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II. Diversity Jurisdiction

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II. DIVERSITY JURISDICTION*

Federal courts are courts of limited jurisdiction and have only that power authorized by Article III of the Constitution and statutes enacted by Congress pursuant thereto.¹ Several consequences arise from this "limited" nature of federal court jurisdiction. For example, parties cannot create jurisdiction by agreement² nor waive the lack of federal subject matter jurisdiction.³ Either party or the court may raise the lack of jurisdiction at any time in the case,⁴ and there is a presumption *against* federal jurisdiction.⁵ Nevertheless, a party's cause may be best served in a federal forum. Therefore, attorneys have a duty to clearly understand the elements necessary to establish federal jurisdiction. Along with that duty is the responsibility to follow developments that arise in the area of federal jurisdiction. The purpose of this article is to apprise attorneys of the key recent developments in one particular area of federal justification: diversity jurisdiction.

The most common explanation for the creation of diversity jurisdiction is that it grew out of a fear that state courts would be prejudiced against out-of-state parties.⁶ However, many commentators argue that with advancements in travel and

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1. *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 534 (1986); *see* U.S. CONST. art. III, § 2, cl. 1.

2. *See Mitchell v. Maurer*, 293 U.S. 237, 244 (1934).

3. *See* FED. R. CIV. P. 12(h)(3); *Ins. Corp. of Ir. v. Compagnie des Bauxites du Guinee*, 456 U.S. 694, 702 (1982).

4. FED. R. CIV. P. 12(h)(3).

5. *See China Basin Props., Ltd. v. Allendale Mut. Ins. Co.*, 818 F. Supp. 1301, 1303 (N.D. Cal. 1992).

6. For further discussion on the history and purpose of diversity jurisdiction, *see* John P. Frank, *Historical Bases of the Federal Judicial System*, 13 LAW & CONTEMP. PROBS. 3 (1948).

communication, this fear is no longer justified.⁷ Although Congress has rejected the complete abolishment of diversity jurisdiction, it recognizes the need to restrict federal jurisdiction when local bias does not exist.⁸ In addition, Congress generally favors restricting diversity jurisdiction out of its concern for the rising caseload of the federal courts.⁹

This article will discuss a number of recent opinions involving diversity jurisdiction, focusing on the federal courts' continuing adherence to Congress's intent to restrict a party's access to federal court. Many of the recent developments in the area of diversity jurisdiction stem from the onset of globalization. Section A focuses on developments in the area of alienage jurisdiction. As modern commerce has become increasingly international, courts have seen an increase in the number of foreign citizens permanently residing in the United States as well as U.S. citizens living abroad. Section B focuses on establishing the citizenship of entities, particularly those not explicitly addressed by Congress. Today's business entities are significantly different than those of the past, in both their complex organization and their global presence. As a result, courts have had to interpret jurisdictional principles in light of new realities. Not surprisingly, circuits have reached inconsistent conclusions, giving rise to splits of authority. Section C discusses recent developments

7. *See id.*

8. In its 1958 legislation concerning corporate citizenship, Congress appropriately restricted diversity jurisdiction, after recognizing that locally present corporations were invoking diversity jurisdiction against other local citizens based on a corporate charter from another state. *See* S. REP. NO. 85-1830, at 4 (1958), *reprinted in* 1958 U.S.C.C.A.N. 3099, 3102-03.

9. *See Snyder v. Harris*, 394 U.S. 332, 339-40 (1969) ("[Congress's] purpose [for increasing the amount in controversy requirement] was to check, to some degree, the rising caseload of the federal courts, especially with regard to the federal courts' diversity of citizenship jurisdiction."). In some areas, however, Congress has recently *expanded* diversity jurisdiction and may do so again soon. For example, Multiparty, Multiforum Jurisdiction, which became effective in 2002, provides for federal jurisdiction for litigation arising out of a single accident in which at least seventy-five persons died. 28 U.S.C.A. § 1369 (Supp. 2004). Moreover, the statute adopts the requirement of only "minimal diversity." *Id.* In addition, the proposed Class Action Fairness Act of 2003 would expand federal court jurisdiction over multistate class actions. For further discussion on the Class Action Fairness Act, see *infra* Part VI.D.2.

in the amount in controversy requirement. It focuses on clarifying the aggregation rules regarding punitive damages and attorney's fees. Section D offers a brief conclusion.

A. Alienage Jurisdiction

Section 1332 explicitly allows for district court original jurisdiction over controversies between:

- (1) citizens of different States;
- (2) citizens of a State and citizens or subjects of a foreign state;
- (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
- (4) a foreign state . . . as plaintiff and citizens of a State or of different States.¹⁰

While the first category involves interstate diversity cases, the second and third involve what is known as "alienage jurisdiction."

1. Permanent-resident-alien amendment to § 1332

In recent years, the nature of both business and individual activity has expanded across national borders, leading courts to address various new issues regarding alienage jurisdiction. In 1988, for example, Congress amended § 1332(a), providing that "an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled."¹¹ Thus, if a Texas citizen sues a foreign citizen who is a permanent resident alien domiciled in Texas, diversity jurisdiction will not exist. Because both parties arguably have ties to Texas, there is no longer a need to protect the foreign citizen against any bias in state court litigation.¹² Clearly, the legislature intended to restrict diversity

10. 28 U.S.C. § 1332(a) (2000). In addition, the controversy must "exceed[] the sum or value of \$75,000, exclusive of interest and costs." *Id.*

11. *Id.* Note that the 1988 amendment only applies to aliens who have received permission from the Immigration and Naturalization Service to remain permanently in this country. See *Foy v. Schantz, Schatzman & Aaronson, P.A.*, 108 F.3d 1347 (11th Cir. 1997) (refusing to invoke the permanent resident alien provision in a case involving an alien who merely intended to reside in the United States permanently).

12. See *Karazanos v. Madison Two Assocs.*, 147 F.3d 624, 627 (7th Cir. 1998) (suggesting that the amendment eliminates the ability of permanent resident aliens to invoke diversity jurisdiction when the case is "more properly

jurisdiction in actions between U.S. citizens and permanent resident aliens. Nevertheless, the amendment creates the possibility for expanded federal jurisdiction.

One instance that could involve the expansion of jurisdiction is a suit solely between aliens. For example, does the amended statute create federal jurisdiction over a suit between a foreign citizen and another foreign citizen who is a permanent resident of Texas? Although the Supreme Court has not addressed the possibility, most courts and commentators agree that such expansion would be unconstitutional.¹³ Article III, Section 2 of the Constitution extends the federal judicial power to all cases between a citizen of a state and a citizen or subject of a foreign country.¹⁴ The federal judicial power cannot, however, extend to cases solely involving aliens. As a result, interpreting the 1988 amendment to provide diversity jurisdiction for a case involving only aliens would be unconstitutional.¹⁵

a. circuit split regarding ability to expand jurisdiction

A circumstance in which the permanent-resident-alien amendment is more likely to expand rather than restrict jurisdiction is a suit between two aliens with a U.S. citizen on either side. For example, if a Texas citizen and a foreign citizen together sue another foreign citizen, the complete diversity requirement would appear not to bar federal jurisdiction if one of the foreign citizens is a permanent resident of Kansas. Note that Article III of the Constitution no longer presents a problem when a U.S. citizen is a party.¹⁶ More importantly, the complete diversity rule is statutory, and thus an interpretation of the amendment that limits the complete diversity

viewed as a local matter analogous to a case between citizens of the same state.”).

13. See, e.g., *Matsuda v. Wada*, 128 F. Supp. 2d 659 (D. Haw. 2000); *Banci v. Wright*, 44 F. Supp. 2d 1272 (S.D. Fla. 1999); see also John B. Oakley, *Recent Statutory Changes in the Law of Federal Jurisdiction and Venue: The Judicial Improvement Acts of 1988 and 1990*, 24 U.C. DAVIS L. REV. 735, 741, 745 (1991).

14. U.S. CONST. art. III, § 2.

15. See *Matsuda*, 128 F. Supp. 2d at 664; *Banci*, 44 F. Supp. 2d at 1275.

16. See *Singh v. Daimler-Benz AG*, 9 F.3d 303, 312 (3d Cir. 1993) (noting that the constitutional issue that exists when one alien sues another does not apply to the present case because there is a U.S. citizen party, thereby satisfying minimal diversity).

requirement does not violate the Constitution.¹⁷ Nevertheless, such an expansion of federal jurisdiction may conflict with the intent of Congress to *reduce* alienage jurisdiction.¹⁸ Two appellate courts have addressed this issue, reaching contrary results.

The D.C. Circuit refuses to interpret the permanent-resident-alien amendment as a tool for expanding diversity jurisdiction. The court in *Saadeh v. Farouki*¹⁹ found jurisdiction lacking when a foreign citizen brought suit in federal court against another foreign citizen permanently residing in the United States and a U.S. corporation.²⁰ Literal application of the amendment would allow federal jurisdiction in this case.²¹ Yet, the court relied on congressional intent.²² Because legislative history revealed the intent to reduce diversity jurisdiction, it was illogical to assume that Congress also intended to expand diversity jurisdiction.²³ As a result, the court in *Saadeh* dismissed the suit for lack of subject matter jurisdiction.²⁴

The Third Circuit, on the other hand, follows the plain language of the permanent-resident-alien amendment, allowing the amendment to create diversity jurisdiction where it did not previously exist. After a thorough review of the legislative history, the court in *Singh v. Daimler-Benz, AG*²⁵ agreed that there is nothing to suggest that Congress intended to expand diversity jurisdiction.²⁶ However, the court found that “there is also nothing to support [the] view that the entire 1988 Act was characterized by a ‘clarity of

17. See *Arai v. Tachibana*, 778 F. Supp. 1535, 1538, 1541 (D. Haw. 1991) (“Article III requires only minimal diversity Therefore, alienage jurisdiction is constitutionally permissible as long as there is at least one alien party and at least one state or citizen of a state opposing the alien.”).

18. See *Saadeh v. Farouki*, 107 F.3d 52, 60 (D.C. Cir. 1997).

19. *Id.*

20. See *id.* at 61.

21. See *id.* at 60.

22. See *id.* (“Given the reasoning underlying the recommendation for the alienage provision and the general expressions of legislative intent for the Judicial Improvements Act, . . . we conclude that Congress intended to contract diversity jurisdiction through the 1988 amendment to § 1332(a), not to expand it by abrogating the longstanding rule that complete diversity is destroyed in lawsuits between aliens.”).

23. *Id.*

24. See *id.* at 61.

25. 9 F.3d 303 (3d Cir. 1993).

26. *Id.* at 309.

purpose' to reduce diversity jurisdiction."²⁷ According to the court in *Singh*, the unintended expansion of diversity jurisdiction is "not sufficient reason for us to torture or limit the statutory language."²⁸ Moreover, because there was a U.S. citizen on one side and a foreign citizen on the other, the Article III minimal diversity requirement was satisfied.

b. current trend in other circuits

Until recently, most district courts had adopted the reasoning of *Saadeh*, refusing to use the amendment to expand diversity jurisdiction in the absence of clear congressional intent to do so.²⁹ Although such an interpretation would not be unconstitutional in cases involving at least one U.S. citizen,³⁰ a plain language interpretation would surely raise constitutional problems in contexts involving only foreign citizens.³¹ Moreover, many courts agree that following the amendment's plain language would lead to the problematic conclusion that Congress abandoned the "longstanding"³² and "well-settled"³³ rule of complete diversity.³⁴ Thus, several district courts have formed a trend, consistently viewing a narrow construction of the permanent-resident-alien provision as the best approach.

