

State Law & State Taxation Corner

Recent Developments in Diversity Jurisdiction for LLCs and Other Unincorporated Forms

By Thomas E. Rutledge

Introduction

A prior column¹ addressed some of the basic principles employed in assessing the citizenship, for purposes of diversity jurisdiction, of an LLC. A trio of recent developments justify a return to the topic. First, in *Lincoln Benefit Life v. AEI Life, LLC*,² the Third Circuit provided important guidance as to when pleading “on information and belief” will be sufficient to survive a facial challenge. Second, there is the question of the taxonomy of foreign (*i.e.*, non-U.S.) entities as being treated as either incorporated or unincorporated. Third, the ABA has passed a resolution calling upon Congress to amend 28 USC §1332, the statute governing diversity jurisdiction, to extend the treatment now given to corporations to unincorporated entities.



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Lincoln Benefit Life v. AEI Life, LLC

Federal diversity jurisdiction, 28 USC §1332, requires that the dispute both involve more than \$75,000 and that there be complete diversity, *i.e.*, that no defendant be a citizen of any state of which a plaintiff is a citizen.³ While corporations, consequent to specific legislative designation, are deemed to be citizens of the jurisdiction of incorporation and the jurisdiction in which is located the corporation's principal place of business,⁴ an unincorporated association such as a partnership, limited partnership or LLC is deemed to be a citizen in which any of its partners/members are citizens⁵ to the effect that, for example, if a member of an LLC is itself another LLC or a partnership, citizenship must be tracked through all layers until there are reached either natural persons or corporations.⁶ A plaintiff bringing an action in federal court, or a defendant seeking to remove an action to federal court, is required to plead facts demonstrating that diversity exists.⁷ This obligation can be, at best, difficult to satisfy when one considers that the membership of partnerships and LLCs is almost never of public record.⁸ How then, can either the plaintiff or the defendant seeking to enlist diversity jurisdiction adequately plead its existence?

This dilemma was recently faced and addressed by the Third Circuit Court of Appeals. In this case, the plaintiff brought an action in federal court against defendants including LLCs. Those defendants moved to dismiss the action on the basis that diversity jurisdiction had not been adequately pled. Of course, the information as to the membership of those defendant LLCs was uniquely within their control. As such, the plaintiff had pled diversity jurisdiction on the basis of “information and belief.” Ultimately, the Third Circuit would confirm that “information and belief” pleading is, at least initially, sufficient.⁹

[The Lincoln Benefit decision] does limit the ability of a defendant to “hide the ball” as to its citizenship while objecting that the other side has not adequately pled citizenship and therefore diversity.

There, plaintiff Lincoln Benefit brought suit in order to have declared void two life insurance policies, alleging they were procured by fraud or for the benefit of third-party investors (*i.e.*, “Stranger Originated Life Insurance” or “STOLI”). AEI Life, LLC and ALS Capital Ventures, LLC were identified as the record owners and beneficiaries of those two policies. In its complaint, originally filed in New Jersey, Lincoln Benefit alleged that it is a citizen of Nebraska based upon its organization and principal place of business. It alleged “upon information and belief” that AEI Life, LLC and ALS Capital Ventures, LLC were citizens of, respectively, New York and Delaware. In response:

The defendants filed motions to dismiss for, among other things, lack of subject-matter jurisdiction. Their primary argument was that Lincoln Benefit failed to adequately plead diversity jurisdiction: an LLC’s citizenship is determined by the citizenship of its members, and Lincoln Benefit had not alleged the citizenship of the members of the LLC defendants.¹⁰

Lincoln Benefit, in response, pointed out that none of the defendants had asserted that it was a citizen of Nebraska and further that, as information as to the membership of an LLC is not publicly available, it should be allowed to proceed on an “information and belief” basis or, in the alternative, it should be afforded the opportunity to

undertake limited discovery for the purpose of confirming that diversity did exist. The trial court held against Lincoln Benefit, holding that (a) pleading diversity on the basis of information and belief is insufficient and (b) allowing jurisdictional discovery would be inappropriate when it was not clear that the federal court did not already have jurisdiction. It was from these determinations that Lincoln Benefit appealed to the Third Circuit Court of Appeals.

