

# THE TRUST AS AN ENTITY AND DIVERSITY JURISDICTION: IS NAVARRO APPLICABLE TO THE MODERN BUSINESS TRUST?

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*Editors' Synopsis: In an attempt to standardize the formation and operation of business trusts, the Uniform Statutory Trust Entity Act provides for the creation of a "statutory" trust. The statutory trust is different from a traditional business trust in certain fundamental ways, raising the question of how courts should evaluate citizenship of these new entities in determining diversity jurisdiction. In Navarro Savings Ass'n v. Lee, the United States Supreme Court determined that citizenship of a business trust is based on the citizenship of the trustees who hold legal title to the trust assets. In contrast, in Carden v. Arkoma Associates the Court determined that an unincorporated association's citizenship is based on the citizenship of all owners, whether general or limited, or impliedly, legal or beneficial. In reconciling these two cases, courts have limited Navarro to actions where the trustees are real parties and not representative of the trust itself. This Article proposes that Navarro's limited application combined with changes in business trust law makes Carden the better rule for determining citizenship for diversity jurisdiction in suits involving a modern business or statutory trust, if trustee citizenship is disregarded where the trustee is only a party in its fiduciary capacity.*

<b>I.</b>	<b>GENERAL INTRODUCTION</b> .....	84
<b>II.</b>	<b>A BRIEF INTRODUCTION TO THE BUSINESS/STATUTORY TRUST</b> .....	86
<b>III.</b>	<b>WHY NOW A UNIFORM BUSINESS/STATUTORY TRUST ACT?</b> .....	92
<b>IV.</b>	<b>"BUSINESS"-v.-"STATUTORY" TRUST</b> .....	93
<b>V.</b>	<b>DIVERSITY JURISDICTION</b> .....	95

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<b>VI.</b>	<b>NAVARRO SAVINGS ASS'N v. LEE</b> .....	96
<b>VII.</b>	<b>DETERMINING CITIZENSHIP OF UNINCORPORATED ASSOCIATIONS</b> .....	97
<b>VIII.</b>	<b>RECONCILING NAVARRO AND CARDEN</b> .....	101
<b>IX.</b>	<b>IS NAVARRO GOOD LAW FOR MODERN STATUTORY TRUSTS?</b> .....	102
<b>X.</b>	<b>WHO IS A MEMBER OF A MODERN BUSINESS TRUST ...</b>	105
<b>XI.</b>	<b>CONCLUSION</b> .....	109

### I. GENERAL INTRODUCTION

Practitioners have been well cautioned that unincorporated business organizations involved in a suit in federal court based upon diversity are a “jurisdictional warning flag.”<sup>1</sup> If the party is in a partnership, whether general or limited, citizenship is determined for the venture based upon the citizenship of each of the partners.<sup>2</sup> Similarly, if the party to the action is a limited liability company (LLC), its citizenship is determined based upon that of each of its members.<sup>3</sup> Regardless of whether the venture is a partnership, a limited partnership, or an LLC, neither the jurisdiction of the state of organization nor that of the principal place of business is relevant to the question of citizenship.<sup>4</sup>

Far less clarity exists in considering the citizenship of a business or statutory trust for purposes of diversity jurisdiction. In a suit involving a business trust in which the trustees brought suit in their own names to collect on a guarantee of an obligation to them as the trustees, the United States Supreme Court determined that the analysis is based upon the citizenship of those trustees without reference to the citizenship of the trust’s beneficial owners.<sup>5</sup> Other courts assessing claims brought by or

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<sup>1</sup> Cosgrove v. Bartolotta, 150 F.3d 729, 731 (7th Cir. 1998).

<sup>2</sup> See Carden v. Arkoma Assocs., 494 U.S. 185, 195–96 (1990).

<sup>3</sup> See, e.g., Pramco, LLC *ex rel.* CFSC Consortium, LLC v. San Juan Bay Marina, Inc., 435 F.3d 51, 54–55 (1st Cir. 2006); Gen. Tech. Applications, Inc. v. Exro Ltda, 388 F.3d 114, 121 (4th Cir. 2004); GMAC Commercial Credit LLC v. Dillard Dep’t Stores, Inc., 357 F.3d 827, 829 (8th Cir. 2004).

<sup>4</sup> See *infra* note 71.

<sup>5</sup> See *Navarro Sav. Ass’n v. Lee*, 446 U.S. 458, 465–66 (1980).

against the trust itself have treated it as any other unincorporated organization, looking to the citizenship of each of the beneficial owners.<sup>6</sup>

A topic worth considering is how existing law as to the diversity treatment of business trusts should apply to the more modern incarnations of that organizational structure, particularly those trusts organized under the Uniform Statutory Trust Entity Act (USTA).<sup>7</sup> The modern business trust organized under USTA arguably departs sufficiently from the old model that *Navarro* is no longer controlling. Rather, at least from the perspective of determining diversity jurisdiction, such entities may not actually be “trusts.” If so, then demonstrating diversity will require an investigation of the citizenship of each beneficial owner. At the same time, in contrast to earlier cases that attributed to the trust the citizenship of each trustee as well, such attribution is not appropriate in the modern business trust. We ultimately determine that, consequent to the organic structure of the modern business trust, in the course of determining citizenship for purposes of assessing diversity: (1) *Navarro*’s reference only to the trustees is not appropriate; (2) the *Carden* references to all of the members is correct; and (3) in applying *Carden*, the trustees qua trustees are not members whose citizenship is relevant.

This Article begins with a review of the trust generally and the business trust in particular, from its rise as a means of avoiding feudal obligations based upon the ownership of real property to its more modern use as an alternative form for capital accumulation, addressing how the corporation was ascendant over the more flexible trust form. This Article then addresses the modern nomenclature and the impetus for the modern statutory trust act. Next, this Article discusses the rules of diversity jurisdiction as applied to traditional format business trusts and then questions whether and how those rules should apply to the modern statutory trust. In conclusion, this Article suggests that a modern “statutory trust” is not a “trust” as contemplated by *Navarro* but rather an unincorporated association to which the rule of *Carden* should apply.

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<sup>6</sup> See *infra* notes 79–86 and accompanying text. We utilize “beneficial owner” because the Uniform Statutory Trust Entity Act uses this term in its definitions. See UNIF. STATUTORY TRUST ENTITY ACT § 102(1), 6B U.L.A. 83 (Supp. 2012).

<sup>7</sup> See UNIF. STATUTORY TRUST ENTITY ACT, 6B U.L.A. 78 (Supp. 2012). To date the District of Columbia and Kentucky have adopted USTA. With respect to the Kentucky adoption, see Thomas E. Rutledge, *The Kentucky Uniform Statutory Trust Act (2012): A Review*, 40 N. KY. L. REV. 93 (2012-13).

## II. A BRIEF INTRODUCTION TO THE BUSINESS/STATUTORY TRUST

Because this Article proposes that changes in the law of business trusts necessitate a new manner of consideration for purposes of diversity jurisdiction, it follows that the analysis should begin with a history of the form and its use and development over time.

While the trust, the separation of legal and beneficial title, may have had its structural genesis in German law, the advance of the English courts of equity was to convert the “trustee’s” obligations from those based upon honor to those enforceable in equity.<sup>8</sup> Various developments such as the Statute of Mortmain,<sup>9</sup> which precluded or limited the ability of religious organizations to own real property,<sup>10</sup> efforts to avoid feudal burdens attendant to real property ownership,<sup>11</sup> and efforts to afford dormitory facilities for the orders of friars who were otherwise obligated not to own property encouraged the advancement of trusts.<sup>12</sup> The intent of the 1535 Statute of Uses was in part to address those efforts by religious communities.<sup>13</sup>

Still, the trust continued to develop. As the industrial age arose, a need emerged for structures through which capital could be accumulated and then devoted to particular purposes. Ultimately, a variety of organizational forms were in competition for acceptance.<sup>14</sup> In the last decade of the nineteenth

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<sup>8</sup> See James Barr Ames, *The Origin of Uses and Trusts*, 21 HARV. L. REV. 261, 265 (1908). See generally Joseph Willard, *Illustrations of the Origin of Cy Près*, 8 HARV. L. REV. 69 (1894).

<sup>9</sup> See, e.g., A Statute of Mortmain, 1279, 7 Edw. 1 C.2 (Eng), Statute of Westminster the Third, 1290, 18 Edw. 1 C.1 (Eng.); see also Ames, *supra* note 8, at 265–66.

<sup>10</sup> See, e.g., F.W. Maitland, *The Origin of Uses*, 8 HARV. L. REV. 127, 130 (1894).

<sup>11</sup> See, e.g., II JAMES KENT, COMMENTARIES ON AMERICAN LAW \*228 (1827); ROBERT C. PALMER, ENGLISH LAW IN THE AGE OF THE BLACK DEATH, 1348–1381, 112–17 (Thomas A. Green ed., 1993).

<sup>12</sup> See J.L. Barton, *The Medieval Use*, 81 L. Q. REV. 562, 564–65 (1965); Maitland, *supra* note 10.

<sup>13</sup> See An Act Concerning Uses and Wills, 1535, 27 Hen. 8, c. 10 (Eng.); see also W.S. Holdsworth, *The Political Causes Which Shaped the Statute of Uses*, 26 HARV. L. REV. 108, 115–21 (1912). Irrespective of the effectiveness (or not) of the Statute of Uses, in ensuing years the suppression of the monasteries and religious institutions dispossessed many religious communities of their properties. See Suppression of Religious Houses Act, 1539, 31 Hen. 8, c. 13 (Eng.); An Act Establishing the Court of Augmentations, 1535, 27 Hen. 8, c. 27 (Eng.); Suppression of Religious Houses Act, 1535, 27 Hen. 8, c. 28 (Eng.); Dissolution of Colleges Act, 1547, 1 Edw. 6, c. 14 (Eng.); Religious Houses Act of 1558, 1 Eliz. c. 24 (Eng.).