However, a recent district court in the Seventh Circuit put an end to this promising trend. In *Cisneros v. Bridgestone/Firestone*,

27. *Id.*

28. *Id.*

29. *See, e.g.*, *Marcus v. "Five J" Jewelers Precious Metals Indus.*, 111 F. Supp. 2d 445, 448 (S.D.N.Y. 2000); *China Nuclear Energy Indus. Corp. v. Arthur Andersen, LLP*, 11 F. Supp. 2d 1256, 1259–60 (D. Colo. 1998); *Lloyds Bank PLC v. Norkin*, 817 F. Supp. 414, 416 (S.D.N.Y. 1993); *Arai v. Tachibana*, 778 F. Supp. 1535, 1542–43 (D. Haw. 1991). *But see* *Cisneros v. Bridgestone/Firestone, Inc. (In re Bridgestone/Firestone, Inc.)*, 247 F. Supp. 2d 1071, 1075 (S.D. Ind. 2003).

30. *See* *Matsuda v. Wada*, 128 F. Supp. 2d 659 (D. Haw. 2000); *Banci v. Wright*, 44 F. Supp. 2d 1272 (S.D. Fla. 1999).

31. *See Arai*, 778 F. Supp. at 1543.

32. *Saadeh v. Farouki*, 107 F.3d 52, 58 (D.C. Cir. 1997).

33. *Id.* at 61.

34. *See Lloyds Bank*, 817 F. Supp. at 418. Note that in 1806, the Supreme Court enunciated the "complete diversity rule," requiring that all the persons on one side of a controversy are citizens of different states from all the persons on the other side. *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806).

Inc. (In re Bridgestone/Firestone, Inc.),³⁵ a foreign citizen permanently residing in Texas sued two foreign corporations as well as a U.S. corporation with citizenship in Tennessee and Ohio.³⁶ Faced with the *Saadeh/Singh* dichotomy, the court found that the Third Circuit's opinion in *Singh* "present[ed] the better-reasoned analysis."³⁷ The court added three additional reasons to the reasoning articulated in *Singh*. First, the court claimed that those district courts that follow *Saadeh* solely involve foreign citizens.³⁸ This statement is undoubtedly incorrect. Interestingly, the court only cited one case in support of its contention,³⁹ conveniently ignoring the many others that include U.S. citizens as parties.⁴⁰ Second, the court claimed that the decision in *Saadeh* weighed too heavily on the fact that a plain reading of the amendment would loosen the complete diversity requirement.⁴¹ In making such an argument, the *Bridgestone/Firestone* court ignores the fact that courts have consistently applied the complete diversity rule for almost two hundred years.⁴² Third, the court argues that § 1332(a)(3) has already altered the complete diversity requirement with respect to foreign parties.⁴³ Under that provision, citizens of different states on opposite sides of litigation will satisfy diversity jurisdiction, despite the presence of additional foreign parties on both sides.⁴⁴ Many courts, however, agree that Congress intended such a result in order to provide diverse citizens with a federal forum irrespective of their involvement with alien parties.⁴⁵

35. 247 F. Supp. 2d 1071 (S.D. Ind. 2003).

36. *See id.* at 1072.

37. *Id.* at 1075.

38. *See id.* at 1073.

39. *Id.* (citing *Matsuda v. Wada*, 128 F. Supp. 2d 659 (D. Haw. 2000)).

40. *See, e.g.*, *Marcus v. "Five J" Jewelers Precious Metals Indus.*, 111 F. Supp. 2d 445, 448 (S.D.N.Y. 2000); *China Nuclear Energy Indus. Corp. v. Arthur Andersen, LLP*, 11 F. Supp. 2d 1256, 1259–60 (D. Colo. 1998); *Lloyds Bank PLC v. Norkin*, 817 F. Supp. 414, 416 (S.D.N.Y. 1993); *Arai v. Tachibana*, 778 F. Supp. 1535, 1542–43 (D. Haw. 1991).

41. *See Bridgestone/Firestone*, 247 F. Supp. 2d at 1073.

42. *See Norkin*, 817 F. Supp. at 418.

43. *See Bridgestone/Firestone*, 247 F. Supp. 2d at 1073.

44. 28 U.S.C. §1332(a)(3) (2000).

45. *See Dresser Indus. v. Underwriters at Lloyd's of London*, 106 F.3d 494, 497 (3d Cir. 1997); *K&H Bus. Consultants Ltd. v. Cheltonian, Ltd.*, 567 F. Supp. 420, 422–23 (D.N.J. 1983). For an interesting discussion of the Congressional motivation behind § 1332(a)(3), see Nancy M. Berkley, Note,

Until the Supreme Court addresses this unsettled issue, courts outside the Third and D.C. Circuits are free to adopt either the *Singh* or *Saadeh* approach. Although suits that are wholly between foreign parties will undoubtedly lack jurisdiction for constitutional reasons, those that also include U.S. citizens may satisfy the plain language of § 1332. As a result, parties invoking the permanent-resident-alien provision should attempt to discern whether they are facing a textualist on the bench.⁴⁶

2. A note on statelessness

Although § 1332 provides jurisdiction over foreign citizens that permanently reside in the United States,⁴⁷ it fails to similarly address U.S. citizens legally domiciled in a foreign country. U.S. citizens domiciled abroad are neither citizens of any State in the United States nor citizens or subjects of a foreign state.⁴⁸ They are therefore deemed “stateless,” and thus cannot invoke alienage jurisdiction to access federal courts.⁴⁹

B. Citizenship of Entities

Before 1958, courts considered a corporation to be a citizen of only its state of incorporation, presuming that all shareholders were citizens of the state in which the corporation was chartered.⁵⁰ In

Federal Jurisdiction over Suits Between Diverse United States Citizens with Aliens Joined to Both Sides of the Controversy Under 28 U.S.C. § 1332(a)(3), 38 RUTGERS L. REV. 71, 94 (1985).

46. For an interesting discussion on the permanent-resident-alien amendment as Congress’s “drafting error,” illustrating the clash between the textualist and contextualist modes of interpretation, see Jonathan R. Siegel, *What Statutory Drafting Errors Teach Us About Statutory Interpretation*, 69 GEO. WASH. L. REV. 309 (2001).

47. 28 U.S.C. § 1332(a).

48. See *Cresswell v. Sullivan & Cromwell*, 922 F.2d 60, 68 (2d Cir. 1990) (“Though we are unclear as to Congress’s rationale for not granting United States citizens domiciled abroad rights parallel to those it accords to foreign nationals, the language of § 1332(a) is specific and requires the conclusion that a suit by or against United States citizens domiciled abroad may not be premised on diversity.”).

49. See *Newman-Green, Inc. v. Alfonzon-Larrain*, 490 U.S. 826, 899 (1989). For a discussion of the citizenship of unincorporated entities with stateless members, see discussion *infra* Part II.B.2.

50. *Covington Drawbridge Co. v. Sheppard*, 61 U.S. (20 How.) 227, 233 (1858).

reality, shareholder ownership exists beyond the state of incorporation, and in 1958 Congress added the corporation's "principal place of business" to the definition of citizenship.⁵¹ In doing so, Congress hoped to prevent local businesses from avoiding local trials simply because they were incorporated in another state.⁵² Diversity jurisdiction was originally designed to prevent local bias, yet it is anomalous to think that a corporation with most of its activities in a state would not be treated fairly in that state, even if incorporated in another.⁵³

Section 1332(c)(1) addresses the issue of corporate citizenship, providing that "a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business."⁵⁴ A corporation is not a citizen of *either* its state (or states) of incorporation *or* principal place of business, but instead is a citizen of *both* states. This treatment helps to exclude from diversity jurisdiction cases between a citizen of a state and a corporation whose principal place of business is in the same state, even though it may be incorporated elsewhere.

A corporation has only one principal place of business, and courts use a number of different approaches in their determination. Some circuits apply the "nerve center" test,⁵⁵ which determines the principal place of business by looking to where the management and policy-making activities take place.⁵⁶ Under this test, a corporation's principal place of business is typically in the state where its corporate headquarters is located.⁵⁷ Other courts apply the "place of activity"

51. See S. REP. NO. 85-1830, at 4 (1958), *reprinted in* 1958 U.S.C.C.A.N. 3099, 3102-03.

52. See *id.* (explaining that the amendment was designed to remedy "the evil whereby a local institution, engaged in a local business and in many cases locally owned, is enabled to bring its litigation into the Federal courts simply because it has obtained a corporate charter from another state"); *J.A. Olsen Co. v. City of Winona*, 818 F.2d 401, 404 (5th Cir. 1987) (discussing Senate Report No. 85-1830).

53. See *Tubbs v. Southwestern Bell Tel. Co.*, 846 F. Supp. 551, 556 (S.D. Tex. 1994).

54. 28 U.S.C. § 1332(c)(1) (2000).

55. See, e.g., *Metro. Life Ins. Co. v. Estate of Cammon*, 929 F.2d 1220, 1223 (7th Cir. 1991); *Topp v. CompAir Inc.*, 814 F.2d 830, 834 (1st Cir. 1987); *Typewriter Co. v. Underwood Corp.*, 170 F. Supp. 862, 865 (S.D.N.Y. 1959).

56. See *Topp*, 814 F.2d at 834.

57. See *Metro. Life Ins.*, 929 F.2d at 1223.

test, which looks to the center of a corporation's production and service activities.⁵⁸ Finally, many courts apply the "total activity" test, treating it as a hybrid of the first two.⁵⁹ Courts using this test typically apply the "nerve center" test when the bulk of activity is dispersed across several states and apply the "place of activity" test when the bulk of activity takes place in one state.⁶⁰ Unfortunately, the language describing each of these tests is imprecise, and their descriptions often overlap. Nevertheless, courts refer to them in establishing the controlling rule for each circuit.⁶¹

Although each circuit has adopted a particular test or tests to define a corporation's "principal place of business," it has not as clearly defined the citizenship of other types of business entities. As globalization leads our economy in new directions, businesses will begin to change form. Some will not survive the changes, and this section will first examine the citizenship of defunct or inactive corporations. Others will organize as unincorporated entities, and this section will also discuss the citizenship of partnerships and other unincorporated associations. Finally, this section will examine recent developments in the courts' treatment of syndicates, national banking associations, and state agencies.

1. Citizenship of defunct corporations

Section 1332(c)(1) addresses the citizenship of corporations,⁶² yet it does not explicate the citizenship of those corporations no longer conducting active business. Many defunct companies remain incorporated simply to tie up the loose ends of a concluded business, which may involve pending litigation.⁶³ Do inactive or defunct

58. *See, e.g., Harris v. Black Clawson Co.*, 961 F.2d 547, 549 n.4 (5th Cir. 1992); *Kelly v. U.S. Steel Corp.*, 284 F.2d 850, 854 (3d Cir. 1960).

