as having taken part in control of the business. Although a limited partner may act as an agent for the limited partnership, *Id.* at § 303(b)(1), a limited partner's name may not be used to induce belief on the part of third parties that a limited partner is a general partner. *Id.* at §§ 303(d), 102(2).

129 Such extraordinary circumstances would include a limited partner taking part in control of the limited partnership's business. ULPA, *supra* note 27, § 7; RULPA, *supra* note 32, § 303.

130 See ULPA, *supra* note 27, § 26.

131 Absent a right to do so granted in the certificate of limited partnership, any change in general partners triggers a dissolution of the limited partnership. ULPA, *supra* note 27, § 20; RULPA, *supra* note 32, § 801.

132 See *Mesa Operating Ltd. Partnership v. Louisiana Intrastate Gas*, 797 F.2d 238, 243 n.2 (5th Cir. 1986).

position of not knowing with whom he is dealing and makes the use of limited partners' citizenships prejudicial.¹³³ This makes reliance on limited partners' citizenships, in a practical effect, more prejudicial to third parties.

B. Countervailing Policy Considerations

In rebuttal to the policy considerations supporting reform of limited partnership diversity rules, the Supreme Court has clearly stated: "[w]e have never held that an artificial entity, suing or being in its own name, can invoke the diversity jurisdiction of the federal courts based on the citizenship of some but not all of its members."¹³⁴

While this "bright line" approach creates a simple test for courts to administer, it has not been uniformly followed.¹³⁵ Moreover, it does not recognize the pragmatic differences between a limited partnership and other unincorporated associations.¹³⁶

Probably the most recognized form of unincorporated association is a labor union. The Supreme Court dealt with the question of the citizenship of a national union for diversity purposes in *United Steelworkers of America, AFL-CIO v. R.H. Bouligny, Inc.*¹³⁷ The Court held that the citizenships of all the union members would determine whether diversity existed. However, the Court's reasoning in this case, like its reasoning in other unincorporated association cases, is distinguishable. A trade union, like other unincorporated associations, is comprised of a single class of members with identical rights and liabilities. A limited partnership has two classes of members with unique rights and liabilities.¹³⁸ A national trade union and a limited partnership are not business entities that fit neatly under a single title like "unincorporated association."¹³⁹ Their class structure distinction creates problems in applying diversity. The limited partner/corporate shareholder analogy makes the limited partnership too unique to group it with other unincorporated associations for diversity purposes. Furthermore, the analogy is too strong to simply ignore.

The generic category of unincorporated association, while still befitting such single class entities as unions, general partnerships and joint

133 *Id.* ("[D]etermination of citizenship [based on general partners alone] would be both faster and easier than a process of matching up long lists of members whose addresses may not even be correctly carried on the partnership's books as of the date of filing.") A determination of citizenship based on state of organization and principal place of business would make the determination even easier.

134 *Carden v. Arkoma Assocs.*, 58 U.S.L.W. 4243, 4245 (1990).

135 *See, e.g., Navarro Savings & Loan Ass'n v. Lee*, 446 U.S. 458 (1980); *Puerto Rico v. Russell & Co.*, 288 U.S. 476 (1933).

136 *See supra* note 115 for a discussion of the difference between limited partnerships and other unincorporated associations.

137 382 U.S. 145 (1965). *See supra* notes 61-63 and accompanying text for a discussion of *Bouligny*.

138 For example, a trade union has only one class of members. The entity itself creates only the single class. The factual participation of any individual member has no bearing on the rights and liabilities of those members concerning the association. Conversely, limited partnerships are structurally two class entities. Two kinds of partners derive from the very nature of the entity.

139 *See supra* note 115 for a discussion of the difference between limited partnerships and other unincorporated associations.

stock companies, is not appropriate for modern, national-scope, dual class, limited partnerships when determining diversity jurisdiction.

Few would argue that the federal courts are not swamped with litigation.¹⁴⁰ Therefore, one objection to any jurisdictional reform which might add to an already crowded federal docket is that state courts are perfectly capable of handling cases involving limited partnerships and litigating those cases in state court keeps the federal dockets clear. In discussing this policy consideration in *Carden*, Justice O'Connor stated, "[t]his concern is more illusory than real in the context of unincorporated business associations."¹⁴¹ Further, diversity reform would in no way preclude recourse to state courts. In fact, one of the reasons the framers provided for diversity jurisdiction in federal courts was that the state courts retained concurrent jurisdiction.¹⁴²

As stated, the limited partnership of today can be an economic force of national scope.¹⁴³ If limited partnerships are prevented from seeking adjudication in national courts,¹⁴⁴ the possibility of local prejudice that was the original basis for diversity jurisdiction¹⁴⁵ has the opportunity to rear its ugly head. State judiciaries are procedurally unique unto themselves and could provide local parties an unfair advantage by forcing a national-scope limited partnership to litigate in the local concern's home forum. It is more realistic to allow a potentially national concern like a limited partnership to have access to federal courts, with their more uniform procedures as embodied in the Federal Rules of Civil Procedure and Evidence.

Conclusion

Limited partnerships are viable investment alternatives with a national character that sets them apart from all other "unincorporated associations." Congress should provide these pseudo-corporations, as well as those seeking to litigate against them, with realistic guidelines for determining diversity jurisdiction. Without Congress providing the federal judiciary with sufficient jurisdictional power to meet the dictates of a new society, the federal courts will mire themselves in the edicts of the past and become less and less effective regarding issues related to limited partnerships in the United States.

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¹⁴⁰ For articles dealing more specifically with this topic, see, e.g., Edwards, *The Rising Work Load and Perceived "Bureaucracy" of the Federal Courts: A Causation-Based Approach to the Search for Appropriate Remedies*, 68 IOWA L. REV. 871 (1983); Levit, *The Caseload Conundrum, Constitutional Restraint and the Manipulation of Jurisdiction*, 64 NOTRE DAME L. REV. 321 (1989); Mills, *Caseload Explosion: The Appellate Response*, 16 J. MARSHALL L. REV. 1 (1982).

¹⁴¹ *Carden v. Arkoma Assocs.*, 58 U.S.L.W. 4243, 4249 (1990) (O'Connor, J. dissenting).

¹⁴² See *supra* note 44.

¹⁴³ See *supra* note 95.

¹⁴⁴ See *supra* note 126.

¹⁴⁵ See *supra* note 43.

* The author wishes to dedicate this Note and his legal career to his mother, MARGARET L. PORTER (1933-1989). She embodied the Christian virtues of Love and Compassion. She taught all around her the necessity of giving and caring from within to have true joy in one's life. Thanks be to God for her time with us and for His divine grace as she rests from her labors.