<sup>14</sup> See John H. Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 YALE L.J. 165, 179 (1997) (“I find it useful to think of the trust as a competitor, locked in a sort of Darwinian struggle against other modes of business

century, these structures included the trust, the corporation, and the joint stock company as well as the partnership and the limited partnership. The partnership, the limited partnership, and the joint stock company would all fail in this contest due to the absence of limited liability to participants in the venture—a significant risk to those seeking diversification and unable to devote significant resources to oversight.<sup>15</sup>

Comparing the business trust and the corporation, the business trust flourished in an environment in which limitations existed upon the corporate form.<sup>16</sup> Initially, the creation of a corporation required an act of the sovereign, typically a state.<sup>17</sup> Even when the era of true general incorporation statutes arose with the groundbreaking New Jersey statute in 1888,<sup>18</sup> corporate charters of the age typically limited the entity to defined purposes.<sup>19</sup> At the

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organization and finance, in particular the corporation, but also the partnership and the various techniques of secured finance.”).

<sup>15</sup> Section 15 of the Uniform Partnership Act (1914) embodied the prior common law of partner liability for partnership obligations; the only prior dispute was whether that liability was joint or joint and several. *See* UNIF. P’SHIP ACT § 15 cmt., 6 pt. 1 U.L.A. 613–14 (2001). The limited partnership—an import from French law—while purporting to provide at least the limited partners limited liability, did so against the backdrop of a far more draconian “control rule” that existed under the Revised Uniform Limited Partnership Act (1985) and the backdrop of public disclosure obligations—in this era the certificate of limited partnership named both the limited and the general partners. *See* UNIF. LTD. P’SHIP ACT § 2(1)(a)(IV) (1916) (requiring certificate of limited partnership to set forth the name of and place of residence of each member; general and limited partners being respectively designated). Even if limited liability was available to the limited partners, the general partners remained at risk; the law did not yet accommodate the corporation or any other limited liability structure as the general partner. *See, e.g.*, THEOPHILUS PARSONS, A TREATISE ON THE L. OF PARTNERSHIP 31 (2d ed. 1870) (“[A]lthough, on general principles, it would be inconvenient, if not impossible, for a corporation, which is only a *legal* person to enter into a full copartnership, either with another *legal* person, or with natural persons.”); JOSEPH STORY, COMMENTARIES ON THE LAW OF PARTNERSHIP 20 (6th ed. 1868); Robert W. Hamilton, *Corporate General Partners of Limited Partnerships*, 1 J. SMALL & EMERGING BUS. L. 73 (1997).

<sup>16</sup> *See* Langbein, *supra* note 14, at 184–85 (“When the modern business corporation developed in the nineteenth century, it emerged encumbered with restrictions of a regulatory character, designed to protect creditors and shareowners.”).

<sup>17</sup> *See, e.g.*, Susan Pace Hamill, *From Special Privilege to General Utility: A Continuation of Willard Hurst’s Study of Corporations*, 49 AM. U. L. REV. 81, 88 (1999) (“Corporations always have been creatures of statute, requiring a formal recognition normally evidenced by a corporate charter issued by a sovereign person or government.” (citations omitted)).

<sup>18</sup> *See* JAMES B. DILL, THE STATUTORY AND CASE LAW APPLICABLE TO PRIVATE COMPANIES UNDER THE GENERAL CORPORATION ACT OF NEW JERSEY AND CORPORATION PRECEDENTS (3d ed. 1901); JAMES WILLARD HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES, 1780–1970, at 69–70 (1970).

<sup>19</sup> *See* Hamill, *supra* note 17, at 159–65.

same time, the law imposed limitations upon the maximum capitalization of a corporation and either limited or precluded corporate ownership of real property.<sup>20</sup> Corporate law also precluded corporate ownership of shares in other corporations while requiring a minimum number of shareholders and directors, typically in each instance three.<sup>21</sup>

In contrast, the trust, a creature of private ordering combined with the sanction of the courts of equity, did not have such constraints.<sup>22</sup> The creation of a trust required no state action, but rather only the conveyance of title by the settlor to one or more trustees for the benefit of the trust's beneficiaries. No requirements existed as to the minimum number of trustees or beneficiaries, beyond requiring one of each.<sup>23</sup> While a corporation could not hold shares in another corporation, no such limitation restricted the trust<sup>24</sup>—

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<sup>20</sup> See *Linn v. Houston*, 255 P. 1105, 1107 (Kan. 1927):

A common-law trust is or may be a very convenient device for the accumulation of sufficient assets to give commercial prestige in the conduct of business, and may be more elastic and adaptable to the business undertakings and projects of its creators than a limited partnership or ordinary corporation would be. So, too, it is less handicapped with ultra vires problems and the necessity of conforming to discordant state laws governing corporations and the payment of burdensome corporation taxes.

See also *State Street Trust Co. v. Hall*, 41 N.E.2d 30, 34 (Mass. 1942) (discussing limits on ownership of real property by corporations); *Dodge v. Ford Motor Co.*, 170 N.W. 668, 680 (Mich. 1919) (discussing statutory limits on minimum and maximum capital); 16A WILLIAM MEADE FLETCHER, *FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS* § 8232 (perm. ed., rev. vol. 2012); 4A KENTUCKY PRACTICE—METHODS OF PRACTICE § 18:4 (Robert W. Keats ed., 4th ed. 2007) (“The business trust was developed in Massachusetts from 1910 to 1925 to achieve limited liability and to avoid restrictions then existing there on a corporation’s acquiring and developing real estate . . . .”); Robert H. Sitkoff, *Trust as “Uncorporation”*: A *Research Agenda*, 2005 U. ILL. L. REV. 31, 44.

<sup>21</sup> See, e.g., 1892 Ky. Acts 617 (requiring a minimum of three directors for private corporations); *Lincoln Court Realty Co. v. First Nat’l Bank*, 219 S.W. 158, 159–60 (Ky. 1920) (sole shareholder of corporation liable for its debts); *Louisville Banking Co. v. Eisenman*, 21 S.W. 531, 532 (Ky. 1893) (a corporation may not have a single shareholder).

<sup>22</sup> See, e.g., *Gardiner v. Gardiner*, 99 N.E. 171 (Mass. 1912); see also WILLIAM C. DUNN, *TRUSTS FOR BUSINESS PURPOSES* § 21, at 34 (1922) (“The only limitation placed on the trust in its development is that its purpose shall not be illegal or against the public policy of the state.”).

<sup>23</sup> See 1 JAIUS WARE PERRY, *A TREATISE ON THE LAW OF TRUSTS AND TRUSTEES* § 13 (Raymond C. Baldes ed., 7th ed. 1929) (“But no person can be both trustee and *cestui que trust* at the same time, for no person can sue a subpoena against himself.”).

<sup>24</sup> See, e.g., JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, *THE COMPANY: A SHORT HISTORY OF A REVOLUTIONARY IDEA* 67 (2003):

For the robber barons, they [trusts] were a way of getting around primitive antitrust laws prohibiting companies from owning shares in each other.

a capacity that allowed certain trusts to amass control over significant portions of commercial activity.<sup>25</sup> The constraints of limited purpose and ultra vires in general,<sup>26</sup> including in particular those on the ownership of real property, restricted corporations but did not restrict trusts.<sup>27</sup>

With that background the corporate form seemed unlikely to prevail; the trust was clearly a more flexible format. The corporate form did prevail, however, an outcome that arose out of two legal developments and the pre-structuring of the corporation by those new laws. Initially, general corporation statutes came into existence, permitting incorporation largely by private act within a permission framework defined by the state legislature.<sup>28</sup> Second, the business trust form was never the beneficiary of an “internal affairs” rule determining the liability of the beneficial owners for the trust’s debts and obligations in accordance with the laws of the jurisdiction in which the trust was organized.<sup>29</sup> Rather, in a number of instances in which a business trust was doing business outside its jurisdiction of formation, courts held that the beneficial owners did not enjoy limited liability vis-à-vis the trust’s obligations.<sup>30</sup> With limited liability across state lines available

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Shareholders in a number of competing companies gave their voting shares to a central trust company in return for tradable trust certificates bearing the right to receive income but not to vote.

*See also* WILLIAM W. COOK, A TREATISE ON THE LAW OF CORPORATIONS HAVING A CAPITAL STOCK § 503a (5th ed. 1903).

<sup>25</sup> The title of the first federal legislation passed to protect competition, namely the Sherman Antitrust Act, reflects widespread use of the form, exemplified by Rockefeller’s Standard Oil Trust. *See* 15 U.S.C. §§ 1–38.

<sup>26</sup> While ultra vires is today a nearly abandoned concept as evidenced by MODEL BUS. CORP. ACT § 3.04 (1971), in this earlier age entire treatises existed on the topic. *See, e.g.*, SEWARD W. BRICE, A TREATISE ON THE DOCTRINE OF ULTRA VIRES (2d Amer. ed. 1880); REUBEN A. REESE, THE TRUE DOCTRINE OF ULTRA VIRES IN THE LAW OF CORPORATIONS (1897).

<sup>27</sup> *See* DUNN, *supra* note 22.

<sup>28</sup> *See supra* note 18.

<sup>29</sup> *See* RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 298 (1971); Thomas E. Rutledge, *To Boldly Go Where You Have Not Been Told You May Go: LLCs, LLPs, and LLLPs In Interstate Transactions*, 58 BAYLOR L. REV. 205 (2006).

<sup>30</sup> *See, e.g.*, Weber Engine Co. v. Alter, 245 P. 143 (Kan. 1926); Ing v. Liberty Nat’l Bank, 287 S.W. 960 (Ky. 1926); Thompson v. Schmitt, 274 S.W. 554 (Tex. 1925); *see also* Ira P. Hildebrand, *Massachusetts Trust, - A Sequel*, 4 TEX. L. REV. 57 (1925–26) (reviewing *Thompson v. Schmitt* and other Texas cases that held beneficial owners of foreign business trusts did not enjoy limited liability); Robert A. Leflar, *Business Trusts in Arkansas*, 1 L. SCH. BULL. 35 (1929–30) (surveying the law of business trusts and identifying conflicting points of foreign case law not yet addressed in that jurisdiction); Calvert Magruder, *The Position of Shareholders in Business Trusts*, 23 COLUM. L. REV. 423 (1923) (reviewing pending issues involving the law of the business trusts and arguing that judicial hostility to

in the corporate form and the corporate form now freely available thanks to the general incorporation statutes, the corporate form became the preferred option.