59. *See, e.g., Bel-Bel Int'l Corp. v. Cmty. Bank of Homestead*, 162 F.3d 1101, 1106-07 (11th Cir. 1998); *Amoco Rocmount Co. v. Anschutz Corp.*, 7 F.3d 909, 915 (10th Cir. 1993); *Tubbs v. Southwestern Bell Tel. Co.*, 846 F. Supp. 551, 553 (S.D. Tex. 1994).

60. *See Gafford v. Gen. Elec. Co.*, 997 F.2d 150, 162-63 (6th Cir. 1993).

61. For a detailed description of the specific test used in each circuit, see 15 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 102.54 (Daniel R. Coquillette et al. eds., 3d ed. 2003).

62. 28 U.S.C. § 1332(c)(1) (2003).

63. *See, e.g., Circle Indus. USA, Inc. v. Parke Constr. Group*, 183 F.3d 105, 107 (2d Cir. 1999) (recognizing as defunct a corporation that is winding down business affairs by hiring an attorney to collect various accounts and defend

corporations⁶⁴ still maintain a principal place of business? As Congress has not expressly provided an answer, this inquiry is left to the courts; and, there is a significant split of authority regarding the proper test to apply.⁶⁵

a. circuit split regarding principal place of business

The Second Circuit takes the strictest approach. When a corporation is no longer active, the Second Circuit determines its citizenship “not only by its state of incorporation, but also by the place it last transacted business.”⁶⁶ In so holding, the Second Circuit relies on notions of congressional intent.⁶⁷ That is, Congress amended § 1332(c) in order to prevent diversity jurisdiction from being invoked in areas where corporations had established local ties.⁶⁸ By virtue of having engaged in business operations, a defunct corporation has established a connection with a state, such that it is

litigation); *Bonnie & Co. Fashions, Inc. v. Bankers Trust Co.*, 18 F. Supp. 2d 297, 303 (S.D.N.Y. 1998) (recognizing as defunct a corporation that is winding down business affairs by collecting outstanding receivables, reconciling accounts, and reconciling and paying sales commissions); *China Basin Props., Ltd. v. Allendale Mut. Ins. Co.*, 818 F. Supp. 1301, 1305 (N.D. Cal. 1992) (recognizing as defunct a corporation that is winding down by negotiating an insurance settlement after a fire destroyed the company’s assets).

64. Courts use the terms “defunct” and “inactive” interchangeably to describe a corporation that at one time engaged in active business, but no longer does. One court made a distinction between the two, referring to a defunct corporation as one that “at one time, [conducted] business,” and an inactive corporation as one that has never conducted any business. *Allendale*, 818 F. Supp. at 1304. See, e.g., *Midlantic Nat’l Bank v. Hansen*, 48 F.3d 693, 696 n.4 (3d Cir. 1995) (defining an “inactive” corporation as one that has “ceased any and all business activities”); *Harris v. Black Clawson Co.*, 961 F.2d 547, 549 (5th Cir. 1992) (explaining that a corporation that has not been active for five years is inactive, rather than defunct).

65. See *Hansen*, 48 F.3d at 696–97 (discussing different approaches used by the Second and Fifth Circuits).

66. *Wm. Passalacqua Builders, Inc. v. Resnick Developers S., Inc.*, 933 F.2d 131, 141 (2d Cir. 1991); see *Pinnacle Consultants, Ltd. v. Leucadia Nat’l Corp.*, 101 F.3d 900, 907 (2d Cir. 1996).

67. *Wm. Passalacqua Builders, Inc.*, 933 F.2d at 141 (“To allow inactive corporations to avoid inquiry into where they were last active would give them a benefit Congress never planned for them, since under such a rule a defunct corporation, no matter how local in character, could remove a case to federal court based on its state of incorporation.”).

68. *China Basin Props., Ltd. v. One Pass, Inc.*, 812 F. Supp. 1038, 1040 (N.D. Cal. 1993).

not at risk of local prejudice.⁶⁹ As the Senate Report accompanying the amendment noted, "It appears neither fair nor proper for such a corporation to avoid trial in the State where it has its principal place of business by resorting to a legal device not available to the individual citizen."⁷⁰

Although the Second Circuit recognizes the state in which a defunct corporation last transacted business, it does not specifically address what constitutes a business transaction. One court, however, suggested that a business transaction for a defunct corporation is one that "goes toward the furtherance of the corporation."⁷¹ Transactions to "wind down" the business affairs of a company will usually not suffice.⁷² For example, the Second Circuit held in *Circle Industries USA, Inc. v. Parke Construction Group, Inc.*⁷³ that a corporation was not transacting business in New York when it hired an attorney to collect accounts in Georgia and defend litigation in New York, despite the fact that the sole officer and director lived in New York and received corporate mail there.⁷⁴ Participation in lawsuits had not

69. See *Allendale*, 818 F. Supp. at 1304 ("[A] defunct corporation . . . is not at risk of being an 'alien' in state court."); *One Pass*, 812 F. Supp. at 1040 ("[A] corporation which, when active, had its principal place of business in California, is unlikely to suffer local prejudice in California state courts.").

70. S. REP. NO. 85-1830 (1958), reprinted in 1958 U.S.C.C.A.N. 3099, 3102.

71. *Bonnie & Co. Fashions v. Bankers Trust Co.*, 18 F. Supp. 2d 297, 303 n.6 (S.D.N.Y. 1998) (interpreting dicta from *Pinnacle Consultants, Ltd. v. Leucadia Nat'l Corp.*, 101 F.3d 900, 907 n.5 (2d Cir. 1996)).

72. See, e.g., *id.* at 303 (collecting outstanding receivables, reconciling accounts, and reconciling and paying sales commissions were considered "a winding down of affairs" and not business transactions for purposes of determining the inactive corporation's principal place of business); *Allendale*, 818 F. Supp. at 1305 (winding down activities consisting of insurance settlement negotiations for a defunct corporation whose assets were destroyed in a fire did not constitute a business transaction). But see *Athena Auto., Inc. v. Digregorio*, 166 F.3d 288, 291 (4th Cir. 1999) ("[A] corporation's winding up of its business affairs may well constitute a significant activity . . ."); *Comtec, Inc. v. Nat'l Tech. Sch.*, 711 F. Supp. 522, 524 n.3 (D. Ariz. 1989) ("When a corporation is winding down, there is an argument to be made that its principal place of business is the state from which the corporation is making its final decisions.").

73. 183 F.3d 105, 108 (2d Cir. 1999).

74. See *id.*

been the corporation's purpose when active, and therefore did not qualify as "transacting business" for jurisdictional purposes.⁷⁵

The Third Circuit, on the other hand, adopted the view that an inactive corporation has no principal place of business and, accordingly, is only a citizen of its state of incorporation.⁷⁶ According to the court in *Midlantic National Bank v. Hansen*, the plain meaning of § 1332(c) gives a corporation citizenship in the state where it *has* its principal place of business, not where it *has had* its business in the past.⁷⁷ While the court recognizes that this rule might conflict with congressional intent,⁷⁸ the court believes that "the benefits of certainty and clarity which obtain from the 'bright line' approach" outweigh the potential for harm.⁷⁹ The court adds that Congress never intended for courts to "strain to locate a principal place of business when no such place in reality exists."⁸⁰

The Third Circuit's relaxed approach to finding diversity of citizenship for defunct corporations was recently developed further in *Grand Union Supermarkets of the Virgin Islands, Inc. v. H.E. Lockhart Management, Inc.*⁸¹ In that case, the court considered whether a corporation's affirmative acts to maintain its ability to conduct future business in a state, such as paying franchise taxes and filing corporate reports, are sufficient to make that state its principal place of business.⁸² The court held that they are not, because a corporation must actually conduct business in a state for it to have a principal place of business there.⁸³ According to the court, a corporation that is merely qualified to conduct business in a state, but does not actually do so, is in the same position as a foreign

75. *See id.*

76. *See Midlantic Nat'l Bank v. Hansen*, 48 F.3d 693, 696 (3d Cir. 1995); *Gavin v. Read Corp.*, 356 F. Supp. 483, 486-87 (E.D. Pa. 1973).

77. *Hansen*, 48 F.3d at 698.

78. *See Wm. Passalacqua Builders, Inc. v. Resnick Developers S., Inc.*, 933 F.2d 131, 141 (2d Cir. 1991) ("To allow inactive corporations to avoid inquiry into where they were last active would give them a benefit Congress never planned for them, since under such rule a defunct corporation, no matter how local in character, could remove a case to federal court based on its state of incorporation.").

79. *Hansen*, 48 F.3d at 698.

80. *Id.*

81. 316 F.3d 408 (3d Cir. 2003).

82. *Id.* at 410.

83. *Id.* at 411.

corporation and should similarly receive the protection provided in federal court.⁸⁴ This new holding makes the Third Circuit's "bright-line" rule even brighter, and a defunct corporation's likelihood of being a diverse party even greater.

The Fifth Circuit has adopted a middle ground approach, analyzing the facts and circumstances of each case to determine the citizenship of inactive corporations.⁸⁵ The amount of time that a corporation has been inactive is important. If a corporation has been inactive for a "substantial period of time," it is a citizen only of its state of incorporation.⁸⁶ On the other hand, if a corporation has not been inactive for a substantial period of time, "the place of [its] last business activity is relevant to determine its principal place of business, [but] not dispositive."⁸⁷ The court in *Harris v. Black Clawson Co.* rejects the Second Circuit's less flexible approach, indicating its potential for finding a corporation's principal place of business in a state where it may not have been a citizen when active.⁸⁸ In other words, it is possible that a corporation's last business activity could take place in a state other than its last principal place of business. "Surely Congress cannot have intended to produce this result either."⁸⁹ The Fourth Circuit agrees and has adopted a "facts and circumstances" approach similar to that of the Fifth Circuit.⁹⁰

b. current trend in other circuits

Most other circuits take the approach that limits diversity jurisdiction.⁹¹ By recognizing a defunct corporation as a citizen of

84. *Id.* at 412.

85. *See Harris v. Black Clawson Co.*, 961 F.2d 547, 551 (5th Cir. 1992).

86. *Id.* Although the court does not clarify the meaning of "substantial," it considered five years to be substantial. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *See Athena Auto., Inc. v. Digregorio*, 166 F.3d 288, 292 (4th Cir. 1999) (reasoning that a corporation who conducts no business for approximately three years is "just the type of out-of-state citizen for whom Congress sought to provide a federal forum by creating diversity jurisdiction").

91. *See, e.g., Flynn v. Teak Associated Invs. #2, Inc.*, 98 F. Supp. 2d 1081 (D.D.C. 2000); *Caribbean Mushroom Co., Inc. v. Gov't Dev. Bank for P.R.*, 980 F. Supp. 620 (D.P.R. 1997); *China Basin Props., Ltd. v. One Pass, Inc.*, 812 F. Supp. 1038, 1040 (N.D. Cal. 1993).

the state where it had its last business activity, courts make it more difficult for such corporations to be diverse parties. Those in support of this trend argue that it comports more closely with (1) the plain meaning of § 1332(c), (2) its legislative history, and (3) congressional intent.