The Third Circuit, after providing a brief review of the rules of diversity jurisdiction, noted that there are two bases for challenging jurisdiction. First, there is a “facial attack,” which, as was done in this case, alleges a deficiency in the pleadings. There is as well a “factual attack,” which challenges whether the alleged facts justify jurisdiction. Distinguishing, in the setting of this dispute, a facial from a factual attack, the court wrote:

If the defendants here had challenged the factual existence of jurisdiction, Lincoln Benefit would have been required to prove by a preponderance of the evidence, after discovery, that it was diverse from every member of both defendant LLCs. Instead, however, the defendants mounted a facial challenge to the adequacy of the jurisdictional allegations in Lincoln Benefit’s complaint.¹¹

The court relied, at least in part, on the decision rendered in *Lewis v. Rego, Co.*,¹² while limiting *Chem. Leaman Tank Lines, Inc. v. Aetna Cas. & Sur. Co.*,¹³ for the proposition that “rather than affirmatively alleging the citizenship of the defendant, a plaintiff may allege that the defendant is not a citizen of the plaintiff’s state of citizenship” to the effect that:

A State X plaintiff may therefore survive a facial challenge by alleging that none of the defendant association’s members are citizens of State X[.]¹⁴

provided that the plaintiff has undertaken reasonable inquiry in support thereof. To that end:

[B]efore alleging that none of an unincorporated association’s members are citizens of a particular state, a plaintiff should consult the sources at its disposal, including court filings and other public records. If, after this inquiry, the plaintiff has no reason to believe that any of the association’s members share its state of citizenship, it may allege complete diversity in good faith. The unincorporated association, which is in the best position to ascertain its own membership, may then mount a factual challenge by identifying any member who destroys diversity.¹⁵

Explaining the rationale for its holding, the court wrote:

We believe that allowing this method of pleading strikes the appropriate balance between facilitating access to the courts and managing the burdens of discovery. District courts have the authority to allow discovery in order to determine whether subject-matter jurisdiction exists. Rule 8(a)(1), however, serves a screening function: only those plaintiffs who have provided some basis to believe jurisdiction exists are entitled to discovery on that issue. The corollary of this principle is that a plaintiff need not allege an airtight case before obtaining discovery.

Depriving a party of a federal forum simply because it cannot identify all of the members of an unincorporated association is not a rational screening mechanism. The membership of an LLC is often not a matter of public record. Thus, a rule requiring the citizenship of each member of each LLC to be alleged affirmatively before jurisdictional discovery would effectively shield many LLCs from being sued in federal court without their consent. This is surely not what the drafters of the Federal Rules intended.

Moreover, the benefits of such a stringent rule would be modest. Jurisdictional discovery will usually be less burdensome than merits discovery, given the more limited scope of jurisdictional inquiries. It seems to us that in determining the membership of an LLC or other unincorporated association, a few responses to interrogatories will often suffice. So long as discovery is narrowly tailored to the issue of diversity jurisdiction and parties are sanctioned for making truly frivolous allegations of diversity, the costs of this system will be manageable.¹⁶

This opinion was followed by a concurrence written by Judge Ambro that, while not specifically commenting upon this dispute, urged the U.S. Supreme Court to in effect abandon the rule of *Carden v. Arkoma Associates*¹⁷ and allow at least limited liability companies, notwithstanding the fact that they are unincorporated, to proceed under the rules for determining citizenship that are applicable to corporations.

Assuming the reasoning employed in the Lincoln Benefit decision is followed by the other circuits, this could be a most important decision. First, it significantly undercuts the large number of decisions that, to date, have held that citizenship must be pled specifically and not on information and belief.¹⁸ Further, it stands in direct challenge

to those decisions that have held that citizenship must be affirmatively pled and that negative statements as to citizenship are insufficient.¹⁹ While it may do nothing to address the fact that diversity jurisdiction may be unavailable consequent to *de minimis* indirect ownership,²⁰ it does limit the ability of a defendant to “hide the ball” as to its citizenship while objecting that the other side has not adequately pled citizenship and therefore diversity.

How to Assess Foreign Entities?