In the modern milieu, these concerns are now behind us. Today the business trust may be used for a variety of applications, although they are best known for use in the structuring of mutual funds,<sup>31</sup> in real estate investment trusts, and in asset securitization.<sup>32</sup> Before USTA, in accordance with the common law developed out of the donative trust,<sup>33</sup> the business trust

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the form is unwarranted and that they should be considered as yet another permissible organizational form); Robert S. Stevens, *Limited Liability in Business Trusts*, 7 CORNELL L. Q. 116 (1921–22) (reviewing analytic path to find an absence of limited liability for the beneficiaries of a business trust and offering an alternative path based upon agency principles combined with private ordering for achieving limited liability).

<sup>31</sup> A “mutual fund” may be an open-end management investment company, a closed-end investment company, or a unit investment trust. See INVESTMENT COMPANY ACT OF 1940 §§ 4–5, 15 U.S.C. §§ 80a-4 to -5. With respect to the use of the business trust in the organization of investment companies, see generally Sheldon A. Jones, Laura M. Moret & James M. Storey, *The Massachusetts Business Trust and Registered Investment Companies*, 13 DEL. J. CORP. L. 421 (1988).

<sup>32</sup> See generally Steven L. Schwarcz, *The Alchemy of Asset Securitization*, 1 STAN. J.L. BUS. & FIN. 133 (1994); STEVEN L. SCHWARCZ, *STRUCTURED FINANCE, A GUIDE TO THE PRINCIPLES OF ASSET SECURITIZATION* (3d ed. 2002); TAMAR FRANKEL, *SECURITIZATION: STRUCTURED FINANCING, FINANCIAL ASSET POOLS, AND ASSET-BACKED SECURITIES* (1991 & Supp. 1995).

<sup>33</sup> It bears recognizing that the relationship of the law of donative trusts and that of business trusts is at least uneasy. For example, both the Restatements (Third) and (Second) of the Law of Trusts and leading trust law treatises exclude business trusts from their respective scopes. See RESTATEMENT (THIRD) OF TRUSTS ch. 1, intro. note (2003) (“The Restatement of Trusts does not deal with such devices as business trusts . . .”); *id.* § 1 cmt. b; RESTATEMENT (SECOND) OF TRUSTS § 1 cmt. b; see also 1 AUSTIN WAKEMAN SCOTT, WILLIAM FRANKLIN FRATCHER & MARK L. ASCHER, *SCOTT AND ASCHER ON TRUSTS* § 2.1.2 (5th ed. 2006) (“[B]ecause the use of the trust as a substitute for incorporation, as in the case of the so-called business trust or Massachusetts trust, necessarily differs in important ways from the use of the trust as a gratuitous transfer, each of the Restatements [of Trusts] leaves these trusts for discussion along with other business organizations. So does this treatise.” (citations omitted)); 1 AUSTIN WAKEMAN SCOTT, *THE LAW OF TRUSTS* § 2.2 (1939). Professor Langbein has questioned Scott’s assertion that the law of business trusts significantly departs from that of the donative trust. See Langbein, *supra* note 14, at 166. Neither “business trust” nor “commercial trust” appears in the index of *A Treatise on the Law of Trusts and Trustees*. See PERRY, *supra* note 23; see also Sitkoff, *supra* note 20, at 33:

Readers familiar with the domestic law school curriculum might assume that, because trusts and estates is a separate course from business organizations, the business trust has become the purview of trusts and estates scholars. It has not. Trusts and estates is organized as a coherent field around gratuitous wealth transfer. Trusts and estates scholars have

was not a legal entity able in its own name to enter into contracts.<sup>34</sup> Further, title to business trust assets vested in the trustees,<sup>35</sup> and suit was brought by or against the trustees in their roles as such.<sup>36</sup> These characteristics of the business trust are at issue in *Navarro*.<sup>37</sup>

For the modern business trust, USTA has modified many of the rules of the common law of trusts. Most important for purposes of this discussion are the treatment of the business trust as a legal entity distinct from both the

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therefore focused on the trust as an instrument of gratuitous transfer, not as a mode of business organization.

<sup>34</sup> See, e.g., *Dolben v. Gleason*, 198 N.E. 762, 763 (Mass. 1935):

[A] corporation is a legal personality which may act through agents. A contract made by the authorized agent of a corporation is the corporation's contract. A trust . . . can itself do no act. It cannot make a contract. It cannot even act to choose an agent. The trustee alone can do any act which affects the rights or property of the trust. He does not act as the agent of the trust but is its embodiment in dealing with its property and in making contracts which affect its property. Such contracts when made are his contracts and he is personally liable upon them unless they include an agreement that he shall not be personally liable.

See also *Taylor v. Mayo*, 110 U.S. 330, 335 (1884) (“When a trustee contracts as such, unless he is bound, no one is bound, for he has no principal. The trust estate cannot promise; the contract is therefore the personal undertaking of the trustee.”); *Duvall v. Craig*, 15 U.S. (2 Wheat.) 45, 56-57 (1817); GUY A. THOMPSON, BUSINESS TRUSTS AS SUBSTITUTES FOR BUSINESS CORPORATIONS § 13 (1920) (“The trustee is not an agent but, upon the contrary, he himself is the principal. He is the owner (in trust it is true) of the property, and the business he transacts is his business, even though another is to receive the benefits or profits therefrom.”); SYDNEY R. WRIGHTINGTON, THE LAW OF UNINCORPORATED ASSOCIATIONS AND SIMILAR RELATIONS § 43 (Lawbook Exch., Ltd. 2002) (1916).

<sup>35</sup> See, e.g., ARIZ. REV. STAT. ANN. § 10-1871 (2004) (defining a business trust as “created by an instrument under which property is held and managed by trustees”); KY. REV. STAT. ANN. § 386.390 (LexisNexis 2010) (vesting in the trustee(s) title to all trust property). See also *Strode v. Spoden*, 284 S.W.2d 663, 665 (Ky. 1955) (“In order to create a trust, legal title to the res must be transferred to the trustee.”); DAVID M. WALKER, THE OXFORD COMPANION TO LAW 1241-42 (Clarendon Press 1980) (defining a trust as, in part, involving the settlor's vesting the settlor's title to property in the trustee).

<sup>36</sup> See, e.g., WRIGHTINGTON, *supra* note 34, at 155:

In the absence of some stipulation in the contract to the contrary, it is well settled that one who contracts with a trustee has a contract right at law against the trustee personally, since courts of law purport to ignore the existence of trusts and the trustee does not act as agent for his beneficiaries but is himself the principal. (citation omitted).

See also *id.* at 157 (“It is equally well settled that one who contracts with a trustee has no right of action against the beneficiaries personally.” (citations omitted)).

<sup>37</sup> See *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 464 (1980) (“Fidelity operated under a declaration of trust that authorized the trustees to take legal title to trust assets . . . and to sue and be sued in their capacity as trustees.”).

trustee and the beneficial owners,<sup>38</sup> the titling of business trust property in the name of the trust,<sup>39</sup> and the capacity of the business trust to sue and be sued in its own name.<sup>40</sup> Continuing the departure from the common law under which the trustees bore personal liability as principals upon contracts and agreements entered into on behalf of the trust,<sup>41</sup> the modern statutes afford the trustees limited liability from the debts and obligations of the business trust.<sup>42</sup>

### III. WHY NOW A UNIFORM BUSINESS/STATUTORY TRUST ACT?

While the business trust flourished in recent decades in highly specialized applications such as the organization of mutual funds and asset

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<sup>38</sup> See KY. REV. STAT. ANN. § 386A.3-020(1) (LexisNexis Supp. 2012); UNIF. STATUTORY TRUST ENTITY ACT § 302, 6B U.L.A. 104 (Supp. 2012); see also CONN. GEN. STAT. ANN. § 34-501(2) (West 2005 & Supp. 2012); DEL. CODE ANN. tit. 12, § 3801(g) (2007 & Supp. 2012).

<sup>39</sup> See KY. REV. STAT. ANN. § 386A.3-020(2) (LexisNexis Supp. 2012); UNIF. STATUTORY TRUST ENTITY ACT § 307, 6B U.L.A. 108 (Supp. 2012); see also CONN. GEN. STAT. ANN. § 34-502b (West 2005); DEL. CODE ANN. tit. 12, § 3805(f) (2007). Some modern statutes go so far as to provide that the trustees lack any proprietary interest in the property of the business trust. See KY. REV. STAT. ANN. § 386A.3-020(3) (LexisNexis Supp. 2012).

<sup>40</sup> See KY. REV. STAT. ANN. § 386A.3-060(1) (LexisNexis Supp. 2012); UNIF. STATUTORY TRUST ENTITY ACT § 308, 6B U.L.A. 109 (Supp. 2012); see also CONN. GEN. STAT. ANN. § 34-502b (West 2005); DEL. CODE ANN. tit. 12, § 3804(a) (2007 & Supp. 2012); UNIF. STATUTORY TRUST ENTITY ACT prefatory n., 6B U.L.A. 79 (Supp. 2012):

A statutory trust differs from a common-law trust in important respects. A common-law trust, whether its purpose is donative or commercial, arises from private action without the involvement of a public official. Because a common-law trust is not a juridical entity, it must sue and be sued, own property, and transact [business] in the name of the trustee and in the trustee's capacity as such. By contrast, a statutory trust is a juridical entity, separate from its trustees and beneficial owners, that has capacity to sue and be sued, own property, and transact [business] in its own name.

<sup>41</sup> At one time the trustee was liable for the debts and obligations of the trust with a corresponding right of contribution out of trust assets. See RESTATEMENT (SECOND) OF TRUSTS §§ 244, 261 (1959); see also DUNN, *supra* note 22, § 115, at 197; HARRY G. HENN, HANDBOOK OF THE LAW OF CORPORATIONS AND OTHER BUSINESS ENTERPRISES § 63, at 89–90 (2d ed. 1970); EDWARD H. WARREN, CORPORATE ADVANTAGES WITHOUT INCORPORATION 858–60 (William S. Hein & Co. 1982) (1929) (discussing rule that the trustee is liable as the principal for obligations undertaken). The Uniform Trust Code reversed this rule, providing that a trustee is not personally liable for the debts, obligations, and liabilities arising in the trustee's fiduciary capacity. See UNIF. TRUST CODE § 1010 (amended 2000), 7C U.L.A. 657 (2006). Only a minority of the states have adopted the Uniform Trust Code.