First, courts highlight that § 1332(c) states that corporate diversity is determined both by a corporation's place of incorporation *and* its principal place of business. By using the conjunction "and," courts imply that Congress intended all elements to be met before diversity jurisdiction would attach.⁹² Therefore, a court that recognizes only a corporation's state of incorporation for diversity purposes "disregards one element that is a prerequisite to diversity jurisdiction."⁹³

Second, courts hold that the legislative history of the 1958 amendment to § 1332 makes it clear that Congress added the "principal place of business" requirement to limit corporate diversity.⁹⁴ Legislatures became concerned about the ease with which corporations removed cases to federal court based solely on their places of incorporation.⁹⁵ A district court in the First Circuit agreed with the Second Circuit's restrictive approach, arguing that the limitation of a defunct corporation's citizenship to only its state of incorporation "flies in the face of Congress' intent."⁹⁶

Finally, courts look to Congress's original purpose for establishing diversity jurisdiction: to protect out-of-state litigants from local prejudice in state courts by providing a neutral, federal forum.⁹⁷ A corporation that once conducted business in a state

92. See *One Pass*, 812 F. Supp. at 1040.

93. *Comtec, Inc. v. Nat'l Technical Sch.*, 711 F. Supp. 522, 525 (D. Ariz. 1989). *But see* *Midlantic Nat'l Bank v. Hansen*, 48 F.3d 693, 696 (3d Cir. 1995) (rejecting the notion that implicit in the statute's terms is the requirement that all corporations be deemed to have a principal place of business, since corporations that never conducted any business would use only its state of incorporation to determine citizenship).

94. See *Comtec*, 711 F. Supp. at 523 ("The debate . . . centered around the perceived evil of allowing an essentially local corporation to remove a case to federal court simply because the corporate charter was obtained in another state.").

95. See S. REP. NO. 85-1830 (1958), *reprinted in* 1958 U.S.C.C.A.N. 3099, 3101-02.

96. *Caribbean Mushroom Co.*, 980 F. Supp. at 625.

97. See *Guar. Trust Co. v. York*, 326 U.S. 99, 111 (1945).

established a connection with that state such that it will not suffer local prejudice.⁹⁸ Therefore, a defunct corporation can receive a fair hearing in state court and does not need the protection of § 1332.

In conclusion, outside the Third Circuit, a corporation will likely have at least two states of citizenship. This recent trend makes corporate access to federal court through diversity more difficult. Even though Congress did not explicitly address the citizenship of inactive or defunct corporations, courts have relied on congressional intent to limit a corporation's ability to invoke diversity jurisdiction.

2. Citizenship of partnerships

While § 1332(c) provides an express rule for determining the citizenship of corporations, no statutory authority provides such a rule for partnerships or other non-corporate entities. As a result, courts consider "all the members" of a partnership in determining whether diversity jurisdiction exists.⁹⁹ The more members, the more likely it is that one of them will defeat the complete diversity requirement of *Strawbridge*.¹⁰⁰

The Supreme Court in *Carden v. Arkoma Associates*¹⁰¹ extended this rule to limited partnerships, holding that the citizenship of all partners, not simply general partners, determines whether there is complete diversity.¹⁰² An increasing number of organizations today are organizing in various forms of unincorporated associations.¹⁰³ As a result, courts in recent cases have applied the *Carden* rule to

98. See *China Basin Props., Ltd. v. Allendale Mut. Ins. Co.*, 818 F. Supp. 1301, 1304 (N.D. Cal. 1992).

99. *Chapman v. Barney*, 129 U.S. 677, 682 (1889).

100. See *supra* note 34.

101. 494 U.S. 185 (1990).

102. See *id.* at 195.

103. See Peter B. Oh, *A Jurisdictional Approach to Collapsing Corporate Distinctions*, 55 RUTGERS L. REV. 389, 397 (2003). For a discussion of the increasing number of cases involving LLCs and diversity of citizenship, see Debra R. Cohen, *Citizenship of Limited Liability Companies for Diversity Jurisdiction*, 6 J. SMALL & EMERGING BUS. L. 435 (2002). See also Susan Pace Hamill, *The Limited Liability Company: A Catalyst Exposing the Corporate Integration Question*, 95 MICH. L. REV. 393, 403-05 (1996) (discussing the rise of the LLC and its effect on tax law).

other complex partnerships, such as LLCs,¹⁰⁴ LLPs,¹⁰⁵ partnerships of multi-tiers,¹⁰⁶ and labor unions.¹⁰⁷

Some courts and commentators argue that corporations and unincorporated associations are “indistinguishable . . . in terms of the reality of function and structure,”¹⁰⁸ and thus justify a uniform rule.¹⁰⁹ According to other courts, these arguments, although well-founded, are better aimed at the legislature.¹¹⁰ Therefore, most courts today remain unwilling to extend corporate treatment to entities not formally incorporated.¹¹¹

104. See, e.g., *Cosgrove v. Bartolotta*, 150 F.3d 729, 731 (7th Cir. 1998); *Halleran v. Hoffman*, 966 F.2d 45, 48 (1st Cir. 1992); *Sonoma Falls Developers, LLC v. Nev. Gold & Casinos, Inc.*, 272 F. Supp. 2d 919, 922 (N.D. Cal. 2003); *JMTR Enters., LLC v. Duchin*, 42 F. Supp. 2d 87, 93 (D. Mass. 1999); *Int'l Flavors & Textures, LLC v. Gardner*, 966 F. Supp. 552, 554–55 (W.D. Mich. 1997). *But see* *Carlos v. Adamany*, No. 95 C 50,264, 1996 WL 210,019, at *3 (N.D. Ill. Apr. 17, 1996) (suggesting in dicta that an LLC's citizenship be the state of its principal place of business).

105. See, e.g., *Cohen v. Kurtzman*, 45 F. Supp. 2d 423, 433 (D.N.J. 1999); *Mudge Rose Guthrie Alexander & Ferdon v. Pickett*, 11 F. Supp. 2d 449, 451 (S.D.N.Y. 1998); *Reisman v. KPMG Peat Marwick LLP*, 965 F. Supp. 165, 176 (D. Mass. 1997).

106. See, e.g., *Cerebus Partners v. Gadsby & Hannah*, 976 F. Supp. 119 (D. R.I. 1997).

107. See, e.g., *United Steelworkers of v. R.H. Bouligny, Inc.*, 382 U.S. 145, 147 (1965).

108. *Id.* at 150.

109. For an excellent discussion of the blurred distinctions between incorporated and unincorporated entities and the necessity for a uniform rule to determine citizenship, see Oh, *supra* note 103.

110. See *Carden v. Arkoma Assocs.*, 494 U.S. 185, 197 (1990) (“Which of [a partnership's members] 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 [W]e will leave the rest to Congress.”); *Bouligny*, 382 U.S. at 150–51 (“We are of the view that . . . pleas for extension of the diversity jurisdiction to hitherto uncovered broad categories of litigants ought to be made to the Congress and not to the courts.”).

111. See *Carden*, 494 U.S. at 197. Note that the Supreme Court has recognized a sole exception for the Puerto Rican entity called “*sociedad en comandita*,” treating such an entity as a corporation for diversity purposes. *Puerto Rico v. Russel & Co.*, 288 U.S. 476, 482 (1933) (holding that the entity's juridical personality is “so complete in contemplation of the law of Puerto Rico” that it could find no adequate reason to give the *sociedad* a different status for purposes of federal jurisdiction than a corporation organized under that law).

As noted earlier, a U.S. citizen domiciled abroad is treated, for diversity purposes, as being neither a citizen of any state nor a citizen or subject of a foreign state.¹¹² Accordingly, when such a party is a member of a partnership or other unincorporated association, she renders the entity “stateless” for diversity purposes. Consequently, the entire entity becomes incapable of invoking alienage jurisdiction to litigate in federal court.

Recently, the Second Circuit has applied this rule to large law firms.¹¹³ Many of the large U.S. law firms operating today have embraced globalization, setting up foreign branches and sending partners to work abroad. Even a single U.S. partner domiciled in a foreign country will deem the entire firm “stateless.”¹¹⁴ It follows, therefore, that by employing stateless members, an unincorporated entity may attempt to avoid litigation in federal court.¹¹⁵

3. Citizenship of syndicates

Lloyd’s of London operates as a marketplace where investors, called “names,” form unincorporated groups, or “syndicates.”¹¹⁶ These syndicates underwrite insurance coverage through agents, known as “underwriters.”¹¹⁷ For purposes of diversity jurisdiction, whose citizenship counts: that of the underwriters or the individual names? Courts of appeals are split on the issue.¹¹⁸

112. See discussion *supra* Part II.A.2.

113. See, e.g., *Herrick Co., Inc. v. SCS Communications, Inc.*, 251 F.3d 315, 322–23 (2d Cir. 2001); *Cresswell v. Sullivan & Cromwell*, 922 F.2d 60 (2d Cir. 1990).

114. See *Herrick*, 251 F.3d at 322.

115. Note, however, that an opposing litigant may still invoke § 1331 to satisfy subject matter jurisdiction. For a possible way to resolve the “anomaly of statelessness,” see Oh, *supra* note 103, at 462–64.

116. See *Certain Interested Underwriters at Lloyd’s London, Eng. v. Layne*, 26 F.3d 39, 42 (6th Cir. 1994).

117. See *id.* For a more detailed description of the London insurance market, see *Edinburgh Assurance Co. v. R.L. Burns Corp.*, 479 F. Supp. 138, 144–46 (C.D. Cal. 1979), *aff’d in part and rev’d in part*, 669 F.2d 1259 (9th Cir. 1982).

118. For a more detailed discussion of the complexity involved in the various circuits’ analyses of syndicate citizenship for diversity purposes, see Howard M. Tollin & Mark Deckman, *Lloyd’s of London and the Problem with Federal Diversity Jurisdiction*, 9 J. TRANSNAT’L L. & POL’Y 289 (2000).

a. *circuit split regarding syndicate citizenship*

The Sixth Circuit represents the minority view, recognizing only the citizenship of the lead underwriter for purposes of establishing diversity jurisdiction. In *Certain Interested Underwriters at Lloyd's London, England v. Layne*,¹¹⁹ the Sixth Circuit analogized the lead underwriter to a trustee who is liable on the contract.¹²⁰ Because underwriters write the insurance, process the claims, and make litigation decisions, they are the real parties in interest,¹²¹ and it is their citizenship that counts.¹²²

The Seventh Circuit, on the other hand, rejected this approach in *Indiana Gas Co. v. Home Insurance Co.*¹²³ The court explained that underwriters at Lloyd's are treated as agents of the syndicates, rather than trustees, because underwriters do not "own the corpus."¹²⁴ Instead, underwriters merely manage the names' assets.¹²⁵ If the underwriters were treated as trustees, "any unincorporated association could avoid [the complete diversity requirement] by naming an agent or attorney to act on behalf of all members."¹²⁶ Instead, the Seventh Circuit, along with the Fifth, considers the citizenship of *all* names within a syndicate for purposes of diversity jurisdiction,¹²⁷ and thus recognizes syndicate members as the real parties in interest. This reasoning is consistent with the fact that the insurance contract is between the policyholder and each individual name, rather than the syndicate or underwriter.¹²⁸ More importantly, all of Lloyd's members face unlimited personal liability, making the

119. 26 F.3d 39 (6th Cir. 1994).

