NOTES

JURISDICTION: DIVERSITY—LIMITED PARTNERSHIP—LIMITED PARTNERSHIP TREATED AS AGGREGATE FOR DIVERSITY PURPOSES—*Carlsberg Resources Corp. v. Cambria Savings & Loan Ass'n*, 554 F.2d 1254 (3d Cir. 1977).

A limited partnership, Carlsberg Mobile Home Properties, Ltd., (Carlsberg),[1] asserted the existence of diversity of citizenship[2] through its general partner, Carlsberg Resources Corp.,[3] in order to litigate its negligence action[4] against Cambria Savings and Loan As-

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[1] Carlsberg Resources Corp. v. Cambria Sav. & Loan Ass'n, 413 F. Supp. 880, 881 (W.D. Pa. 1976), *aff'd*, 554 F.2d 1254 (3d Cir. 1977); Carlsberg Resources Corp. v. Cambria Sav. & Loan Ass'n, 554 F.2d 1254, 1255 (3d Cir. 1977). Carlsberg was formed pursuant to the Pennsylvania Uniform Limited Partnership Act. *See* 413 F.Supp. at 882; 59 PA. CONS. STAT. ANN. §§ 501 to 545 (Purdon Cum. Supp. 1978-1979). This Act defines a limited partnership as one

> formed by two or more persons under the provisions of section 512 (relating to formation), having as members one or more general partners and one or more limited partners. The limited partners as such shall not be bound by the obligations of the partnership.

59 PA. CONS. STAT. ANN. § 511 (Purdon Cum. Supp. 1978-1979). The members of Carlsberg included one general partner and over 1500 limited partners. 413 F. Supp. at 882.

[2] Carlsberg Resources Corp. v. Cambria Sav. & Loan Ass'n, 554 F.2d 1254, 1255 (3d Cir. 1977); Brief for Appellant at 24, Carlsberg Resources Corp. v. Cambria Sav. & Loan Ass'n, 554 F.2d 1254 (3d Cir. 1977) [hereinafter cited as Brief for Appellant]; *see* Carlsberg Resources Corp. v. Cambria Sav. & Loan Ass'n, 413 F. Supp. 880, 881 (W.D. Pa. 1976), *aff'd*, 554 F.2d 1254 (3d Cir. 1977).

[3] Carlsberg Resources Corp. v. Cambria Sav. & Loan Ass'n, 413 F. Supp. 880, 881 (W.D. Pa. 1976), *aff'd*, 554 F.2d 1254 (3d Cir. 1977); *see* 59 PA. CONS. STAT. ANN. § 545 (Purdon Cum. Supp. 1978-1979) (providing that "[a] contributor, unless he is [a] general partner, is not a proper party to proceedings by or against a partnership, except where the object is to enforce a limited partner's right against or liability to the partnership"). Thus, the general partner in the Carlsberg limited partnership is the only member of the association having capacity to sue or be sued on the limited partnership's behalf. Carlsberg Resources Corp. v. Cambria Sav. & Loan Ass'n, 554 F.2d 1254, 1265 (3d Cir. 1977).

[4] Carlsberg Resources Corp. v. Cambria Sav. & Loan Ass'n, 413 F. Supp. 880, 884–85 (W.D. Pa. 1976), *aff'd*, 554 F.2d 1254 (3d Cir. 1977). The negligence action arose from a purchase-leaseback transaction between Carlsberg as purchaser-lessor and Forest Park as seller-lessee. As part of the transaction, Carlsberg required Forest Park to complete construction of a mobile home park on the leased property. *Id.* at 884. Before the purchase-leaseback transaction, Forest Park had encumbered the title to the property by executing a mortgage in favor of Cambria Savings and Loan Association as security for a loan granted by Cambria to expand the mobile home park. *Id.* The loan agreement stipulated that Cambria would disburse loan funds in proportion to the amount of construction completed. *Id.* Carlsberg did not assume the mortgage and the purchase-leaseback agreement contemplated that Forest Park would pay for and complete the expansion of the park. *Id.* Forest Park defaulted on both the lease and loan agreements by failing to complete expansion of the park. *Id.* at 885. Cambria violated the loan stipulation by distributing loan funds in excess of the amount of construction completed. *Id.* After Cambria initiated foreclosure proceedings and bought the property, Carlsberg instituted this negligence suit against Cambria. *Id.*; Brief for Appellant, *supra* note 2, at 2.