<sup>42</sup> See KY. REV. STAT. ANN. § 386A.3-040 (LexisNexis Supp. 2012); UNIF. STATUTORY TRUST ENTITY ACT § 304(a), 6B U.L.A. 106 (Supp. 2012).

securitization, USTA was intended to regularize the disparate business trust statutes existing in the various states.<sup>43</sup> The drafters also anticipated that USTA would set the stage for broader use of the business trust in commercial endeavors by providing clear rules regarding, for example, the limited liability of both the trustees and beneficial owners.

The reasons for a delay in the development of a uniform or other national model for the business trust are not apparent. By 1902 (although not completed until 1914)<sup>44</sup> work was underway on the Uniform Partnership Act, modeled after the British Partnership Act of 1890. The Uniform Limited Partnership Act was completed in 1916, and a Uniform Business Corporation Act was released in 1928.<sup>45</sup> Clearly at the turn of the twentieth century and in the succeeding decades, a time that saw the zenith of the business trusts, active efforts existed to create standardized statutory forms for different organizational structures. In addition, scholars devoted significant efforts to the drafting of treatises on the business trust<sup>46</sup>—an activity one would think would not be undertaken as to an organizational form of perceived declining utility. Why no similar effort occurred to draft a uniform business trust act is a question whose answer seems lost to time.<sup>47</sup>

#### IV. “BUSINESS”-V.-“STATUTORY” TRUST

The designation of the business organizations created under USTA as a “statutory trust”—in contrast with the traditional “business trust”—was the result of a desire to conform to the practices currently employed in Connecticut and Delaware, which are considered the leading states for the organization of these trusts.<sup>48</sup> By doing so, USTA created a convenient

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<sup>43</sup> See UNIF. STATUTORY TRUST ENTITY ACT prefatory n., 6B U.L.A.79 (Supp. 2012).

<sup>44</sup> See UNIF. P’SHIP ACT, prefatory n., 6 pt. 1 U.L.A. 275–77 (2001).

<sup>45</sup> The Uniform Business Corporation Act, initially drafted and promulgated by the National Conference of Commissions of Uniform State Laws, was transferred to the ABA Committee on Corporate Laws, which renamed it the Model Business Corporation Act.

<sup>46</sup> See, e.g., DUNN, *supra* note 22; JOHN H. SEARS, TRUST ESTATES AS BUSINESS COMPANIES (Vernon Law Book Co., 2d ed. 1921) (1912); WARREN, *supra* note 41; WRIGHTINGTON, *supra* note 34.

<sup>47</sup> We thank Professors Hannsman, Langbein, Schwarcz, and Sitkoff for their time in responding to our inquiries on this question.

<sup>48</sup> Delaware adopted a Business Trust Act in 1988, referring to an organization created thereunder as a “business trust.” See *Preliminary Report on the Uniform Statutory Trust Act*, NAT’L CONFERENCE OF THE COMM’RS ON UNIF. STATE LAWS 2 (2005) [hereinafter *Preliminary Report*] available at [www.uniformlaws.org/shared/docs/statutory\\_trust\\_entity/usta\\_am05\\_binder.pdf](http://www.uniformlaws.org/shared/docs/statutory_trust_entity/usta_am05_binder.pdf). In 2001, the name of the act changed to the Delaware Statutory Trust Act and the name of an organization created thereunder was changed to a “statutory

differentiation of the modern statutory trust from the traditional business trust for purposes of referencing the controlling statute.

This explanation, however, begs the question of why the term “statutory trust” has replaced “business trust.” The change to “statutory trust” followed *In re Secured Equipment Trust of The Eastern Airlines, Inc.*,<sup>49</sup> which held that certain trusts used for securitizations were not “business trusts” within the Bankruptcy Code.<sup>50</sup> Given that business/statutory trusts are often utilized for financing structures for which bankruptcy remoteness is desired,<sup>51</sup> this relabeling arguably further removes a “statutory trust” from the ambit of organizations that may file for protection under the Bankruptcy Code. At the same time, no published opinion to date has addressed this “rose by any other name.”<sup>52</sup>

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trust.” See DEL. CODE ANN. tit. 12, § 3801(g) (2007 & Supp. 2012). The amendment was not intended as a substantive change in Delaware law. Rather, the report explained:

The change addressed the concern of those who used these trusts in structured finance transactions that a “business trust” might be deemed a “person” under the Bankruptcy Code. If so, the entity could be the subject of an involuntary bankruptcy, which would defeat the expectations of the parties in asset securitization transactions, who rely upon a bankruptcy remote entity.

See *Preliminary Report* at 2; see also Ellisa Opstbaum Habbart & Thomas E. Rutledge, *Sneak Previews: Will the Uniform Statutory Trust Act Be Next Summer’s Blockbuster Hit?*, DELAWARE BANKER, Summer 2008, at 10. The Connecticut act, enacted in 1997, used the term “statutory trust” from the outset. See CONN. GEN. STAT. ANN. § 34-500 (West 2005). The Wyoming statute also utilizes the label “statutory trust.” See WYO. STAT. ANN. § 17-23-202(g) (2011).

<sup>49</sup> 38 F.3d 86 (2d Cir. 1994).

<sup>50</sup> A “debtor” eligible to file bankruptcy includes a “person,” 11 U.S.C. § 101(13) (2006), which is defined to include a “corporation,” § 101(41), which is in turn defined to include a “business trust,” § 101(9). See also *In re Gurney’s Inn Corp. Liquidating Trust*, 215 B.R. 659 (Bankr. E.D.N.Y. 1997); *In re Estate of the Assignment for the Benefit of Creditors of Edward Paul May*, 405 B.R. 443 (Bankr. E.D. Mich. 2008); *In re Gen. Growth Props.*, 409 B.R. 43, 70–72 (Bankr. S.D.N.Y. 2009) (holding that an Illinois land trust had such characteristics as to permit it to file for bankruptcy); Kenneth N. Klee & Brendt C. Butler, *Asset-Backed Securitization, Special Purpose Vehicles and Other Securitization Issues*, 35 UCC L.J. 23, 46–48 (2002). See also Thomas E. Rutledge & Ellisa O. Habbart, *The Uniform Statutory Trust Entity Act: A Review*, 65 BUS. LAW. 1055, 1060–61 (2010).

<sup>51</sup> See, e.g., Steven L. Schwarcz, *Commercial Trusts as Business Organizations: Unraveling the Mystery*, 58 BUS. LAW. 559, 564 (2003). See also Thomas E. Rutledge, *Again, For the Want of a Theory: The Challenge of the “Series” to Business Organization Law*, 46 AM. BUS. L.J. 311, 313–21 (2009); *supra* note 48.

<sup>52</sup> WILLIAM SHAKESPEARE, *THE TRAGEDY OF ROMEO AND JULIET*, act 2, sc. 2.

## V. DIVERSITY JURISDICTION

Article III of the U.S. Constitution provides that the federal judicial power shall extend to controversies between citizens of different states and between a state, or the citizens thereof, and foreign states, citizens, or subjects.<sup>53</sup> Courts have interpreted this provision not as a declaration conferring jurisdiction to lower federal courts, but rather as a limitation upon Congress's power to confer jurisdiction on the courts it creates.<sup>54</sup> "Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of Congress. That body may give, withhold or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution."<sup>55</sup>

28 USC § 1332 is Congress's implementation of Article III of the Constitution for claims between citizens of different states. Pursuant to § 1332, diversity of citizenship must be complete; no plaintiff may be a citizen of the same jurisdiction as any defendant.<sup>56</sup> Thus, properly assessing

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<sup>53</sup> See U.S. CONST. art. III, § 2, cl. 1. Citizenship is synonymous with domicile, and "the domicile of an individual is his true, fixed and permanent home and place of habitation. It is the place to which, whenever he is absent, he has the intention of returning." *Vlandis v. Kline*, 412 U.S. 441, 454 (1973) (quoting *Non-Resident Tuition*, Op. Att'y Gen. of Conn. (1972) (unreported)).

<sup>54</sup> See *Kline v. Burke Constr. Co.*, 260 U.S. 226 (1922); *Denny v. Orient Lines*, 375 F. Supp. 2d 1320 (D.N.M. 2005).

<sup>55</sup> *Kline*, 260 U.S. at 234.

<sup>56</sup> *Wis. Dep't of Corr. v. Schacht*, 524 U.S. 381, 388 (1998) ("A case falls within the federal district court's original diversity jurisdiction only if diversity of citizenship among the parties is complete, *i.e.*, only if there is no plaintiff and no defendant who are citizens of the same State.") (internal quotation marks omitted); *Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 68 (1996); *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806); *Caudill v. N. Am. Media Corp.*, 200 F.3d 914, 916 (6th Cir. 2000) ("Section 1332's congressionally conferred diversity jurisdiction has been interpreted to demand complete diversity, that is, that no party share citizenship with any opposing party."). For individuals, a person is considered a citizen of a state if that person is domiciled within that state and has intent to stay there indefinitely. See, *e.g.*, *Krasnov v. Dinan*, 465 F.2d 1298, 1300 (3d Cir. 1972) ("Where one lives is *prima facie* evidence of domicile, but mere residency in a state is insufficient for purposes of diversity. The fact of residency must be coupled with a finding of intent to remain indefinitely.") (citations omitted).

The other aspect of diversity jurisdiction, namely an amount in controversy exceeding \$75,000 (exclusive of interest and costs), can be likewise problematic. In *Freeland v. Liberty Mut. Fire Ins. Co.*, the court considered a suit in which the question was whether an insurance policy provided coverage of \$25,000 or \$100,000 per accident. 632 F.3d 250, 251–52 (6th Cir. 2011). As the amount in controversy, exactly \$75,000, did not exceed \$75,000, no diversity jurisdiction existed. *Id.* at 255.

the citizenship of all parties—including business trusts—is central in determining the jurisdiction of federal courts to hear state law claims.