120. *See id.* at 43; *see also* Navarro Sav. Ass'n v. Lee, 446 U.S. 458 (1980) (holding that trustees were entitled to sue in their own right and thus were the real parties in interest).

121. Federal Rule of Civil Procedure 17(a) requires that "[e]very action . . . be prosecuted in the name of the *real party in interest.*" FED. R. CIV. P. 17(a) (emphasis added).

122. *See Layne*, 26 F.3d at 43–44.

123. 141 F.3d 314 (7th Cir. 1998).

124. *Id.* at 318.

125. *See id.*

126. *Id.*

127. *See, e.g., id.*; *Royal Ins. Co. of Am. v. Quinn-L Capital Corp.*, 3 F.3d 877 (5th Cir. 1993).

128. *See Int'l Ins. Co. v. Certain Underwriters at Lloyd's London*, No. 88 C 9838, 1991 WL 693,319, at *3 (N.D. Ill. Sept. 16, 1991).

syndicate much like a partnership.¹²⁹ The court in *Indiana Gas Co.* explained, "An underwriting syndicate at Lloyd's has the personal-liability characteristics of a general partnership and the management structure of a limited partnership."¹³⁰ As a result, the court followed *Carden* and held that syndicates, just like other unincorporated associations, have the citizenships of every member.¹³¹

The Second and Third Circuits present yet another approach to the determination of syndicate citizenship. In *E.R. Squibb & Sons, Inc. v. Accident & Casualty Insurance Co.*,¹³² the Second Circuit held that when the lead underwriter is sued as a representative of the syndicate, courts should consider the citizenship of all the syndicate's names;¹³³ however, when the lead underwriter is sued in an individual capacity, only the underwriter's citizenship determines federal diversity jurisdiction.¹³⁴ In *Chemical Leaman Tank Lines, Inc. v. Aetna Casualty & Surety Co.*,¹³⁵ the Third Circuit similarly held that the citizenship of a lead underwriter sued in his individual capacity is sufficient to determine diversity.¹³⁶ The fact that many syndicate policies contractually bind each of the names to any judgments rendered against any name does not require courts to consider the citizenship of unspecified names not before the court, provided that the name sued is in the litigation as an individual, rather than as a representative.

b. current trend in other circuits

District courts sitting in both the First and Ninth Circuits follow the reasoning of the Seventh Circuit, which has become the modern trend.¹³⁷ This trend is yet another that restricts diversity jurisdiction,

129. See *Ind. Gas Co.*, 141 F.3d at 316.

130. *Id.* at 317. The court rejected the argument that a syndicate is more like a trust because the names participate for their own interest. *Id.*

131. *Id.*

132. 160 F.3d 925 (2d Cir. 1998).

133. *Id.* at 939.

134. *Id.*

135. 177 F.3d 210 (3d Cir. 1999).

136. *Id.* at 223. The court noted that even a side agreement regarding the liability between the underwriter and the names did not deprive the court of jurisdiction. *Id.*

137. See, e.g., *Bath Iron Works Corp. v. Certain Member Cos. of the Inst. of London Underwriters*, 870 F. Supp. 3 (D. Me. 1994); *Queen Victoria Corp. v. Ins. Specialists of Haw., Inc.*, 711 F. Supp. 553 (D. Haw. 1989).

for it is likely, given the nature of Lloyd's syndicates, that there will be a name who is not diverse from the adverse party.

4. Citizenship of national banking associations

A national bank is organized under federal law pursuant to the National Banking Act.¹³⁸ As a result, national banks have no state of incorporation, and Congress enacted a statute to specifically address their citizenship.¹³⁹ According to Section 1348, “[a]ll national banking associations shall . . . be deemed citizens of the States in which they are respectively located.”¹⁴⁰ The statute, however, fails to clarify the meaning of “located,” and the issue has become more complex as banks have opened numerous branches across the United States. Once again, the interpretations are split three ways.¹⁴¹

a. circuit split regarding national bank citizenship

The Ninth Circuit was the first to address this issue, holding in 1943 that a national bank is located in the state where it maintains its principal place of business.¹⁴² A district court sitting in the First Circuit began a new trend in *Connecticut National Bank v. Iacono*,¹⁴³ recognizing that a national bank is a citizen of every state in which it maintains a branch office.¹⁴⁴ The overwhelming majority of federal

138. See 12 U.S.C. §§ 22–24 (2000).

139. See 28 U.S.C. § 1348 (2000).

140. *Id.*

141. See *Evergreen Forest Prods. of Ga., L.L.C. v. Bank of Am., N.A.*, 262 F. Supp. 2d 1297, 1301–02 (M.D. Ala. 2003) (comparing and contrasting Ninth, First, and Seventh Circuit analyses of the citizenship of a national bank and ultimately adopting a variation of the Seventh Circuit’s reasoning).

142. See *Am. Sur. Co. v. Bank of Cal.*, 133 F.2d 160, 161–62 (9th Cir. 1943).

143. 785 F. Supp. 30 (D.R.I. 1992).

144. *Id.* at 33.

courts followed this interpretation,¹⁴⁵ addressing the need to “relieve the congestion of federal courts.”¹⁴⁶

The Seventh Circuit recently introduced a third approach in *Firststar Bank, N.A. v. Faul*,¹⁴⁷ holding that a national bank is located in both the state of its principal place of business *and* the state listed in its organizational certificate.¹⁴⁸ Before rejecting the approach established in *Iacono* and forming its own interpretation of Section 1343, the court recounted the history of jurisdiction over national banks.¹⁴⁹ Federally chartered banks originally could invoke federal question jurisdiction to bring a case into federal court since a suit by or against it was one arising under the laws of the United States.¹⁵⁰ In 1882, Congress rejected that idea in an attempt “to place national banks on the same footing as banks of the state where they were located”¹⁵¹ After several amendments aimed at preserving the “jurisdictional parity” between national banks and state corporations, Congress enacted the current version of Section 1348.¹⁵² A state bank, which is organized under state corporate law, is a citizen of both its state of incorporation and of its principal place of business.¹⁵³ According to the *Firststar* court, a court can achieve parity by similarly recognizing a national bank as a citizen of both the state listed in its organizational certificate and the state of its

145. See, e.g., *First Union Corp. v. Am. Cas. Co. of Reading, Pa.*, 222 F. Supp. 2d 767, 770 (W.D.N.C. 2001); *Frontier Ins. Co. v. MTN Owner Trust*, 111 F. Supp. 2d 376, 376–81 (S.D.N.Y. 2000); *Schmidt v. Fleet Bank*, 16 F. Supp. 2d 340, 354 (S.D.N.Y. 1998); *Ferraiolo Constr., Inc. v. Keybank, N.A.*, 978 F. Supp. 23, 24 (D. Me. 1997); *Norwest Bank of Minn., N.A. v. Patton*, 924 F. Supp. 114, 115 (D. Colo. 1996); *Bank of N.Y. v. Bank of Am.*, 861 F. Supp. 225, 231 (S.D.N.Y. 1994). *But see* *Fin. Software Sys., Inc. v. First Union Nat'l Bank*, 84 F. Supp. 2d 594, 602 (E.D. Pa. 1999).

146. *Bank of N.Y.*, 861 F. Supp. at 230.

147. 253 F.3d 982 (7th Cir. 2001).

148. *Id.* at 994.

149. See *id.* at 988–89.

150. *Leather Mfrs.' Nat'l Bank v. Cooper*, 120 U.S. 778, 781 (1887).

151. *Id.* at 780; see *Petri v. Commercial Nat'l Bank of Chi.*, 142 U.S. 644, 649 (1892) (explaining that after the 1882 amendment, “the jurisdiction of the Circuit Courts over suits by or against national banks could no longer be asserted on the ground of their Federal origin, as they were placed in the same category with banks not organized under the laws of the United States”).

152. See *Firststar*, 253 F.3d at 985–86 (presuming that Congress enacted § 1348 in light of this legislative background).

153. 28 U.S.C. § 1332(c) (2000).

principal place of business.¹⁵⁴ Since the *Firststar* decision, most courts have construed the citizenship of national banks in this manner.¹⁵⁵

b. current trend in other circuits

A significant development in the area of national bank citizenship recently emerged from a district court in Alabama. In *Evergreen Forest Products of Georgia, L.L.C. v. Bank of America, N.A.*,¹⁵⁶ the court agreed with the Seventh Circuit's conclusion that a national bank is a citizen of the state where it maintains its principal place of business.¹⁵⁷ However, the court in *Evergreen* believes that the state listed in a national bank's most recent articles of association, rather than its organizational certificate, more accurately reflects its true location.¹⁵⁸ The defendant in *Evergreen*, Bank of America, merged with NationsBank and moved its operations from California to North Carolina.¹⁵⁹ A bank that relocates its main office must amend the articles of association,¹⁶⁰ but it need not change the original organizational certificate.¹⁶¹ After the move, Bank of America's organizational certificate inaccurately reflected its citizenship for purposes of diversity, which indicated "a flaw in *Firststar's* reasoning."¹⁶² Therefore, the court held that a national bank's citizenship should be determined by the state of its principal

154. *Firststar*, 253 F.3d at 993–94 (reasoning that the organizational certificate, which requires a bank to disclose the place where its "operations of discount and deposit are to be carried on" would serve as an appropriate substitute (quoting 12 U.S.C. § 22 (2000))).

155. See, e.g., *Pitts v. First Union Nat'l Bank*, 217 F. Supp. 2d 629, 630–31 (D. Md. 2002); *Bank One, N.A. v. Euro-Alamo, Invs., Inc.*, 211 F. Supp. 2d 808, 810 (N.D. Tex. 2002); *Bank of Am., N.A. v. Johnson*, 186 F. Supp. 2d 1182, 1183–84 (W.D. Okla. 2001).

156. 262 F. Supp. 2d 1297 (M.D. Ala. 2003).

157. *Id.* at 1303.

158. *Id.*

159. *Id.* at 1305. Bank of America's organizational certificate indicated its location in California. *Id.* Pursuant to 12 U.S.C. § 30(b), a national bank may move its location. *Evergreen Forest Prods.*, 262 F. Supp. at 1306 n.13.

160. 12 C.F.R. § 5.40(d)(2)(ii) (2004).