sociation[5] in federal court. Carlsberg argued that the court, in determining jurisdiction, should only look to the citizenship of its general partner.[6] Since Carlsberg's general partner held its citizenship in California,[7] and the defendant, Cambria, was a citizen of Pennsylvania,[8] Carlsberg alleged that federal jurisdiction existed over the action by virtue of 28 U.S.C. § 1332(c),[9] the diversity jurisdictional grant.

The United States District Court for the Western District of Pennsylvania raised sua sponte[10] the concept of limited jurisdiction[11] of the federal courts and dismissed the action for lack of diversity jurisdiction.[12] Relying upon what he deemed to be the law for determining diversity of citizenship of limited partnerships and other

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[5] Carlsberg Resources Corp. v. Cambria Sav. & Loan Ass'n, 413 F. Supp. 880, 885 (W.D. Pa. 1976), *aff'd*, 554 F.2d 1254 (3d Cir. 1977).

[6] Carlsberg Resources Corp. v. Cambria Sav. & Loan Ass'n, 413 F. Supp. 880, 882 (W.D. Pa. 1976), *aff'd*, 554 F.2d 1254 (3d Cir. 1977); Carlsberg Resources Corp. v. Cambria Sav. & Loan Ass'n, 554 F.2d 1254, 1260 (3d Cir. 1977); Brief for Appellant, *supra* note 2, at 24.

[7] Carlsberg Resources Corp. v. Cambria Sav. & Loan Ass'n, 413 F. Supp. 880, 881 (W.D. Pa. 1976), *aff'd*, 554 F.2d 1254 (3d Cir. 1977); Carlsberg Resources Corp. v. Cambria Sav. & Loan Ass'n, 554 F.2d 1254, 1255 (3d Cir. 1977); Brief for Appellant, *supra* note 2, at 2. Pursuant to 28 U.S.C. § 1332(c), which provides that "a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business," the corporate general partner of Carlsberg was considered a citizen of California—the state of its incorporation and principal place of business—for purposes of diversity, 413 F. Supp. at 881.

[8] Carlsberg Resources Corp. v. Cambria Sav. & Loan Ass'n, 413 F. Supp. 880, 881 n.1 (W.D. Pa. 1976), *aff'd*, 554 F.2d 1254 (3d Cir. 1977). The district court assumed that Cambria Savings and Loan Association was a "Pennsylvania corporation with its principal place of business in Pennsylvania." *Id.*; Brief for Appellant, *supra* note 2, at 3. On appeal, the Third Circuit did not question this assumption. *See* Carlsberg Resources Corp. v. Cambria Sav. & Loan Ass'n, 554 F.2d 1254, 1255 (3d Cir. 1977).

[9] Carlsberg Resources Corp. v. Cambria Sav. & Loan Ass'n, 554 F.2d 1254, 1255, 1262 (3d Cir. 1977); Brief for Appellant, *supra* note 2, at 10. Section 1332(a) provides, in pertinent part, that "[t]he district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between . . . citizens of different States . . . ." 28 U.S.C. § 1332(a) (1976). Section 1332(c) provides for the characterization of corporations as citizens. For the text of section 1332(c), see note 7 *supra*.

[10] Carlsberg Resources Corp. v. Cambria Sav. & Loan Ass'n, 413 F.Supp. 880, 881 (W.D. Pa. 1976), *aff'd*, 554 F.2d 1254 (3d Cir. 1977).

[11] *See* Carlsberg Resources Corp. v. Cambria Sav. & Loan Ass'n, 413 F.Supp. 880, 881 (W.D. Pa. 1976), *aff'd*, 554 F.2d 1254 (3d Cir. 1977). "[A] cause is presumed to be without [the court's] jurisdiction unless the contrary affirmatively appears." Thomas v. Trustees of the Ohio State Univ., 195 U.S. 207, 210 (1904); *see* Miller & Lux, Inc. v. East Side Canal & Irrigation Co., 211 U.S. 293, 296–97 (1908); Lehigh Mining & Mfg. Co. v. Kelly, 160 U.S. 327, 337 (1895); McSparran v. Weist, 402 F.2d 867, 876 (3d Cir. 1968), *cert. denied*, 395 U.S. 903 (1969); Underwood v. Maloney, 256 F.2d 334, 338, 340 (3d Cir.), *cert. denied*, 358 U.S. 864 (1958).