### VI. *NAVARRO SAVINGS ASS'N V. LEE*

In *Navarro*<sup>57</sup> eight trustees of Fidelity Mortgage Investors initiated a suit to enforce the terms of a “take out” loan commitment given by Navarro Savings Association, which had secured a loan made by the trustees and reflected in a promissory note payable to them as trustees. In their roles as trustees, they held title to the trust’s assets “as if the Trustees were the sole owners of the Trust Estate in their own right”<sup>58</sup> with the capacity to “sue and be sued in the name of the Trust or in their names as Trustees of the Trust.”<sup>59</sup> Responding to *Navarro*’s argument that the Fidelity Trust’s citizenship should be that of all of its beneficial owners—the same rule as that employed for unincorporated associations—the Supreme Court focused, in light of Fidelity’s status as an express trust, on “whether its trustees are real parties to this controversy for purposes of a federal court’s diversity jurisdiction.”<sup>60</sup>

Relying upon *Bullard v. Cisco*,<sup>61</sup> the *Navarro* court focused entirely upon the trustees to the exclusion of the trust’s beneficial owners:

[A] trustee is a real party to the controversy for purposes of diversity jurisdiction when he possesses certain customary powers to hold, manage, and dispose of assets for the benefit of others. The trustees in this case have such powers. At all relevant times, Fidelity operated under a declaration of trust that authorized the trustees to take legal title to trust assets, to invest those assets for the benefit of the shareholders, and to sue and be sued in their capacity as trustees. Respondents filed this lawsuit in that capacity. They seek damages for breach of an obligation running to the holder of a promissory note held in their own names. Fidelity’s 9,500 beneficial shareholders had no voice in the initial investment decision. They can neither control the disposition of this action nor intervene in the

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<sup>57</sup> 446 U.S. 458 (1980).

<sup>58</sup> *Id.* at 459.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 462 (footnote omitted).

<sup>61</sup> 290 U.S. 179 (1933).

affairs of the trust except in the most extraordinary situations.<sup>62</sup>

In conclusion the Court wrote:

They [the trustees] have legal title; they manage the assets; they control the litigation. In short, they are real parties to the controversy. For more than 150 years, the law has permitted trustees who meet this standard to sue in their own right, without regard to the citizenship of the trust beneficiaries. We find no reason to forsake that principle today.<sup>63</sup>

## VII. DETERMINING CITIZENSHIP OF UNINCORPORATED ASSOCIATIONS

Traditionally, a corporation was a citizen of only the jurisdiction of its incorporation.<sup>64</sup> This rule has been modified by statute<sup>65</sup> to provide that a corporation is a citizen of its jurisdiction of incorporation and the jurisdiction in which it maintains its principal place of business.<sup>66</sup> In contrast (with an exception for a sociedad en comandita organized under the law of Puerto Rico),<sup>67</sup> the Supreme Court has rejected a “family resemblance” analysis

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<sup>62</sup> *Navarro*, 446 U.S. at 464–65 (citations omitted).

<sup>63</sup> *Id.* at 465–66.

<sup>64</sup> See, e.g., HENRY O. TAYLOR, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS §§ 410–13 (2d ed. 1888).

<sup>65</sup> See 28 U.S.C. § 1332(c)(1) (2006). This statute increased the number of jurisdictions in which a corporation is deemed a citizen and thereby reduced the likelihood of diversity jurisdiction. See also *Kristufek v. Saxonburg Ceramics, Inc.*, 901 F. Supp. 1018, 1021–22 (W.D.N.C. 1994), *aff’d*, 60 F.3d 823 (4th Cir. 1995); *Van Horn v. W. Elec. Co.*, 424 F. Supp. 920, 923–24 (E.D. Mich. 1977); 13F CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3624 (3d ed. 2009).

<sup>66</sup> Various tests have developed for determining the principal place of business. See, e.g., *J.A. Olson Co. v. City of Winona*, 818 F.2d 401, 404 (5th Cir. 1987) (seeking to apply a “total activity” test); *Kelly v. U.S. Steel Corp.*, 284 F.2d 850, 853 (3d Cir. 1960) (seeking to identify the “muscle center” or “place of activity”); *Scot Typewriter Co. v. Underwood Corp.*, 170 F. Supp. 862, 865 (S.D.N.Y. 1959) (seeking to identify the “nerve center”). The Supreme Court, in *Hertz Corp. v. Friend*, held that for purposes of determining the “State where [a corporation] has its principal place of business” under 28 U.S.C. § 1332, it will utilize the “nerve center” test, directing the focus upon “the place where a corporation’s officers direct, control, and coordinate the corporation’s activities.” 130 S. Ct. 1181, 1192 (2010).

<sup>67</sup> See *Puerto Rico v. Russell & Co.*, 288 U.S. 476, 481–82 (1933). In *United Steelworkers v. R.H. Bouligny, Inc.*, the Court described the *Russell* decision as “that of

that would allow an unincorporated business organization to be treated like a corporation for diversity purposes and insisted that the focus be upon the citizenship of the organization's owners. In *Carden v. Arkoma Associates*,<sup>68</sup> the Court held that the citizenship of a limited partnership would be that of each of the partners, both general and limited.<sup>69</sup> In recent years, courts have applied the *Carden* decision to determine the citizenship of LLCs and other unincorporated business forms.<sup>70</sup> In making this assessment, neither the

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fitting an exotic creation of the civil law, the sociedad en comandita, into a federal scheme which knew it not." 382 U.S. 145, 151 (1965).

<sup>68</sup> 494 U.S. 185 (1990).

<sup>69</sup> See *id.* at 195–96. By this ruling, the Court overruled a significant number of prior decisions that had held that the citizenship of the limited partners, as contrasted with the citizenship of the general partners, would not be relevant to the diversity analysis. See, e.g., *Arkoma Assocs. v. Carden*, 874 F.2d 226, 228–29 (5th Cir. 1988), *rev'd* 494 U.S. 185 (1990); *Colonial Realty Corp. v. Bache & Co.*, 358 F.2d 178, 183–84 (2d Cir. 1966), *cert. denied*, 385 U.S. 817 (1966); *Winn v. Seidman Fin. Servs.*, 726 F. Supp. 170, 171–72 (W.D. Mich. 1989); *Namco, Inc. v. Davidson*, 725 F. Supp. 1148, 1149–53 (D. Kan. 1989); *Gordon-Maizel Constr. Co. v. Leroy Prods., Inc.*, 643 F. Supp. 188, 188–90 (D.D.C. 1986).

<sup>70</sup> See, e.g., *Harvey v. Grey Wolf Drilling Co.*, 542 F.3d 1077 (5th Cir. 2008) (reversing a trial court ruling that determined the citizenship of an LLC with the rule for a corporation (jurisdiction of organization and of principal place of business) and holding that citizenship of an LLC is to be determined by that of each member); *OnePoint Solutions, LLC v. Borchert*, 486 F.3d 342 (8th Cir. 2007); *Pramco, LLC ex rel. CFSC Consortium, LLC v. San Juan Bay Marina, Inc.*, 435 F.3d 51, 54 (1st Cir. 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."); *Gen. Tech. Applications, Inc. v. Exro Ltda.*, 388 F.3d 114, 120 (4th Cir. 2004) (citing *GMAC Commercial Credit*, 257 F.3d at 828–29) (noting the rule that an LLC has the citizenship of each of its members); *GMAC Commercial Credit LLC v. Dillard Dep't Stores, Inc.*, 357 F.3d 827 (8th Cir. 2004) (applying, as a matter of first impression within the Eighth Circuit, the *Carden* rule to limited liability companies); *Marseilles Hydro Power, LLC v. Marseilles Land & Water Co.*, 299 F.3d 643 (7th Cir. 2002); *Homfeld II, LLC v. Comair Holdings, Inc.*, 53 F. App'x 731, 732 (6th Cir. 2002) (adopting the rule of *Cosgrove* that "a limited liability company is not treated as a corporation and has the citizenship of its members"); *Handelsman v. Bedford Vill. Assocs. Ltd. P'ship*, 213 F.3d 48, 51–52 (2d Cir. 2000); *Cosgrove v. Bartolotta*, 150 F.3d 729, 731 (7th Cir. 1998) ("[W]e conclude that the citizenship of an LLC for purposes of the diversity jurisdiction is the citizenship of its members."); *Master v. Quiznos Franchise Co.*, No. 06-4253 (MLC), 2007 WL 419287, at \*1 (D.N.J. Feb. 1, 2007) ("[L]imited liability companies are (1) unincorporated associations, and (2) deemed citizens of each state in which their members are citizens, not the states in which they were formed or have their principal places of business."); *Schindler v. Seiler*, No. 05-C-0521-C 2006 U.S. Dist. LEXIS 11750 (W.D. Wis. Mar. 20, 2006), at \*2 (stating that citizenship of LLP is determined by the citizenship of each of its partners); *Burton v. Coburn*, No. 04-965(RBW) 2005 WL 607912, at \*2 (D.D.C. Mar. 16, 2005) (holding that citizenship of LLP is determined by the citizenship of each of its partners); *Koettters ex rel. AIK Comp. v. Ernst & Young LLP*, No. 3:05-19-JMH, 2005 WL 1475533, at \*1–\*2 (E.D. Ky. June 21, 2005) (ruling on a motion to

jurisdiction of the entity's organization nor that of the entity's principal place of business is relevant,<sup>71</sup> a rule that has found at least one application to a statutory trust.<sup>72</sup>