Whether a foreign (non-U.S.) entity should be treated as a corporation or as an unincorporated entity can be a particularly complicated problem.²¹ While several courts have recognized the challenge and begun to define an analytic paradigm by which it could be assessed, no fully integrated test for corporate equivalency has yet been developed.²²

The availability to access a federal court by diversity is a matter of positive law; when the standards are not met, then access is denied.

For example, in *Keshock v. Metabowerke GMBH*,²³ a defendant in the lawsuit was a German GMBH. The defendants, in support of removal, described the entity as being a “foreign corporation” and then pled its citizenship accordingly, namely, jurisdiction of organization and of the principal place of business. In not so many words, “not so fast,” said the District Court. Rather, it directed that the defendants demonstrate whether a GMBH should be treated as incorporated or, in the alternative, as an unincorporated structure. This direction was provided even as it was acknowledged through citation to prior cases that this question of taxonomy can be quite difficult.²⁴ Likewise, in *Banks v. Janssan Research & Development LLC*,²⁵ the plaintiff was admonished to explain and categorize two “AG”s formed under German law.

*Instep Software LLC v. Instep (Beijing) Software Co., Ltd.*²⁶ involved, for these purposes, the classification (corporate or unincorporated) of a Sino-foreign Equity Joint Venture (EJV). In response to a directive from the Seventh Circuit to assess the character of an EJV,²⁷ the court relied upon a declaration (the credentials of the person giving the declaration are not recited in the opinion) to find that an EJV is similar to a corporation in that they share limited liability, separation of ownership and management, personhood

and separate entity taxation. Even though the EJV lacked perpetual existence²⁸ and freely transferable shares, these were not sufficient differentials to preclude the conclusion that an EJV “has attributes sufficiently similar to those of a corporation organized in the United States for the purposes of subject-matter jurisdiction.”²⁹

*White Pearl Inversiones S.A. (Uruguay) v. Cemusa, Inc.*³⁰ involved an S.A. organized in Uruguay; it pled its citizenship as if it were a corporation, namely, jurisdiction of organization and principal place of business. Rejecting this *ab initio* equivalency of a U.S. corporation and an S.A., the Court wrote:

If it is hard to determine whether a business entity from a common-law nation is equivalent to a ‘corporation,’ it can be even harder when the foreign nation follows the civil-law tradition. Uruguay has at least three forms of limited-liability businesses: sociedad anónima (S.A.), sociedad anónima financiera de inversión (S.A.F.I.), and sociedad responsabilidad limitada (S.R.L.). White Pearl did not say which kind it is, and its lawyers did not analyze whether that kind of business organization should be treated as a corporation. We learned at oral argument that White Pearl’s lawyers did not know—indeed, that they did not even know their client’s legal name and had not tried to analyze the significance of its (unknown) organizational attributes. They simply assumed that Uruguay has such a beast as a ‘corporation’ and that White Pearl is one. The lawyers for Cemusa made the same assumption.³¹

*V&M Star, L.P. v. Centimark Corp.*³² involved a limited partnership that had as partners two LLCs and a French S.A.R.L.; the case was remanded to determine citizenship of each LLC and of S.A.R.L. The court noted that there appeared to be no cases squarely addressing whether an S.A.R.L. would itself be treated as incorporated or unincorporated for purposes of diversity analysis.

In *Rigel v. Rosewood Hotels and Resorts, LLC*,³³ the court determined that the defendant LLC had the citizenship of its corporate member’s jurisdiction of incorporation, the British Virgin Islands; a review of the BVI Business Companies Act demonstrating multiple mechanisms of incorporating under BVI law “does not discredit the conclusion that Rosewood Limited is not an unincorporated association.” The court provided, however, no analysis as to why a BVI corporation is equivalent to a U.S. corporation. Rather, it appears to have treated “incorporated” as utilized in BVI law as being necessarily equivalent to the term as utilized in the United States.

*Principle Solutions LLC v. Feed.Ing BV*³⁴ involved the assertion, “on information and belief,” that Feed was “a limited liability company ... organized in accordance with Dutch law.” Rejecting that naked assertion the court wrote:

The acronym B.V. stands for “Besloten Vennootschap,” a Dutch entity. It is unclear to the Court whether a “Besloten Vennootschap” is more like a corporation, a limited liability company, or some other legal entity. Principle must provide factual information regarding the nature of a “Besloten Vennootschap,” and the type of legal entity to which it is most analogous for purposes of section 1332.