161. See *Evergreen Forest Prods.*, 262 F. Supp. 2d at 1306.

162. *Id.* at 1307 ("[A]pplication of *Firststar* [to situations in which banks relocate] could result in national banks being deemed citizens of states where they no longer maintain significant contacts.").

place of business and the state listed in its most recent articles of association.¹⁶³

Perhaps it is premature to determine whether the majority of courts will change their interpretation of Section 1348 to that established in *Evergreen*. However, one district court in the Fifth Circuit has already done so,¹⁶⁴ following *Evergreen* with no explanation other than that it “presents a better interpretation of 28 U.S.C. § 1348.”¹⁶⁵ The Second Circuit, on the other hand, has yet to reach a consensus on the issue, analyzing Section 1348 inconsistently in various recent opinions.¹⁶⁶

5. Citizenship of states and state agencies

Section 1332 provides federal jurisdiction for actions between *citizens* of different states,¹⁶⁷ and it is a basic principle of law that a state is not a citizen for purposes of diversity.¹⁶⁸ Thus, if a party is not a citizen of any state, diversity of citizenship will not exist.¹⁶⁹ The Supreme Court in *Moor v. Alameda County* further explained that “a political subdivision of a State, unless it is simply ‘the arm or *alter ego* of the State,’ is a citizen of the State for diversity

163. *See id.*

164. *See Bank One, N.A. v. Shreeji A&M, Inc.*, No. CA 3:02-CV-1555-R, 2003 U.S. Dist. LEXIS 10,994, *4–7 (N.D. Tex. 2003).

165. *Id.* at *6.

166. *Compare World Trade Ctr. Props., L.L.C. v. Hartford Fire Ins. Co.*, 345 F.3d 154, 161 (2d Cir. 2003) (“Defendant . . . is a national bank . . . and by statute is deemed to be a citizen of every state in which it has offices.”), and *United Republic Ins. Co., in Receivership v. Chase Manhattan Bank*, 315 F.3d 168, 169 (2d Cir. 2003) (per curiam) (remanding to district court to determine whether diversity jurisdiction existed in light of fact that defendant had branch offices in plaintiff’s home state), *with Lerner v. Fleet Bank, N.A.*, 318 F.3d 113, 124–25 (2d Cir. 2003) (assuming that the national bank was a citizen of New York, presumably its principal place of business, for diversity purposes).

167. 28 U.S.C. § 1332(a)(1) (2003).

168. *See Moor v. Alameda County*, 411 U.S. 693, 717 (1973) (stating that a state cannot be a “‘citizen’ [of itself] for purposes of the diversity jurisdiction”); *U.S.I. Props. Corp. v. M.D. Constr. Co.*, 230 F.3d 489, 499 (1st Cir. 2000); *JMB Group Trust IV v. Pa. Mun. Ret. Sys.*, 986 F. Supp. 534, 536 (N.D. Ill. 1997).

169. *See Batton v. Ga. Gulf*, 261 F. Supp. 2d 575, 583 (M.D. La. 2003) (rejecting the argument that only a party who shares citizenship with a party “across the ‘v’” destroys diversity).

purposes.”¹⁷⁰ Therefore, an agency or political subdivision must be separate and distinct from the state in order to be deemed a citizen. The First Circuit notes that public and private corporations are usually regarded as “citizens,” where most unincorporated state agencies and departments are recognized as arms of the State.¹⁷¹

State law determines the test for whether a political subdivision is the “alter ego” of the state.¹⁷² This test is the same as that used to determine Eleventh Amendment immunity.¹⁷³ Courts primarily weigh two factors: “(1) the extent of control exercised over the entity by the state, and (2) whether the entity has a role which is completely defined by the state, i.e., whether it acts as an agent of the state.”¹⁷⁴ Previously, Eleventh Amendment immunity analysis turned on whether a judgment against the entity would be paid out of the state treasury.¹⁷⁵ The Court in *Seminole Tribe v. Florida*,¹⁷⁶ however, held that the financial effect on a state’s treasury is

170. *Moor*, 411 U.S. at 717 (quoting *State Highway Comm’n v. Utah Constr. Co.*, 278 U.S. 194, 199 (1929)); see *Tex. Dep’t of Hous. & Cmty. Affairs v. Verex Assurance, Inc.*, 68 F.3d 922, 926 (5th Cir. 1995) (explaining that state agencies that are the alter ego of the state are not citizens for purposes of diversity jurisdiction); *JMB Group Trust*, 986 F. Supp. at 536–37 (finding it “well-settled” law that political subdivisions of a state are citizens unless arms or alter egos of that state).

171. *Univ. of R.I. v. A.W. Chesterton Co.*, 2 F.3d 1200, 1203–04 (1st Cir. 1993); see, e.g., *Nevada v. Pioneer Cos.*, 245 F. Supp. 2d 1120, 1124 (D. Nev. 2003) (recognizing the Colorado River Commission of Nevada (CRCN) as an arm of the state where CRCN explicitly refers to itself as an *agent* of Nevada in pleadings and where legislation regarding the powers and duties of the commission repeatedly refer to CRCN as an *agent* of Nevada); *JMB Group Trust*, 986 F. Supp. at 536–37 (recognizing a pension fund system providing retirement benefits for municipal employees as a state agency of the Commonwealth of Pennsylvania and thus, an arm of the state).

172. See *Moor*, 411 U.S. at 717; *Ind. Port Comm’n v. Bethlehem Steel Corp.*, 702 F.2d 107, 109 (7th Cir. 1983); see also *Adden v. J.D. Middlebrooks*, 688 F.2d 1147, 1153–54 (7th Cir. 1982) (using Louisiana law to determine that the Department of Corrections performed a normal government function).

173. See *JMB Group Trust*, 986 F. Supp. at 537 (applying the same test to determine diversity jurisdiction and Eleventh Amendment immunity).

174. *Id.*; see also *Crosetto v. State Bar*, 12 F.3d 1396, 1402 (7th Cir. 1993).

175. See *Adden v. Middlebrooks*, 688 F.2d 1147 (7th Cir. 1982).

176. 517 U.S. 44 (1996).

irrelevant if other factors weigh in favor of finding that the entity is an agent or alter ego of the state.¹⁷⁷

Recently, courts have addressed the citizenship of states and state agencies in a few new contexts. For example, section 1332 provides that the word "States" includes territories of the United States.¹⁷⁸ As a result, the Ninth Circuit recently determined that because the Commonwealth of Northern Mariana Islands is a U.S. territory, it is a state and thus not a citizen for purposes of diversity.¹⁷⁹

The Second Circuit in *World Trade Center Properties, L.L.C. v. Hartford Fire Insurance Co.*¹⁸⁰ addressed whether the Port Authority of New York and New Jersey was "so closely aligned with the two state governments that created it to foreclose its being treated as a citizen . . . for diversity purposes."¹⁸¹ The court noted that although the issue was one of first impression in the circuit, existing case law established that the Port Authority is not entitled to sovereign immunity.¹⁸² Therefore, without any inquiry into the Port Authority's level of autonomy, the court held that the Port Authority must be an independent political subdivision and a citizen of both New York and New Jersey.¹⁸³

Not surprisingly, many recent district court decisions regarding political subdivisions have continued to limit diversity by recognizing various entities as arms of their respective states. For example, recent courts have added a state university,¹⁸⁴ a health

177. *Id.* at 58; *see also* Thiel v. State Bar, 94 F.3d 399, 401 (7th Cir. 1996); *JMB Group Trust*, 986 F. Supp. at 538 ("Because . . . [defendant] is indeed subject to the direction and control of the Commonwealth of Pennsylvania to a great degree, and . . . acts as agent of the Commonwealth in performing its duties, the court need not address whether a judgment against the [defendant] would have an effect upon the Pennsylvania State Treasury.").

178. 28 U.S.C. § 1332(d) (2000).

179. *See* Dyack v. North Mariana Islands, 317 F.3d 1030, 1037 (9th Cir. 2003).

180. 345 F.3d 154 (2d Cir. 2003).

181. *Id.* at 162.

182. *Id.*; *See* Japan Airlines Co. v. Port Auth., 178 F.3d 103, 110–12 (2d Cir. 1999) (denying sovereign immunity to the Port Authority); *Feeney v. Port Auth. Trans-Hudson Corp.*, 873 F.2d 628, 631 (2d Cir. 1989) (denying sovereign immunity to the Port Authority).

183. *See* *World Trade Ctr. Props.* 345 F.3d at 162.

184. *See* *Llewellyn-Waters v. Univ. of P.R.*, 56 F. Supp. 2d 159, 162 (D.P.R. 1999).

department,¹⁸⁵ a pension fund system,¹⁸⁶ and a subsidiary of a tourism promotion company¹⁸⁷ to the list of agents or arms of a state. Note, however, that most courts agree that school districts are not arms of a state and therefore are not entitled to Eleventh Amendment immunity.¹⁸⁸ Accordingly, a recent district court decision held that, for diversity purposes, a school district in Mississippi is a citizen of that state.¹⁸⁹

C. Jurisdictional Amount in Controversy

In addition to satisfying citizenship requirements, diversity actions must also exceed the sum or value of \$75,000, exclusive of interest and costs.¹⁹⁰ Although Congress originally set the threshold at \$500,¹⁹¹ it has continued to limit the jurisdiction of federal courts by periodically increasing the amount.¹⁹² Because Congress intended to “stem the tide of diversity litigation in the federal

185. See *Batton v. Ga. Gulf*, 261 F. Supp. 2d 575, 581 (M.D. La. 2003).

186. See *JMB Group Trust IV v. Pa. Mun. Ret. Sys.*, 986 F. Supp. 534, 538 (N.D. Ill. 1997).

187. See *CBR Holdings v. Hotel Dev. Corp.*, 203 F. Supp. 2d 131, 138 (D.P.R. 2002).

188. See, e.g., *Cuesta v. Sch. Bd.*, 285 F.3d 962, 966 (11th Cir. 2002); *Cash v. Granville County Bd. of Educ.*, 242 F.3d 219 (4th Cir. 2001); *Duke v. Grady Mun. Sch.*, 127 F.3d 972 (10th Cir. 1997); *Lester H. v. Gilhool*, 916 F.2d 865, 870–71 (3d Cir. 1990). *But see* *Belanger v. Madera Unified Sch. Dist.*, 963 F.2d 248 (9th Cir. 1992).

189. *Jefferson County Sch. Dist. v. Lead Indus. Ass’n*, 223 F. Supp. 2d 771, 777–78 (S.D. Miss. 2002) (finding that a school district is not the alter ego of the state because it can contract in its own name, sue in its own name, own and lease property, is primarily concerned with local rather than state problems, and has been sued by the state in state court in the past).

190. 28 U.S.C. § 1332 (2000). Congress originally imposed a similar amount in controversy requirement for federal question cases, but dropped it in 1980. See Act of Dec. 1, 1980, Pub. L. 96-486, sec. 2(a), 94 Stat. 2369, 2369 (codified as amended at 28 U.S.C. § 1331).