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remand and stating that the citizenship of an LLP is determined by the citizenship of all of its partners and that the jurisdiction where the statement of qualification is filed and where the principal place of business of the partnership is located are not relevant); *Thiara v. Kiernan*, No. C06-03503MJJ, 2006 WL 3065568 (N.D. Cal. Oct. 25, 2006); *Schlichtmann v. Ivey & Ragsdale*, 352 F. Supp. 2d 6, 7 (D. Me. 2005) (citing *Carden*, 494 U.S. at 195–96) (reciting the rule that an LLP has the citizenship of each of its partners); *Muhlenbeck v. KI, LLC*, 304 F. Supp. 2d 797, 802 (E.D. Va. 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.”); *Sonoma Falls Developers, LLC v. Nevada Gold & Casinos, Inc.*, 272 F. Supp. 2d 919 (N.D. Cal. 2003); *Johnson-Brown v. 2200 M Street LLC*, 257 F. Supp. 2d 175, 178 (D.D.C. 2003) (reviewing prior decisions displaying “‘admirable consistency’ of jurisprudence by refusing to extend corporate citizenship to other legal persons or entities” (quoting *Carden*, 494 U.S. at 189)); *TPS Utilicom Servs., Inc. v. AT&T Corp.*, 223 F. Supp. 2d 1089 (C.D. Cal. 2002); *Keith v. Black Diamond Advisors, Inc.*, 48 F. Supp. 2d 326, 330 (S.D. N.Y. 1999) (“Because Pace is a New York LLC and not a New York corporation, jurisdiction is determined by the citizenship of each of Pace’s individual members.”); *Mudge Rose Guthrie Alexander & Furdon v. Pickett*, 11 F. Supp. 2d 449, 452 (S.D.N.Y. 1998) (citing *Reisman*, 965 F. Supp. at 176) (holding an LLP to be a citizen of each state where a partner is resident); *ALMS, Ltd. v. Barnes*, No. 3:98-CV-1784-P, 1998 WL 907034, at \*1 (N.D. Tex. Dec. 16, 1998) (addressing the citizenship of what is alternatively described in the opinion as “a limited liability partnership” and implied to be a limited partnership by references to the “limited partner” and, after applying the *Carden* analysis, determining that diversity jurisdiction did exist); *Reisman v. KPMG Peat Marwick LLP*, 965 F. Supp. 165, 176–77 (D. Mass. 1997) (rejecting an argument that a “real party in interest” analysis should be applied in determining the citizenship of a limited liability partnership with the focus upon only those partners who are subject to personal liability and holding the LLP to be a citizen of every state where any of the partners are a resident); *Int’l Flavors & Textures, LLC v. Gardner*, 966 F. Supp. 552, 554 (W.D. Mich. 1997) (“The citizenship of an unincorporated association, at least for purposes of diversity jurisdiction, is the citizenship of each of its members.”).

<sup>71</sup> See, e.g., *Lincoln Prop. Co. v. Christopher Roche*, 546 U.S. 81, 84 n.1 (2005) (“We note, however, that our prior decisions do not regard as relevant to subject-matter jurisdiction the locations at which partnerships conduct business.”); *Guar. Nat’l Title Co. v. J.E.G. Assocs.*, 101 F.3d 57, 59 (7th Cir. 1996) (“There is no such thing as ‘a [state name] limited partnership’ for purposes of the diversity jurisdiction. There are only partners, each of which has one or more citizenships.”); *Citizens Bank v. Plasticware, LLC*, 830 F. Supp. 2d 321, 325 (E.D. Ky. 2011) (“Plasticware’s principal place of business, however, is not relevant to its citizenship determination.”); *Master*, 2007 WL 419287, at \*1 (stating that an LLC is not a citizen of a state by virtue of being organized or having a principal place of business in that state); *Muhlenbeck*, 304 F. Supp. 2d at 802 (“[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.”); *IFC Credit Corp. v. Mahon*, No. 03CV1266, 2003 WL 503601 (N.D. Ill. Feb. 24, 2003) (characterizing the jurisdiction of formation and the principal place of business of a limited liability company as

This treatment of unincorporated organizations is not dependent upon the capacity of the organization to sue or be sued in its own name. While the general partnership has traditionally not had the capacity,<sup>73</sup> all modern unincorporated entity statutes afford unincorporated entities, including partnerships, that capacity.<sup>74</sup> In a similar vein, modern statutes afford unincorporated organizations characterization as an “entity.”<sup>75</sup> Neither of

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“wholly irrelevant for diversity purposes”); *TPS Utilicom Servs., Inc.*, 223 F. Supp. 2d at 1102 (“[T]he place of organization of an L.L.C. is not relevant to its citizenship for diversity purposes.”); *Bank One Nat’l Ass’n v. Pickens*, No. 02C3158, 2002 WL 1008456 (N.D. Ill. May 13, 2002) (“[T]he principal place of business of a partnership or other unincorporated association is totally irrelevant for diversity purposes, just as is the place of the partnership’s formation.”); *Hale v. MasterSoft Int’l Pty. Ltd.*, 93 F. Supp. 2d 1108, 1112 (D.C. Colo. 2000) (“[A] limited liability company . . . is not a citizen of the state in which it was organized unless one of its members is a citizen of that state.”); *JMTR Enter. v. Duchin*, 42 F. Supp. 2d 87, 93–94 (D. Mass. 1999) (holding that the only means of determining the citizenship of a LLC is the citizenship of its members, not the state where it is organized); *Yards Developers Ltd. v. Subway Real Estate Corp.*, 904 F. Supp. 843, 844 (N.D. Ill. 1995) (stating that allegations as to a limited partnership’s principal place of business are irrelevant in determining whether diversity exists, as the citizenship of the partners, not that of the partnership itself, is relevant); *Dragon v. Wolline*, 856 F. Supp. 456, 456 (N.D. Ill. 1994) (stating that the location of a partnership’s principal place of business is irrelevant for determining the citizenship of the partnership for purposes of diversity jurisdiction). Certain early decisions have now been soundly rejected and do not constitute good law. *See, e.g.*, *Carlos v. Adamany*, No. 95C50264, 1996 WL 210019, at \*2–\*3 (N.D. Ill. Apr. 17, 1996) (looking to the principal place of business of an LLC to determine its citizenship).

<sup>72</sup> *See Dixon v. DB50 2007-1 Trust*, No. 3:10-CV-35 (CDL), 2010 WL 5174758, at \*3 (M.D. Ga. Dec. 15, 2010) (“A trust’s state of formation, however, does not determine its citizenship for diversity purposes.” (citations omitted)).

<sup>73</sup> *See, e.g.*, *Zee-Bar, Inc. - N.H. v. Kaplan*, 792 F. Supp. 895, 899–900 (D.N.H. 1992); *Telamarketing Commc’ns. v. Liberty Partners*, 798 S.W.2d 462, 463 (Ky. 1990); *see also* UNIF. P’SHIP ACT § 307, cmt. 1 (amended 1997), 6 U.L.A. 125 (2001) (“At common law, a partnership, not being a legal entity, could not sue or be sued in the firm name.”); *Wesley A. Sturges, Unincorporated Associations as Parties to Actions*, 33 YALE L.J. 383 (1924).

<sup>74</sup> *See, e.g.*, KY. REV. STAT. ANN. § 362.1-307(1) (LexisNexis 2008); UNIF. P’SHIP ACT § 307(a) (amended 1997), 6 U.L.A. 124 (2001); UNIF. LTD. LIAB. CO. ACT § 105 (amended 2006), 6B U.L.A. 438 (2008).

<sup>75</sup> DEL. CODE ANN. tit. 8, § 3801(g) (2007 & Supp. 2012) (“Any such association heretofore or hereafter organized shall be a statutory trust and a separate legal entity.”); KY. REV. STAT. ANN. § 362.1-201(1) (LexisNexis 2008) (“A partnership is an entity distinct from its partners.”); KY. REV. STAT. ANN. § 362.2-104(1) (“A limited partnership is an entity distinct from its partners.”); KY. REV. STAT. ANN. § 386A.3-020(1) (LexisNexis Supp. 2012) (“A statutory trust is a legal entity distinct from its trustees and beneficial owners.”); KY. REV. STAT. ANN. § 275.010(2) (LexisNexis 2012) (“A limited liability company is a legal entity distinct from its members.”); UNIF. STATUTORY TRUST ENTITY ACT § 302, 6B U.L.A. 104 (Supp. 2012) (“A statutory trust is an entity separate from its trustees and beneficial owners.”); UNIF. LTD. LIAB. CO. ACT § 104(a) (amended 2006), 6B U.L.A. 436 (2008) (“A

these rules, however, impacts the ability of the unincorporated entity to access the federal courts' diversity jurisdiction.<sup>76</sup>

### VIII. RECONCILING *NAVARRO* AND *CARDEN*

*Navarro* and *Carden* appear to conflict with one another because the former looks to the citizenship of only the trustees while the latter looks to the citizenship of all of the owners.<sup>77</sup> Numerous courts have endeavored to reconcile this conflict by restricting *Navarro* to its facts—trustees suing in their own names. For example, in *Crews & Associates, Inc. v. Nuveen High Yield Municipal Bond Fund*,<sup>78</sup> after reviewing a variety of authorities, the court explained:

Accordingly, it would appear that the correct approach is to determine diversity based on whether the trust or the trustee is the party to the suit. If the business trust itself is the party to the suit, then, as an unincorporated entity, its citizenship is determined by all of its members. If, on the other hand, the trustees sue in their own names and are thus the real parties to the controversy, diversity is determined by their citizenship.<sup>79</sup>

One case the *Crews & Associates* court relied upon was *Riley v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*,<sup>80</sup> which treated a business trust, for purposes of diversity citizenship, as any other unincorporated association under the rule of *Carden*.<sup>81</sup> The court held *Navarro* applies only if the party

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limited liability company is an entity distinct from its members.”); UNIF. LTD. P’SHIP ACT § 104(a) (amended 2001), 6A U.L.A. 366 (2008) (“A limited partnership is an entity distinct from its partners.”); UNIF. P’SHIP ACT § 201(a) (amended 1999), 6 U.L.A. 91 (2001) (“A partnership is an entity distinct from its partners.”); “Entity” treatment does not alter the fact that none of these organizations is either a “corporation” or “incorporated”; resemblance to a “corporation” is not the test of 28 U.S.C. § 1332(c).

<sup>76</sup> See, e.g., *Fifty Assocs. v. Prudential Ins. Co. of Am.*, 446 F.2d 1187, 1190 (9th Cir. 1970) (“The citizenship of each member of an unincorporated association must be alleged, even though the entity might be recognized at state law as having the ability to sue and the liability to be sued.” (citations omitted)).

<sup>77</sup> The trustees in *Navarro* were not necessarily beneficial owners in the trust; the opinion is simply silent as to the question.

<sup>78</sup> 783 F. Supp. 2d 1066 (E.D. Ark. 2011).

<sup>79</sup> *Id.* at 1069.

<sup>80</sup> 292 F.3d 1334 (11th Cir. 2002).