Likewise, addressing the treatment of the Netherlands, B.V., in *Boumatic, LLC v. Idents Operations, B.V.*,³⁵ the Seventh Circuit determined they are equivalent to a corporation in that:

A BV has the standard elements of “personhood” (perpetual existence, the right to contract and do business in its own name, and the right to sue and be sued) and issues shares to investors who enjoy limited liability (which is to say, are not liable for the business’s debts). Shares can be bought and sold, subject to restrictions that the business declares.³⁶

While the *Instep Software* and *Boumatic* decisions acknowledge the need for an analytic paradigm by which to assess whether a foreign entity should be treated as incorporated or unincorporated and hint at a “similar characteristics” test, they have not articulated what that test should be. One is reminded of the question of the classification of unincorporated associations beginning with *T.A. Morrissey*,³⁷ continuing through *A.R. Kintner*³⁸ and the eventual adoption of the *Kintner* classification regulations.³⁹ At the same time, it is curious that these decisions have not referenced the “*per se*” corporation equivalent rules set forth in the “check-the-box” classification rules.⁴⁰ Under these rules, there are listed foreign (non-U.S.) structures that are *per se* treated as corporations; all other forms are treated as being unincorporated. While not meaning to suggest that tax classification should drive treatment under §1332,⁴¹ those rules may be a useful starting point.

The ABA Endorsement to Amend §1332

In August, 2015, the House of Delegates of the American Bar Association approved Resolution 103B, sponsored by

the Standing Committee on American Judicial System, Section of Litigation, it providing:

RESOLVED, that the American Bar Association urges Congress to amend 28 USC §1332, (sic) to provide that any unincorporated business entity shall, for diversity jurisdiction purposes, be deemed a citizen of its state of organization and the state where the entity maintains its principal places (sic) of business.⁴²

Essentially, this proposal, if adopted by Congress, would eliminate the “confusion” that exists from having different tests for incorporated and unincorporated entities and as well eliminate the current test’s effect of eliminating diversity jurisdiction for certain widely held entities.⁴³ The question is whether those constitute reasons sufficient to justify an increase in the federal court’s workload.

The confusion comes about because litigators think that corporations are the “standard” organizational form. That confusion then leads to the belief that the corporate treatment under 28 USC §1332 is “standard.” In fact corporations are atypical, and the rule for their treatment under 28 USC §1332 is a departure from the standard treatment.

The fact that the standard rule for determining diversity citizenship, as contrasted with the atypical rule applicable to corporations, may involve more work for parties to a lawsuit is not sufficient alone to set it aside. The corporate

rule came about by the adoption of an acknowledged fiction, namely, that all shareholders are citizens of the corporation’s jurisdiction of incorporation.⁴⁴ Even as that was done, joint stock companies/associations remained common organizational forms, and they were treated as being “unincorporated” with citizenship determined by that of all owners.⁴⁵

As for limiting the “right” to access federal courts on the basis of diversity jurisdiction,⁴⁶ the fact that a party may prefer the federal, as contrasted with a state, standard for summary judgment or perceive that federal judges are more qualified to hear a case of a particular nature, there is no such right. The availability to access a federal court by diversity is a matter of positive law; when the standards are not met, then access is denied.

All in all, I’m not convinced that a change in 28 USC §1332 as recommended by the ABA is necessary.

Conclusion

The implications of the choice of entity calculus impact not only obvious issues such as the rights of the participants *vis-à-vis* the organization and one another and the apparent agency of the organization’s agents but also a multitude of oft-ignored implications. One of those is the availability (or not) of diversity jurisdiction in federal courts. This is an area in which a great deal is happening.

ENDNOTES

¹ See Thomas E. Rutledge, *State Law & State Taxation Corner, Which Courthouse Door?—Diversity Jurisdiction and Unincorporated Business Organizations*, J. PASSTHROUGH ENTITIES, Nov.–Dec. 2005, at 21.