191. See Act to Establish the Judicial Courts of the United States, ch. 20, § 11, 1 Stat. 73, 78 (1789).

192. Congress raised the requirement to \$2,000 in 1887, see Act of March 3, 1887, ch. 373, 24 Stat. 552, 552, to \$3,000 in 1911, see Act of March 3, 1911, ch. 231, § 24, 36 Stat. 1087, 1091, to \$10,000 in 1958, see Act of July 25, 1958, Pub. L. No. 85-554, sec. 2, § 1332(a), 72 Stat. 415, 415, to \$50,000 in 1988, see Judicial Improvements and Access to Justice Act, Pub. L. 100-702, sec. 201(a), 102 Stat. 4642, 4646 (1988), and to the current \$75,000 minimum in 1996, see Federal Courts Improvement Act of 1996, Pub. L. 104-317, sec. 205(a), 110 Stat. 3847, 3850.

courts,”¹⁹³ judges have a responsibility “to police the border of federal jurisdiction.”¹⁹⁴ On the other hand, an extensive fact-finding inquiry may be too time consuming and may force a plaintiff to put on the damages portion of her case before discovery even begins.¹⁹⁵

Recognizing these conflicting interests, courts apply the “legal certainty” test established in 1938 in *St. Paul Mercury Indemnity Co. v. Red Cab Co.*¹⁹⁶ The party seeking to invoke diversity jurisdiction must allege that the amount in controversy exceeds the statutory minimum.¹⁹⁷ A good faith assertion that the action satisfies the requirement is generally sufficient;¹⁹⁸ however, when such an assertion is challenged, the party asserting jurisdiction must show that it is not a “legal certainty” that the claim involves less than the jurisdictional amount.¹⁹⁹ A party may meet this burden by either

193. *Rosenboro v. Kim*, 994 F.2d 13, 19 (D.C. Cir. 1993); see H.R. REP. NO. 100-889, at 45 (1988), reprinted in 1988 U.S.C.C.A.N. 5982, 6005.

194. *Speilman v. Genzyme Corp.*, 251 F.3d 1, 4 (1st Cir. 2001). If not raised by either party, the issue of amount in controversy may be raised at any time by the court. See FED. R. CIV. P. 12(h)(3); see, e.g., *Matheson v. Progressive Specialty Ins. Co.*, 319 F.3d 1089, 1091 (9th Cir. 2003) (remanding an action for determination of diversity jurisdiction when the plaintiff only sought “in excess” of \$30,000 without explaining how much “in excess” and where the record failed to show that the district court determined that the amount in controversy was met).

195. See *Speilman*, 251 F.3d at 8 (“[D]etermining whether a case belongs in federal court should be done quickly, without an extensive fact-finding inquiry.”); see also *Pratt Cent. Park Ltd. P’ship v. Dames & Moore, Inc.*, 60 F.3d 350, 352 (7th Cir. 1995) (“To make the ‘which court’ decision expeditiously and cheaply, a judge must simplify the inquiry . . .”).

196. 303 U.S. 283 (1938).

197. See FED. R. CIV. P. 8(a) (“A pleading which sets forth a claim for relief . . . shall contain . . . a short and plain statement of the grounds upon which the court’s jurisdiction depends.”); see also *Iglesias v. Mut. Life Ins. Co.*, 156 F.3d 237, 243 (1st Cir. 1998) (holding that the district court lacked jurisdiction where defendant failed to allege that the counterclaim satisfied the amount in controversy requirement and where the record lacked “facts . . . indicative that this [was] so”).

198. See *Dep’t of Recreation & Sports v. World Boxing Ass’n*, 942 F.2d 84, 88 (1st Cir. 1991).

199. See *St. Paul Mercury Indem. Co.*, 303 U.S. at 289 (1938); see also *Speilman*, 251 F.3d at 5 (“Once the damages allegation is challenged, however, ‘the party seeking to invoke jurisdiction has the burden of alleging with sufficient particularity facts indicating that it is not a legal certainty that the claim involves less than the jurisdictional amount.’”) (quoting *Dep’t of Recreation & Sports*, 942 F.2d at 88).

amending the pleadings or submitting affidavits.²⁰⁰ It is important to note that courts “look[] to the circumstances at the time the complaint is filed,”²⁰¹ and subsequent events that reduce the amount in controversy below the minimum do not divest the federal court of jurisdiction.²⁰²

An example of an amount in controversy claim that fails to meet the “legal certainty” test is one that involves a damages cap (provided in either a statute or a contract) at an amount below the jurisdictional minimum.²⁰³ For example, in *Pratt Central Park Ltd. Partnership v. Dames & Moore, Inc.*,²⁰⁴ Judge Easterbrook dismissed a case where a contract clause capped liability at \$5,000.²⁰⁵ The plaintiff argued that his assent to the cap was an issue of material fact to be resolved by the jury.²⁰⁶ As Judge Easterbrook responded, “Yet many contract cases can be and are decided on the papers.”²⁰⁷ He emphasized the conflict between easy access to federal courts, which would reduce the “heightened cost of jurisdictional inquiry at the outset of the case,”²⁰⁸ and strict enforcement of jurisdictional limits in marginal cases, which would “protect . . . [those] litigants whose claims are squarely within federal jurisdiction.”²⁰⁹ Although such conflicts rarely yield to bright-line tests, a district judge may dismiss a case if a contract holds damages below the jurisdictional amount. Judge Easterbrook’s decision in *Pratt* exemplifies the Seventh

200. *Dep’t of Recreation and Sports*, 942 F.2d at 88.

201. *Coventry Sewage Assoc. v. Dworkin Realty Co.*, 71 F.3d 1, 4 (1st Cir. 1995).

202. *Id.* at 4–7 (distinguishing “subsequent events”—such as defendant’s partial payment of a claim—which will not affect a court’s jurisdiction, from “subsequent revelations” as to the actual amount at the commencement of the suit—such as plaintiff’s realization that she made an error in her original calculation—which will affect the court’s jurisdiction if plaintiff lacked good faith); *Gebbia v. Wal-Mart Stores, Inc.*, 233 F.3d 880, 883 (5th Cir. 2000).

203. *See Pratt Cent. Park Ltd. P’ship v. Dames & Moore*, 60 F.3d 350, 353 (7th Cir. 1995) (citing cases that involve damages caps).

204. *Id.*

205. *Id.* at 355.

206. *Id.* at 353.

207. *Id.*

208. *Id.* at 351 (“A judge would need to conduct proceedings, potentially complex, to determine whether the claim had sufficient substance to meet the jurisdictional requirements.”).

209. *Id.* at 352.

Circuit's adherence to Congress's intent to restrict diversity jurisdiction.²¹⁰

1. Aggregation of punitive damages

Contractual damages caps may not bar federal jurisdiction if a suit also seeks punitive damages.²¹¹ In some circumstances, punitive and actual damages may be aggregated to meet the jurisdictional amount in controversy.²¹² The court must ask (1) whether punitive damages are recoverable as a matter of law and (2) whether recovery is precluded because the plaintiff cannot, beyond a legal certainty, recover the jurisdictional amount under any circumstances.²¹³

The first question seems to be a simple one, yet the Seventh Circuit has recently taken a rather strict approach to the inquiry. Recently, in *American Bankers Life Assurance Company of Florida v. Evans*,²¹⁴ the court declared that simply pointing to the availability of punitive damages is insufficient to sustain the burden of proof.²¹⁵ After Evans filed suit in an Illinois court, American responded by petitioning a federal court to compel Evans to arbitration.²¹⁶ The Seventh Circuit dismissed the petition for lack of subject matter jurisdiction,²¹⁷ indicating that American offered no evidence tending to show that its conduct was "outrageous."²¹⁸ Instead, American

210. Note that the Seventh Circuit has also found dismissal proper when *state law* limits a claim to an amount less than the jurisdictional minimum. See *Ind. Hi-Rail Corp. v. Decatur Junction Ry.*, 37 F.3d 363, 366 (7th Cir. 1994) (determining that state law limited damages in a conversion case to nominal damages if property was returned).

211. See *Normand v. Orkin Exterminating Co., Inc.*, 193 F.3d 908, 910–11 (7th Cir. 1999).

212. *Bell v. Preferred Life Assur. Soc'y of Montgomery, Ala.*, 320 U.S. 238, 240 (1943).

213. See *Del Vecchio v. Conseco, Inc.*, 230 F.3d 974 (7th Cir. 2000); see also *Packard v. Provident Nat'l Bank*, 994 F.2d 1039 (3d Cir. 1993) (holding that plaintiffs had no right under Pennsylvania law to recover punitive damages).

214. 319 F.3d 907 (7th Cir. 2003).

215. *Id.* at 909.

216. *Id.* at 908.

217. *Id.*

218. *Id.* at 909. Outrageous conduct is a requirement for punitive awards under the Consumer Fraud Act. See *Ekl v. Knecht*, 585 N.E.2d 156, 244 (Ill. 1991).

merely pointed to the theoretical availability of certain categories of damages, which the Seventh Circuit held is “not enough.”²¹⁹

The Seventh Circuit has also taken a strict approach to the second inquiry, addressing whether punitive damages can be considered in the jurisdictional inquiry when the amount of compensatory damages is small compared to the punitive damages alleged.²²⁰ Punitive damages in such a large amount may be unattainable to a legal certainty, justifying dismissal for lack of jurisdiction.²²¹ In *Del Vecchio v. Conseco, Inc.*, the Seventh Circuit prohibited the aggregation of punitive damages to satisfy the amount in controversy requirement where the punitive/compensatory ratio was 125:1.²²² The court noted that such an award was “bordering on the farcical” and dismissed the suit for lack of subject matter jurisdiction.²²³ The Seventh Circuit revisited this issue in *American Bankers*, affirming the district court’s finding that a 635:1 punitive/compensatory ratio was untenable.²²⁴ In another recent Seventh Circuit opinion,²²⁵ the court noted that after the Supreme Court’s recent decision in *State Farm Mutual Automobile Insurance Co. v. Campbell*,²²⁶ the court must take a realistic look at the size of the punitive damages demanded.²²⁷ Although courts need not “train their sight on ratios or numbers,”²²⁸ they should carefully scrutinize claims that “assert[] a right to punitive damages at the far upper end of the possible distribution of outcomes.”²²⁹

Recently, courts have addressed a more complex issue regarding punitive damages: whether a claim for punitive damages in a class action may be attributed *in toto* to each class member in order to establish diversity jurisdiction, or must instead be attributed *pro rata*

219. *Evans*, 319 F.3d at 909.

220. *See Del Vecchio v. Conseco, Inc.*, 230 F.3d 974, 979–80 (7th Cir. 2000).

221. *See id.* at 980.

222. *Id.*

223. *Id.*

224. *Am. Bankers Life Assurance Co. of Fla. v. Evans*, 319 F.3d 907, 909–10 (7th Cir. 2003).

225. *Smith v. Am. Gen. Life and Accident Ins. Co.*, 337 F.3d 888 (7th Cir. 2003).

226. 538 U.S. 408 (2003).

227. *Smith*, 337 F.3d at 894.

228. *Id.* at 896.