<sup>81</sup> See *id.* at 1338–39.

to the suit is the trustee, as contrasted with the trust.<sup>82</sup> Another decision relied upon was *Emerald Investors Trust v. Gaunt Parsippany Partners*,<sup>83</sup> which likewise sought to reconcile *Navarro* and *Carden*, ultimately finding that the citizenship of a trust acting in its own name is that of its beneficial owners and its trustees.<sup>84</sup> The court made a similar determination in *Wang v. New Mighty U.S. Trust*,<sup>85</sup> applying *Carden* to assess the citizenship of a donative trust and restricting *Navarro* to suits brought by the trustees in their own names.<sup>86</sup>

### IX. IS *NAVARRO* GOOD LAW FOR MODERN STATUTORY TRUSTS?

In light of the changes in the nature of the business trust, questions regarding trust citizenship have become apparent. Do the characteristics of a modern business trust exclude it from the scope of *Navarro*? Is the modern statutory trust not a “trust” as contemplated by *Navarro*? Careful consideration of the modern form of the business trust supports only one conclusion—namely that *Navarro*’s reference to the citizenship of the trustees and only the trustees does not apply to the modern form. Rather, in the modern form of the business trust (particularly the “statutory trust” under USTA), the citizenship of only the beneficial owners of the venture should be considered.

The declaration of trust under which the Fidelity trustees operated vested title to the trust’s assets in the trustee, and the decision ultimately rested on this factor, with the capacity to bring suit in their respective names being a strong secondary factor.<sup>87</sup> In *Navarro*, the trustees were acting as principals and not as agents.<sup>88</sup> In the modern form of the business trust, title to trust property is vested not in the trustees qua trustees but rather in the trust as a legal entity,<sup>89</sup> and the trust undertakes contracts as the principal with the trustee executing the agreement as an agent on its behalf.<sup>90</sup> It is axiomatic that an agent acting with authority on behalf of an identified prin-

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<sup>82</sup> *See id.*

<sup>83</sup> 492 F.3d 192 (3d Cir. 2007).

<sup>84</sup> *See id.* at 200–06.

<sup>85</sup> 841 F. Supp. 2d 198 (D.D.C. 2012).

<sup>86</sup> *See id.* at 204 (“In so doing, the Court explicitly distinguished *Navarro*: ‘*Navarro* had nothing to do with the citizenship of the “trust,”’ it insisted, ‘since it was a suit by the trustees in their own names.’” (quoting *Carden v. Arkoma Assocs.*, 494 U.S. 185, 192–93 (1990))).

<sup>87</sup> *See Navarro Sav. Ass’n v. Lee*, 446 U.S. 458, 465 (1980).

<sup>88</sup> *See id.* at 468.

<sup>89</sup> *See supra* note 39 and accompanying text.

<sup>90</sup> *See supra* notes 41–42 and accompanying text.

principal is not a party to the agreement; the agents are not personally obligated on its performance and lack standing to object to a failure of performance by those so obligated.<sup>91</sup> If the agreement is between the statutory trust and a third party, the trust will be the party to bring suit to compel performance or will be the defendant when the third party seeks to compel performance. In either instance, no action involves the trustees in their individual capacities.<sup>92</sup> Ergo, the conditions precedent to the application of *Navarro*, namely the titling of the trust's properties in the trustee's name and the agreement at issue being in the name of the trustees as principals rather than as agents, will under the modern statutes typically be lacking. In consequence, the approach of *Navarro* will not be applicable to the modern form of the business trust, and citizenship for purposes of diversity jurisdiction will not be restricted to the citizenship of the trustees. Rather, the broader rule of *Carden* will apply, and the citizenship of each beneficial owner will be at issue.

Rule 17(b)(3) of the Federal Rules of Civil Procedure does not dictate a different result. Under that rule, the capability of a trust to sue in its own name is determined under the local law of the state where the court is located.<sup>93</sup> Assume a statutory trust that in its jurisdiction of organization has the power to sue or be sued in its own name. In a foreign jurisdiction, it enters into an agreement with a third party and in that foreign jurisdiction brings suit against the third party to enforce its performance. Assume as well that the law of the foreign jurisdiction does not permit a trust to sue or be sued in its own name. Applying Rule 17(b)(3), the trust will have to proceed other than under its own name, and presumably it will have to initiate suit in the name of the trustee(s).<sup>94</sup> The trustee(s) so proceeding will, however, be acting in a representational role—the suit will not be on the individual behalf of the trustee(s).<sup>95</sup>

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<sup>91</sup> See, e.g., RESTATEMENT (THIRD) OF AGENCY § 6.01 (2006).

<sup>92</sup> See KY. REV. STAT. ANN. § 386A.3-060(2) (LexisNexis Supp. 2012) (“A beneficial owner or a trustee of a statutory trust shall not be a proper party to a proceeding by or against a statutory trust solely by reason of being a beneficial owner or trustee of the statutory trust except if the object of the proceeding is to enforce a beneficial owner's or trustee's right against or liability to the statutory trust or as otherwise provided in a governing instrument.”). This provision of the Kentucky Uniform Statutory Trust Act is not uniform and has no equivalent in USTA.

<sup>93</sup> See FED. R. CIV. P. 17(b)(3).

<sup>94</sup> A well-crafted governing instrument should provide this capacity.

<sup>95</sup> By way of analogy, such a suit would be similar to that brought by an administrator of an estate pursuant to 28 U.S.C. § 1332(c)(2). Administrators typically bring such suits in their own names, even as, on a representative basis, they are suing on behalf of the

Of course, requiring a statutory trust to demonstrate complete diversity based upon its beneficial owners, rather than only its trustees, may be an insurmountable burden, thereby effectively precluding a statutory trust from the federal courts absent federal question jurisdiction.<sup>96</sup> Often utilized in complex financial structures, the trust may not have information as to its ultimate beneficial owners, much less information as to their citizenship. By way of a backhanded example, in *Schaftel v. Highpointe Business Trust*,<sup>97</sup> Highpointe was successful in asserting that the citizenship of its trustee should determine its citizenship for purposes of diversity jurisdiction, but it was unsuccessful in demonstrating the citizenship of its trustee. Highpointe's trustee was HBT Beneficiary, LLC, a Delaware LLC with two members, each a limited partnership for which another limited partnership served as the general partner.<sup>98</sup> Highpointe did not provide information to the court as to the various limited partners, asserting the following:

[I]t lacks sufficient knowledge concerning the structure and residency of these investors and suggests that its "right to remove this action should not be frustrated by its lack of sufficient knowledge concerning parties who invested in an entity several layers removed from the operations and control over [Highpointe]. Such peripheral analysis would not afford [Highpointe] due process to protecting its right of removal."<sup>99</sup>

The court rejected this argument, noting the settled law that the citizenship of all partners, general and limited, is assessed in determining citizenship. The court also explained: "[T]he removing party bears the burden of establishing jurisdiction. . . By simply complaining that it is too cumbersome to parse its own structure, Highpointe does not meet its burden and the Court finds that Highpointe has not established that this action was properly removed."<sup>100</sup> Likewise, courts have not recognized a "virtually

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decedents' estates. In those situations, the citizenship is that of the decedent and not of the representative administrator. Alternatively, one or more of the trustees acting as the named plaintiff could bring the suit as a derivative action on behalf of the business trust. *See* KY. REV. STAT. ANN. § 386A.6-110(2) (LexisNexis Supp. 2012); UNIF. STATUTORY TRUST ENTITY ACT § 609(b), 6B U.L.A.129 (Supp. 2012).

<sup>96</sup> *See* 28 U.S.C. § 1331 (2006).

<sup>97</sup> No. WMN-11-2879, 2012 WL 219511 (D. Md. Jan. 24, 2012).

<sup>98</sup> *See id.* at \*1.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at \*2 (citations omitted).

impossible” exception to the obligation of demonstrating complete diversity.<sup>101</sup>

#### X. WHO IS A MEMBER OF A MODERN BUSINESS TRUST

The correct application of *Carden* to the modern business trust format is unclear. Accepting that the trust is to be treated as an unincorporated association whose citizenship is determined by that of its “members” (in contrast with *Navarro*’s focus on the citizenship of only the trustees), it remains to be determined who falls within the applicable class.<sup>102</sup> Specifically, it is not clear whether a trustee qua trustee is a “member” of the trust for purposes of determining its citizenship. For example, assume a Kentucky-based statutory trust having beneficial owners A, B, and C, each an individual domiciled, respectively, in Indiana, Illinois, and Iowa. The trustee of the trust is a Kentucky trust company incorporated and doing business only in Kentucky, and it is not a beneficial owner. A Kentucky-domiciled plaintiff brings suit against the trust. If the citizenship of the trustee is relevant to the trust’s citizenship, diversity is lacking. Alternatively, if the trustee’s citizenship is not attributed to the statutory trust, diversity exists.

In the cases that have applied *Carden* to a business trust, although the opinions are not express as to the point, it is at least inferable that the trustees had the traditional attributes of that role, including the vesting of title to trust property in the trustees. As such, even if the trustees were not also beneficial owners of the business trust,<sup>103</sup> they enjoyed attributes that would make their citizenship relevant to the situation in that they, as trustees, in part composed the association. For example, in *Emerald Investors Trust*, in

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<sup>101</sup> See *Mendoza v. Hospitality Staffing Solutions, LLC*, No. 13-cv-1286-WJM-MJW, 2013 WL 2477166 (D. Colo. June 10, 2013) (defendant failed in its burden to show diversity existed when in response to a show cause order it stated that the ultimate members were unknown and further their identities were protected by a confidentiality agreement); *James v. Myers*, No. 12-cv-22-DRH-SCW, 2012 WL 525583 at \*3 (S.D. Ill. Feb. 16, 2012) (“[A]s defendants admit it is ‘virtually impossible’ to allege the citizenship of Wayzata’s members, defendants have not met their burden of presenting competent proof, or a reasonable probability, that complete diversity exists among the parties.”); see also *Fadal Machining Ctrs., LLC v. Mid-Atlantic CNC, Inc.*, 464 F. App’x 672 (9th Cir. 2012) (rejecting the suggestion that a *de minimis* exception exists as to the requirement of demonstrating complete diversity).

<sup>102</sup> See *Carden v. Arkoma Assocs.*, 494 U.S.185, 195–96 (1990) (stating that the citizenship of an entity is determined by reference to “the citizenship of ‘all the members’ . . . ‘the several persons composing such association’” (citations omitted)).