² *Lincoln Benefit Life Co. v. AEI Life, LLC*, CA-3, No. 14-2660, 2015 U.S. App. LEXIS 15576 (Sept. 2, 2015).

³ 28 USC §1332(c)(5). In *Freeland v. Liberty Mutual Fire Ins. Co.*, CA-6, 632 F3d 250 (2011), the court considered a suit in which the question was whether an insurance policy provided coverage of \$25,000 or \$100,000 per accident. As the amount in controversy, exactly \$75,000, did not “exceed” \$75,000, there was no diversity jurisdiction.

⁴ See *Carden v. Arkoma Assoc.*, S Ct, 494 US 185 (1990).

⁵ See, e.g., *Cosgrove v. Bartolotta*, CA-7, 150 F3d 729 (1998) (“[W]e conclude that the citizenship of a LLC for purposes of diversity jurisdiction is the citizenship of its members.”); *Homfeld II, L.L.C. v. Comair Holdings, Inc.*, CA-6, 53 FedAppx 731 (2003) (Adopting the rule of *Cosgrove v. Bartolotta* in the Sixth Circuit to the effect that “a limited liability company is not treated as a corporation and has the citizenship of its members.”); *Pranco, LLC ex rel.*

CGSC Consortium, LLC v. San Juan Bay Marina, Inc., CA-1, 435 F3d 51 (2006) (“Limited liability companies are unincorporated entities. The citizenship of an unincorporated entity, such as a partnership, is determined by the citizenship of all of its members.”); *Muhlenbeck v. KI, LLC*, DC-VA, 304 FSupp2d 797 (2004) (“[T]he citizenship of a limited liability company depends not on the state in which it is organized or the state in which it does most of its business, but rather on the citizenship of the entities that own the LLC.”); *Zambelli Fireworks Mfg. Co. v. Wood*, CA-3, 592 F3d 412, 420 (2010) (“The citizenship of an LLC is determined by the citizenship of its members.”); *International Flavors and Textures, LLC v. Gardner*, DC-MI, 966 FSupp 552, 554 (1997) (“The citizenship of an unincorporated association, at least for the purposes of diversity jurisdiction, is the citizenship of each of its members.”).

⁶ See, e.g., *Cerberus Partners, L.P. v. Gadsby Hannah*, DC-RI, 976 FSupp 119, 123 (1997) (This case involved a multitier partnership and an expansive argument that the court’s review of the citizenship of the partners should be limited to the first-tier partners and should not extend all the way to the ultimate constituent persons or corporations. The court rejected this argu-

ment, noting that it “run[s] counter to *Carden* and find[s] no support in any other cases.”); *Meyerson v. Showboat Marina Casino Partnership*, CA-7, 299 F3d 616, 617 (2002) (noncorporate parties are admonished that their citizenship must be “traced through however many layers of partners and members [and trustees] there may be.”); *Community Preservation Corp. v. MYG Mgmt, LLC*, DC-NJ, No. 07-2286, 2008 U.S. Dist. LEXIS 87940 (Oct. 27, 2008) (“Every membership layer must be traced and analyzed to determine a limited liability company’s citizenship.”); *Mut. Assignment & Indem. Co. v. Lind-Waldock & Co., LLC*, CA-7, 364 F3d 858, 861 (2004) (“Lind-Waldock is a limited liability company, which means that it is a citizen of every state of which any member is a citizen; this may need to be traced through multiple levels if any of its members is itself a partnership or LLC.”); *Delay v. Rosenthal Collins Group, LLC*, CA-6, 585 F3d 1003, 1005 (2009) (“When diversity jurisdiction is invoked in a case in which a limited liability company is a party, the court needs to know the citizenship of each member of the company. And because a member of a limited liability company may itself have multiple members—and thus may itself have multiple citizenships—the federal court needs to know