229. *Del Vecchio v. Conseco*, 230 F.3d 974, 978 (7th Cir. 2000).

to each class member.²³⁰ The court in *Cohen v. Office Depot* settled the issue for the Eleventh Circuit, holding that a punitive damages claim must be divided among the total number of class members to determine the amount in controversy for each class member.²³¹ In that case, the class representative claimed to satisfy the amount in controversy requirement because his complaint sought \$10 million in punitive damages for the entire class of 39,000 members.²³² Initially, the Eleventh Circuit followed *Tapscott v. MS Dealer Service Corp.*,²³³ which allowed the aggregation of a punitive damages claim under Alabama law to satisfy the amount in controversy requirement for each class member.²³⁴ It is well established that multiple plaintiffs may only aggregate claims if they have “a single title or right in which they have a common and undivided interest.”²³⁵ The *Tapscott* court reasoned that when state law awards punitive damages solely to punish and deter wrongful conduct, it intends to serve the collective good and thus gives the class a “common and undivided interest” in the punitive damages claim.²³⁶

On petition for rehearing, however, the defendant in *Cohen* argued that the *Tapscott* reasoning was in conflict with *Lindsey v. Alabama Telephone Co.*,²³⁷ an earlier Fifth Circuit decision.²³⁸ Almost twenty years earlier, the court in *Lindsey* held that punitive damages under Alabama law, despite their purpose to punish and deter, must be allocated *pro rata* to each class member.²³⁹ Because

230. See, e.g., *Cohen v. Office Depot, Inc.*, 204 F.3d 1069, 1072–73 (11th Cir. 2000).

231. *Id.* at 1076.

232. *Id.* at 1072.

233. 77 F.3d 1353 (11th Cir. 1996).

234. See *id.* at 1358. As the court explained in *Cohen*, the use of the word “aggregate” in this context “is commonly used by courts when addressing the issue of whether the total amount of a class claim should be attributed to each member of the class.” 204 F.3d at 1073 n.3.

235. *Snyder v. Harris*, 394 U.S. 332, 335 (1969); see also *Bishop v. Gen. Motors Corp.*, 925 F. Supp. 294, 298 (D.N.J. 1996) (“The paradigm cases of ‘common and undivided interest’ . . . are those which involve a single indivisible *res*, such as an estate, a piece of property (the classic example), or an insurance policy. These are matters that cannot be adjudicated without implicating the rights of everyone involved with the *res*.”).

236. See *Tapscott*, 77 F.3d at 1358–59.

237. 576 F.2d 593 (5th Cir. 1978).

238. See *Cohen*, 204 F.3d at 1072.

239. See *Lindsey*, 576 F.2d at 595.

the Eleventh Circuit must follow Fifth Circuit decisions rendered before the Eleventh Circuit's creation,²⁴⁰ the court in *Cohen* determined that it must follow *Lindsey*.²⁴¹ As a result, the plaintiff could not use the total claim for punitive damages and failed to satisfy the amount in controversy requirement.²⁴²

Every circuit that has addressed the issue has similarly concluded that punitive damages cannot be aggregated in total to each class member for jurisdictional purposes.²⁴³ These circuits argue that class members' claims for punitive damages are "as separate and distinct as their claims for actual damages."²⁴⁴ After all, a class member could sue for punitive damages in a separate lawsuit without affecting the rights of subsequent plaintiffs to punitive awards.²⁴⁵ Class members' claims are "brought together in a class action only for the convenience of the plaintiffs."²⁴⁶ Although those circuits that have not yet addressed the issue will likely follow the holding in *Cohen*, the issue ultimately depends on the purpose of punitive damages under a particular state law.²⁴⁷

2. Aggregation of attorney's fees

Attorney's fees are only included in the amount in controversy determination when provided by contract or state law.²⁴⁸ In such a situation, the amount of the judgment plus the attorney's fees is

240. See *Bonner v. City of Prichard*, 661 F.2d 1206, 1209-11 (11th Cir. 1981) (en banc) (adopting as binding precedent all decisions of the Fifth Circuit delivered prior to the close of business on September 30, 1981).

241. See *Cohen*, 204 F.3d at 1072.

242. See *id.* at 1077.

243. See *Martin v. Franklin Capital Corp.*, 251 F.3d 1284, 1292-93 (10th Cir. 2001); *Morrison v. Allstate Indem. Co.*, 228 F.3d 1255, 1265-68 (11th Cir. 2000); *H&D Tire & Automotive-Hardware, Inc. v. Pitney Bowes, Inc.*, 227 F.3d 326, 329-30 (5th Cir. 2000); *Gilman v. BHC Sec., Inc.*, 104 F.3d 1418, 1430-31 (2d Cir. 1997); *Anthony v. Sec. Pac. Fin. Servs., Inc.*, 75 F.3d 311, 315 (7th Cir. 1996); *Bishop v. Gen. Motors Corp.*, 925 F. Supp. 294, 298 (D.N.J. 1996).

244. *Visintine v. Saab Auto. A.B.*, 891 F. Supp. 496, 498 (E.D. Mo. 1995).

245. See *Bishop*, 925 F. Supp. at 298.

246. *Id.*

247. See *Kirkland v. Midland Mortgage Co.*, 243 F.3d 1277, 1280-82 (11th Cir. 2001).

248. See *Smith v. GTE Corp.*, 236 F.3d 1292, 1300-03 (11th Cir. 2001); *Velez v. Crown Life Ins. Co.*, 599 F.2d 471, 474 (1st Cir. 1979).

considered for jurisdictional purposes.²⁴⁹ However, this rule becomes more difficult in class actions, when the named plaintiff wishes to aggregate the attorney's fees for the entire class in order to reach the statutory minimum.²⁵⁰ Although courts are somewhat divided on the issue, the recent trend is to limit aggregation in class actions.

The Ninth Circuit precludes the named plaintiff from aggregating the fees of the entire class,²⁵¹ and several district courts have followed this approach.²⁵² However, the Fifth Circuit in *In re Abbott Laboratories*²⁵³ allowed aggregation where a Louisiana state law authorized the allocation of all attorney's fees to "representative parties," or the named plaintiff or plaintiffs in a class action.²⁵⁴ In the absence of such a law, however, courts are reluctant to aggregate attorney's fees to meet the jurisdictional amount.²⁵⁵

249. See *San Juan Hotel Corp. v. Greenberg*, 502 F. Supp. 34, 35 (E.D.N.Y.), *aff'd mem.*, 646 F.2d 562 (2d Cir. 1980).

250. See, e.g., *Spielman v. Genzyme Corp.* 251 F.3d 1 (1st Cir. 2001). Although the Supreme Court has yet to discuss whether the named plaintiff in a class action may aggregate the attorney's fees of the class, the Court did explain in *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), that "when two or more plaintiffs having separate and distinct demands, unite for convenience and economy in a single suit, each [member of the class must] satisfy the jurisdictional-amount requirement." *Id.* at 294. For a discussion about whether the holding in *Zahn* remains good law after the enactment of the Judicial Improvements Act of 1990, see *infra* Part IV.C.4.b.

251. See *Goldberg v. CPC Int'l, Inc.*, 678 F.2d 1365, 1367 (9th Cir. 1982) (holding that aggregating anticipated fees to the named plaintiff "would conflict with the policy of [*Zahn*], in which the Supreme Court reaffirmed that the 'matter in controversy' requirement must be satisfied by each member of the plaintiff class").

252. See, e.g., *Karofsky v. Abbott Labs.*, 921 F. Supp. 18, 20 (D. Me. 1996); *Ratcliff v. Sears, Roebuck & Co.*, 911 F. Supp. 177, 178 (E.D.N.C. 1995); *Quebe v. Ford Motor Co.*, 908 F. Supp. 446, 450 (W.D. Tex. 1995); *Gilman v. Wheat, First Sec., Inc.*, 896 F. Supp. 507, 510 (D. Md. 1995); *Visintine v. Saab Auto. A.B.*, 891 F. Supp. 496, 499 (E.D. Mo. 1995).

253. 51 F.3d 524 (5th Cir. 1995), *aff'd by an equally divided Court sub nom. Free v. Abbott Labs., Inc.*, 529 U.S. 333 (2000).

254. *Id.* at 526.

255. See *Coghlan v. Wellcraft Marine Corp.*, 240 F.3d 449, 455 n.5 (5th Cir. 2001) (explaining that the holding in *Abbott Labs.* is peculiar to a Louisiana statute and that "[t]he standard approach to awards of attorney's fees in a class action context is to distribute them pro rata to all class members, both named and unnamed").

Recently, courts have been unwilling to extend the holding in *Abbott* to allow aggregation.²⁵⁶ In *Spielman v. Genzyme Corp.*,²⁵⁷ for example, the Eleventh Circuit distinguished the Louisiana statute in *Abbott* from a Massachusetts statute that allocated attorney's fees to the "petitioner."²⁵⁸ The court explained that the word "petitioner" is not the equivalent of the term "representative" in the Louisiana statute.²⁵⁹ As a result, the court precluded aggregation and dismissed the suit for lack of subject matter jurisdiction.²⁶⁰

This area of diversity jurisdiction represents yet another effort by the courts to restrict diversity jurisdiction. Unless the language in a contract or state law specifically allocates attorney's fees to the named plaintiff or representative party, most courts will keep parties out of federal court by prohibiting the aggregation of attorney's fees in class actions.²⁶¹

D. Conclusion

For the most part, courts have continued to enforce Congress's intent to restrict federal diversity jurisdiction. Only those attorneys who recognize this trend and become familiar with the court's recent developments will make the right forum selection decision for their clients. After all, a wrong decision may be fatal to a client's claim if the statute of limitations has run by the time the federal court dismisses the case for lack of subject matter jurisdiction. Additionally, such action may invoke sanctions against an attorney

256. See *Martin v. Franklin Capital Corp.*, 251 F.3d 1284, 1293 & n.7 (10th Cir. 2001) (prohibiting aggregation of attorney's fees in a class action but noting that "[t]he result might be different if the state statute under which fees are sought expressly awards those fees solely to the *class representatives*") (emphasis added); *Morrison v. Allstate Indem. Co.*, 228 F.3d 1255, 1274 (11th Cir. 2000).

257. 251 F.3d 1 (1st Cir. 2001).

258. *Id.* at 8.

259. *Id.* (explaining that the term "petitioner" is a generic term in Massachusetts law).

260. *Id.* at 9.

261. See *id.*; see also *H&D Tire & Automotive-Hardware, Inc. v. Pitney Bowes, Inc.*, 227 F.3d 326, 330 (5th Cir. 2000) (same result for Connecticut statute awarding attorney's fees to "plaintiff" in a class action); *Cohen v. Office Depot*, 204 F.3d 1069, 1080 n.11 (11th Cir. 2000) (same result for Florida statutes awarding fees to "prevailing party" or "any person prevailing"); *Darden v. Ford*, 200 F.3d 753, 758 n.4 (11th Cir. 2000) (same result for Georgia statute awarding fees to "any person who is injured").

under Rule 11.²⁶² Until Congress makes legislative changes to diversity jurisdiction, it is inevitable that courts will continue to interpret diversity jurisdiction principles in new contexts. In order to effectively participate in the forum selection battle, attorneys must carefully monitor the courts' various interpretations.

262. *See, e.g.,* *Int'l Shipping Co. v. Hydra Offshore, Inc.*, 875 F.2d 388, 393 (2d Cir. 1989) (imposing a \$10,000 sanction on plaintiffs' attorney under Rule 11); *Weisman v. Rivlin*, 598 F. Supp. 724, 727 (D.D.C. 1984) (imposing a \$200 sanction on plaintiffs' attorney under Rule 11).