<sup>103</sup> The opinions did not address this point.

which the court determined that for a trust the *Carden* “members” would be both the trustees and the beneficial owners,<sup>104</sup> the trustees at issue enjoyed the traditional attributes of the trustee of a common law donative trust.<sup>105</sup> Similarly, in the unpublished decision rendered in *Mecklenburg County v. Time Warner Entertainment—Advance/Newhouse Partnership*,<sup>106</sup> the court held that for purposes of assessing diversity jurisdiction the citizenship of a Delaware statutory trust would be that of the beneficiaries and the trustees.<sup>107</sup> In rejecting an effort to exclude the trustees from the analysis, characterizing that effort as “a complete distortion of reality,” the *Mecklenburg County* court wrote: “Without the trustees, the association—and the trust as a separate business entity—would not exist.”<sup>108</sup>

In *Emerald Investors Trust*, the court explained:

We reach this conclusion in recognition of the law that a trustee is more than a mere manager of a trust inasmuch as title to a trust’s assets is fragmented with its legal title being vested in the trustee and its equitable title being vested in the beneficiary. . . . Overall, we see no reason why a trustee, who, in fact, has a significant ownership interest in the title to the assets of the trust in addition to management responsibilities, should not be deemed a “member” of a trust for purposes of determining the trust’s citizenship in a diversity of citizenship case.<sup>109</sup>

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<sup>104</sup> See *Emerald Investors Trust v. Gaunt Parsipany Partners*, 492 F.3d 192 (3d Cir. 2007). In so doing, the Third Circuit affirmed the rule previously set forth in *Riverside Mem’l Mausoleum, Inc. v. UMET Trust*, 581 F.2d 62, 65 (3d Cir. 1978).

<sup>105</sup> See *Emerald*, 492 F.3d 192. To the extent a meaningful distinction exists between the traditional business trust and the traditional common law donative trust, the parties disagreed as to the correct categorization of the trust at issue in *Emerald Investors Trust*. See Brief for the Appellants at 18–19, *Emerald*, 492 F.3d 192 (No. 05-4134).

<sup>106</sup> No. 3:05cv333, 2010 WL 391279 (W.D.N.C. Jan. 26, 2010).

<sup>107</sup> See *id.* at \*3.

<sup>108</sup> *Id.* Assuming this to be a fair characterization of a Delaware statutory trust (and that is open to debate), a modern business trust survives without “trustees” having the traditional attributes of trustees. See *supra* notes 38–42 and accompanying text. It may even be structured without trustees. See KY. REV. STAT. ANN. § 386A.5-010, .1-040 (LexisNexis Supp. 2012); UNIF. STATUTORY TRUST ENTITY ACT § 501, 6B U.L.A. 114 (Supp. 2012) (default requirement that statutory trust be managed by trustees); *id.* § 104, 6B U.L.A. 88–89 (Supp. 2012) (not precluding modification to Section 501 in the mandatory rules).

<sup>109</sup> *Emerald*, 492 F.3d at 205–06 (citations omitted). In a similar vein is *Mills 2011 LLC v. Synovus Bank*, 2013 WL 443541 (S.D.N.Y. Feb. 5, 2013), wherein the court adopted the “dual trustee-beneficiary approach” of *Emerald*, attributing to the trust the citizenship of

This guidance, useful in the context of the traditional trust in which legal title to the trust assets is in the trustee,<sup>110</sup> is of questionable application to the modern form of the business trust in which title to trust assets is vested not in the trustees but in the trust as an entity.<sup>111</sup> Just as England and the United States may be separated by a common language,<sup>112</sup> the traditional law of trusts and the modern business trust both use the term “trustee” while attributing to that label significantly different purposes and powers. Simply put, if the sine qua non of a “trust” is the vesting of legal title to property in the trustee,<sup>113</sup> a statutory trust is arguably not a trust because, notwithstanding the “trust” label,<sup>114</sup> title to a statutory trust’s assets is not vested in the name of the trustees.<sup>115</sup>

USTA could have avoided the incorrect attribution of equivalency by, for example, abandoning the term “trustee” and substituting “governor,” which would have signaled the need to newly assess the characteristics of the position. Alas that was not done. To avoid an unwarranted and incorrect assumption of equivalency based upon the “trustee” label, courts should look past that label to ascertain the actual characteristics of the position.<sup>116</sup> Courts have already made this type of inquiry in determining the citizenship of partnerships having “contract partners,”<sup>117</sup> and those cases can serve as a

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each trustee and each beneficiary. The *Mills* court made no determination regarding the nature of the trustees’ relationship to the trust.

<sup>110</sup> See *supra* notes 38–39 and accompanying text.

<sup>111</sup> See *supra* note 39 and accompanying text.

<sup>112</sup> Attributed, but without apparent authority, to George Bernard Shaw. See [http://en.wikiquote.org/wiki/English\\_language](http://en.wikiquote.org/wiki/English_language) (last modified Jan. 9, 2013); see also OSCAR WILDE, *THE CANTERVILLE GHOST* 6 (John W. Luce & Co. 1906) (“[W]e have really everything in common with America nowadays, except, of course, language.”).

<sup>113</sup> See, e.g., RESTATEMENT (SECOND) OF TRUSTS § 2, § 2 cmt. d, § 2 cmt. h, § 3(3) (1959); RESTATEMENT (THIRD) OF TRUSTS § 2, § 3(3) (2003).

<sup>114</sup> See KY. REV. STAT. ANN. § 386A.1-010 (LexisNexis Supp. 2012); UNIFORM STATUTORY TRUST ENTITY ACT § 101, 6B U.L.A. 83 (Supp. 2012).

<sup>115</sup> See KY. REV. STAT. ANN. § 386A.3-020(2) (LexisNexis Supp. 2012); UNIFORM STATUTORY TRUST ENTITY ACT § 307, 6B U.L.A. 108 (Supp. 2012).

<sup>116</sup> See generally Thomas E. Rutledge, *Putting the Shepherds and the Magi in the Manger - The Problem of False Isomorphism*, 15 J. PASSTHROUGH ENTITIES 49 (Nov./Dec. 2012); Thomas E. Rutledge, *Vampires and the Law of Business Organizations: The Fruitless Search for Authenticity*, 14 J. PASSTHROUGH ENTITIES 51 (Nov./Dec. 2011).

<sup>117</sup> See *Morson v. Kreindler & Kreindler, LLP*, 616 F. Supp. 2d 171, (D. Mass. 2009) (holding that citizenship of “contract partner” who received a Form W-2, not a Form K-1, had no voting rights in the firm and did not share in its profits or losses, would not be attributed to the partnership, the “contract partner” being a mere employee); *Passavant*

useful model for the analysis needed with regard to the citizenship of the modern form of the business trust.

Although it appears no published decision has yet addressed the question, the authors assume that the citizenship of a manager of an LLC would not be relevant to diversity jurisdiction if that manager is not also a member.<sup>118</sup> When the Supreme Court adopted the legal fiction that, for purposes of assessing the corporation's citizenship, each shareholder shall be "presumed" a citizen of the state in which the corporation is organized,<sup>119</sup> it set aside the notion that the citizenship of the directors would be at issue.<sup>120</sup> In the same way, the citizenship of the trustees of a modern business trust should not be attributed to the trust unless the trustees are also beneficial owners—absent that status they are not "members" within the scope of *Carden*. In the same vein, and for the same reason, the citizenship of the trustee should not be considered if the trustee lacks the traditional attributes of a trustee such as holding title to the trust assets and being individually parties to its contracts.<sup>121</sup> Whether and how this question will ultimately be

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Mem'l Area Hosp. Ass'n v. Lancaster Pollard & Co., No. 11-CV-3116, 2012 WL 1119402 (C.D. Ill. Apr. 2, 2012).

<sup>118</sup> See, e.g., KY. REV. STAT. ANN. § 275.165(2)(b) (LexisNexis 2012) (managers "[s]hall not be required to be members of the [LLC] or natural persons"); IND. CODE ANN. § 23-18-4-1(b)(2) (LexisNexis 2012) (managers "[d]o not need to be members of the [LLC] or natural persons").

<sup>119</sup> See *Marshall v. Balt. & Ohio R.R. Co.*, 57 U.S. (16 How.) 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 Co. v. Tugman*, 106 U.S. 118, 120–21 (1882).

<sup>120</sup> See *Marshall*, 57 U.S. at 328 ("If it were otherwise it would be in the power of every corporation, by electing a single director residing in a different State, to deprive citizens of other States with whom they have controversies, of this constitutional privilege, and compel them to resort to State tribunals in cases in which, of all others, such privilege may be considered most valuable.").

<sup>121</sup> The statement made in *Dixon* that "for diversity of citizenship purposes, a trust is a citizen of each state in which it has at least one beneficial owner," while helpful to the analysis, cannot be considered a conclusive ruling on the point because it was rendered in the context of an order that a jurisdictional statement be corrected. See *Dixon v. DB 50 2007-1 Trust*, No. 3:10-CV-35 (CDL), 2010 WL 5174758, \*3 (M.D. GA Dec. 15, 2010). The dicta in *Luminent Mortgage Capital Inc. v. Merrill Lynch & Co.* must receive similar treatment. 652 F. Supp. 2d 576, 587 (E.D. Pa. 2009) ("Diversity jurisdiction over an unincorporated business trust depends on the citizenship of its trustees and beneficiaries." (citing *Emerald Inv. Trust v. Gaunt Parsippany Partners*, 492 F.3d 192, 201 (3d Cir. 2009))).

resolved remains to be seen. That said, under *Carden* no basis exists for applying to a new model business trust the citizenship of a trustee who is not also a beneficial owner.

## XI. CONCLUSION

While the business trust has seldom been utilized in the recent era, the need for carefully structured financial transactions such as securitizing assets and the organization of mutual funds—activities that themselves involve nearly unimaginable funds<sup>122</sup>—is increasing. With the anticipated broad adoption of USTA, this form of organization will likely become more broadly used in what may be considered more everyday applications.<sup>123</sup> In those applications, business trusts likely will be involved in disputes in which the question of availability (or not) of federal diversity jurisdiction will be at issue. Having decanted the traditional business trust into the new bottle of the statutory trust and in so doing changed many of its characteristics, we must now reconsider the rules for assessing diversity. Hopefully these thoughts move that process forward.

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<sup>122</sup> See, e.g., Langbein, *supra* note 14, at 172.

<sup>123</sup> See Rutledge & Habbart, *supra* note 50, at 1057–58.