the citizenship of each 'sub-member' as well."); *Gonyer v. Enbridge Energy, Limited Partnership*, DC-MI, No. 1:13-CV-796, 2014 U.S. Dist. LEXIS 39892 (Mar. 16, 2014) ("Moreover, if a party is a limited partnership with partners that are also limited partnerships, limited liability companies, or other similar unincorporated business entities, the plaintiff must allege the citizenship of each partner or member of such entity, and so on."); *McLaud v. Industrial Resources, Inc.*, DC-PA, No. 3:CV-14-737, 2014 U.S. Dist. LEXIS 55688 (Apr. 22, 2014), citing *Zambelli Fireworks*, 592 F3d at 420 (Where one or more of an LLC's members is itself another LLC, the citizenship of each LLC must be determined by "trac[ing] through however many layers of partners or members there may be."); *D.B. Zwirn Special Opportunities Fund, L.P. v. Mehrotra*, CA-1, 661 F3d 124, 126–27 (2011) ("If even one of Zwirn's members is another unincorporated entity, the citizenship of each of that member's members (or partners, as the case may be) must then be considered.").

⁷ See, e.g., *Hale v. M.J.J.K., LLC*, DC-LA, Civil Action No. 12–1515, 2013 U.S. Dist. LEXIS 170993, *3 ("Accordingly, the party invoking federal jurisdiction 'must list the citizenship of each member of each limited liability company to properly allege diversity of jurisdiction.'").

⁸ The courts have been inconsistent in permitting or forbidding, on a case-by-case basis, discovery as to citizenship and therefore the availability of diversity jurisdiction. Compare *Dougherty Funding, LLC v. Gateway Ethanol, LLC*, DC-KS, No. 08-CV-2213-JWL, 2008 U.S. Dist. LEXIS 44749 (June 5, 2008) (permitting defendant to take written discovery of the plaintiff's citizenship in order to ascertain if diversity jurisdiction exists) with *MCP Trucking, LLC v. Speedy Heavy Hauling, Inc.*, DC-CO, Civ. Act. No. 14-CV-02427-PAB, 2014 U.S. Dist. LEXIS 142544 (Oct. 6, 2014) (denying jurisdictional recovery and remanding action to state court even as it was acknowledged that further discovery in that forum could demonstrate that diversity exists, leading to a subsequent removal). See also *Osborn & Barr Communications, Inc. v. EMC Corp., Inc.*, DC-MO, No. 4:08-CV-87 CAS, 2008 U.S. Dist. LEXIS 8430 (Feb. 5, 2008) (denying motion for jurisdictional recovery and collecting cases).

⁹ *Lincoln Benefit Life Co. v. AEI Life, LLC*, CA-3, No. 14-2660, 2015 U.S. App. LEXIS 15576 (Sept. 2, 2015).

¹⁰ *Id.*, *3–*4.

¹¹ *Id.*, *9.

¹² *Lewis v. Rego, Co.*, CA-3, 757 F2d 66 (1985).

¹³ *Leaman Tank Lines, Inc. v. Aetna Cas. & Sur. Co.*, CA-3, 177 F3d 210, 222 n. 13 (1999).

¹⁴ *Supra* note 9, at *14.

¹⁵ *Supra* note 9, at *15.

¹⁶ *Supra* note 9, at *16–*18.

¹⁷ *Carden v. Arkoma Associates*, SCt, 494 US 185 (1990).

¹⁸ See, e.g., *Principle Solutions LLC v. Feed.Ing BV*, DC-WI, Case No. 13-C-223, 2013 U.S. Dist. LEXIS 79689 (June 5, 2013) ("It is well-settled

that a plaintiff claiming diversity jurisdiction may not do so on the basis of information and belief, only personal knowledge is sufficient."); *Pharmerica Corp. v. Crestwood Care, LLC*, DC-IL, No. 13C 1422, 2015 U.S. Dist. LEXIS 25782 (Mar. 2, 2015) ("[I]t is not sufficient to assert jurisdiction based on information and belief."); *MCP Trucking, LLC v. Speedy Heavy Hauling, Inc.*, DC-CO, 2014 U.S. Dist. LEXIS 142544 (Oct. 6, 2014) (denying jurisdictional discovery and remanding action to state court even as it acknowledged that further discovery in that forum could demonstrate that diversity exists, leading to subsequent removal); *Lake v. Hezebeicks*, DC-IN, 2014 U.S. Dist. LEXIS 64133 (May 9, 2014) (allegations of subject matter jurisdiction must be based on personal knowledge and may not be based upon information and belief and collecting cases to that effect). But see Charles Alan Wright *et al.*, Federal Practice and Procedure: Federal Rules of Civil Procedure §1224 (3rd ed. 2013) (stating that pleading on the basis of information and belief "is a practical necessity").

¹⁹ See, e.g., *D.B. Zwirn Special Opportunities Fund, LP v. Mehrotra*, CA-1, 661 F3d 124 (2011), citing *Cameron v. Hodges*, SCt, 127 US 322 (1888).

²⁰ See, e.g., *Fadal Machining Centers, LLC v. Mid-Atlantic CNC, Inc.*, 2012 US App. LEXIS 48 (2012); *Alphonse v. Arch Bay Holdings, L.L.C.*, CA-5, No. 14-31320 Summary Calendar, 2015 U.S. App. LEXIS 12222 (July 13, 2015).

²¹ See also Jeff Bowen, *Are You Sure It's a Corporation*, THE CIRCUIT RIDER, available online at <https://dptax5jbd3l.cloudfront.net/images/content/1/1/v2/118363/Are-You-Sure-Its-a-Corporation.pdf>.

²² See U.S. Const. Art III, Sect. 2 (federal courts have jurisdiction of disputes "between a state, or the citizens thereof, and foreign states, citizens or subjects.").

²³ *Keshock v. Metabowerke GMBH*, DC-AL, Civ. Act. No. 15-00345-N, 2015 U.S. Dist. LEXIS 94338 (July 21, 2015).

²⁴ *Id.* See also *Appjigger GMBH v. Blu Products, Inc.*, DC-IL, Case No. 14 C 9650, 2015 U.S. Dist. LEXIS 69477 (May 29, 2015) (*in dicta*, describing a GMBH as being "a German limited liability company."). GMBH, typically set forth as GmbH, is the abbreviation for Gesellschaft mit beschränkter Haftung.

²⁵ *Banks v. Janssan Research & Development LLC*, DC-AL, 2014 U.S. Dist. LEXIS 162681 (Nov. 19, 2014).

²⁶ *Instep Software LLC v. Instep (Beijing) Software Co., Ltd.*, DC-IL, 2015 U.S. Dist. LEXIS 117379 (Sept. 2, 2015).

²⁷ See *Instep Software LLC v. Instep (Beijing) Software Co., Ltd.*, CA-7, 577 FedAppx 612 (2014).

²⁸ Curiously, in describing the EJV as lacking "perpetual existence," the court departed from the interpretation of that term as traditionally applied with respect to the "continuity of life" factor under the *Kintner* classification regulations. Here, because the entity had a defined expiration date, the court treated it

as not having perpetual existence. That is not, however, how the factor was examined in applying the *Kintner* classification regulations. Rather, notwithstanding an expiration date in the entity's organizational documents, an organization has continuity of life if it, during its period of existence, does not dissolve simply consequent to the separation of a constituent owner from the organization. See also Thomas E. Rutledge, *It Just Doesn't Matter, Or Why You Don't Need a Definite Date of Dissolution*, LLC RPT (1994).

²⁹ *Supra* note 26, at *10.

³⁰ *Pearl Inversiones S.A. (Uruguay) v. Cemus, Inc.*, CA-7, 647 F3d 684 (2011).

³¹ *Id.*, at 686. *Accord Fellowes, Inc. v. Changzhou Xinrui Fellowes Office Equipment Co.*, CA-7, 759 F3d 787 (2014).

Deciding whether a business enterprise based in a foreign nation should be treated as a corporation for the purpose of §1332 can be difficult. See, e.g., *White Pearl Inversiones S.A. (Uruguay) v. Cemus, Inc.*, 647 F3d 684 (7th Cir. 2011). Businesses in other nations may have attributes that match only a subset of those that in the United States distinguish a 'corporation'—a business with indefinite existence, person-hood (the right to contract and litigate in its own name), limited liability for equity investors, and alienable shares, among other features—from forms such as the limited liability company, the limited partnership, and the business trust.

Fellowes's complaint calls Changzhou Fellowes a 'limited liability company'. Changzhou Fellowes describes itself that way too. The parties agree that it has 'members' (like an LLC or partnership in the United States) rather than 'shareholders,' and that memberships are not alienable. It is like a general partnership in the latter respect.

³² *V & M Star, L.P. v. Centimark Corp.*, CA-6, 596 F3d 354 (2010).

³³ *Rigel v. Rosewood Hotels and Resorts, LLC*, DC-TX, 2014 U.S. Dist. LEXIS 171676 (Dec. 11, 2014).

³⁴ *Principle Solutions LLC v. Feed.Ing BV*, DC-WI, No. 13-C-223, 2013 U.S. Dist. LEXIS 79689 (June 5, 2013).

³⁵ *Boumatic, LLC v. Idents Operations, B.V.*, CA-7, 759 F3d 790 (2014).

³⁶ *Id.*, at 791. See also *Lear Corp. v. Johnson Electric Holdings Ltd.*, CA-7, 353 F3d 580 (2003), treating a Bermuda "limited" organization as incorporated based upon limited liability, perpetual existence, a board of directors and transferable shares.

³⁷ *T.A. Morrissey*, SCt, 36-1 usrc ¶9020, 296 US 344, 56 SCt 289. In *Morrissey*, the Supreme Court was called upon to identify how, under the Internal Revenue Code, a trust would be classified. Therein, the Supreme Court looked to six factors in distinguishing organizational forms, namely: associates; an objective to carry

on a business and divide the gains thereof; limited liability; free transferability; continuity of life; and centralized management.

³⁸ *A.R. Kintner*, CA-9, 54-2 USTC ¶9626, 216 F2d 418.

³⁹ Reg. §301.7701-2 (1960) (repealed Jan. 1, 1997). Adopted in response to the IRS's loss in *Kintner*, these classification regulations distinguish organizational forms based on four factors, namely, limited liability, continuity of life, free transferability of interests and centralized management. Further, reflecting the bias of the IRS at the time, these classification regulations were tipped in favor of partnership classification consequent to its equal weighting of the factors and the requirement that, absent incorporation, corporate classification requires the existence of three or more of the factors. See also *P.G. Larson* 66 TC 159, 185, Dec. 33,793 (1976), *acq.*, 1979-2 CB 1.

⁴⁰ See Reg. §301.7701-2(b)(8).

⁴¹ See, e.g., *Fairfield Castings, LLC v. Hofmeister*, DC-LA, No. 4:15-cv-00059, 2015 U.S. Dist. LEXIS 88279 (July 2, 2015) (rejecting the suggestion that an LLC's election to be classified for tax purposes as a corporation affects its treatment for purposes of diversity jurisdiction).

⁴² The resolution and supporting report are available on the ABA website. See www.americanbar.org/news/reporter_resources/annual-meeting-2015/house-of-delegates-resolutions/103b.html.

⁴³ See, e.g., *Reisman v. KPMG Peat Marwick LLP*, DC-MA, 965 FSupp165 (1997) ("This Court is particularly troubled that a Big Six accounting firm which operates offices within every state in the United States has effectively immunized itself from the reach of the diversity."); *Great Lakes Gas Transmission Limited Partnership v. Essar Steel Minnesota, LLC*, DC-MN, No. 09-cv-3037 (SRN/LIB), 2015 U.S. Dist. LEXIS 57863

(May 4, 2015).

⁴⁴ See *Marshall v. Baltimore and Ohio RR Co.*, 57 US 314, 328 (1854) ("The persons who act under these faculties, and use this corporate name, must be justly presumed to be resident in the State which is the necessary habitat of the corporation, ..."); *Id.*, at 329 ("The presumption arising from the habitat of a corporation in the place of its creation being conducive as to the residence or citizenship of those who use the corporate name and exercise the facilities conferred by it, ..."); see also *Steamship Company v. Tugman*, 106 US 118, 120-21 (1882).

⁴⁵ See, e.g., *Chapman v. Barney*, SCt, 129 US 677, 9 SCt 426, 32 L.Ed. 800 (1889).

⁴⁶ See, e.g., *Alphonse v. Arch Bay Holdings, L.L.C.*, CA-5, No. 14-31320 Summary Calendar, 2015 U.S. App. LEXIS 12222 (July 13, 2015).

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