[12] Carlsberg Resources Corp. v. Cambria Sav. & Loan Ass'n, 413 F. Supp. 880, 883, 886 (W.D. Pa. 1976), *aff'd*, 554 F.2d 1254 (3d Cir. 1977); Brief for Appellant, *supra* note 2, at 2. The court stated that if Carlsberg's appeal as to the jurisdictional question should result in a

unincorporated associations,[13] District Judge Marsh examined the citizenship of all the members of the association in question.[14] The district court determined that "all the members" of the limited partnership included both general and limited partners.[15] Since thirty-eight of Carlsberg's 1500 limited partners possessed the same citizenship as that of the defendant association,[16] diversity was lacking and the court denied access to the federal forum.[17]

Relying on principles of federalism[18] and judicial economy,[19] the United States Court of Appeals for the Third Circuit, in *Carlsberg Resources Corp. v. Cambria Savings & Loan Association*,[20] affirmed the decision of the district court.[21] Reiterating the district court's aggregate theory,[22] the majority, represented by Judge Adams, re-

reversal of its holding, the suit should be dismissed on the merits since "there is no genuine issue of material fact . . . and defendant Cambria would be entitled to judgment as a matter of law." 413 F. Supp. at 884.

[13] Carlsberg Resources Corp. v. Cambria Sav. & Loan Ass'n, 413 F.Supp. 880, 881 (W.D. Pa. 1976), *aff'd*, 554 F.2d 1254 (3d Cir. 1977).

[14] Carlsberg Resources Corp. v. Cambria Sav. & Loan Ass'n, 413 F. supp. 880, 881 (W.D. Pa. 1976), *aff'd*, 554 F.2d 1254 (3d Cir. 1977). This method of examination has been characterized in later cases as aggregate treatment. For a further explanation of this treatment, see text accompanying note 39 *infra*.

[15] Carlsberg Resources Corp. v. Cambria Sav. & Loan Ass'n, 413 F. Supp. 880, 882, 884 (W.D. Pa. 1976), *aff'd*, 554 F.2d 1254 (3d Cir. 1977).

[16] Carlsberg Resources Corp. v. Cambria Sav. & Loan Ass'n, 413 F. Supp. 880, 882 (W.D. Pa. 1976), *aff'd*, 554 F.2d 1254 (3d Cir. 1977).

[17] Carlsberg Resources Corp. v. Cambria Sav. & Loan Ass'n, 413 F. Supp. 880, 883, 886 (W.D. Pa. 1976), *aff'd*, 554 F.2d 1254 (3d Cir. 1977).

[18] Carlsberg Resources Corp. v. Cambria Sav. & Loan Ass'n, 554 F.2d 1254, 1257 (3d Cir. 1977). The *Carlsberg* court felt that diversity jurisdiction violated the concept of federalism in that it "interferes with the autonomy of state tribunals by diverting [state] litigation . . . to federal forums." *Id.*; *see, e.g.*, Indianapolis v. Chase Nat'l Bank, 314 U.S. 63, 76–77 (1941); McSparran v. Weist, 402 F.2d 867, 876 (3d Cir. 1968), *cert. denied*, 395 U.S. 903 (1969). Federalism embraces neither a "'blind deference to "States' Rights"'" nor a "'centralization of control . . . in our National Government and its courts.'" Instead, federalism is " 'the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.' " Friendly, *Federalism: A Foreword*, 86 YALE L.J. 1019, 1019 n.1 (1977) (quoting Justice Black, writing for the majority, in Younger v. Harris, 401 U.S. 37, 44–45 (1971)).

[19] Carlsberg Resources Corp. v. Cambria Sav. & Loan Ass'n, 554 F.2d 1254, 1256–57 (3d Cir. 1977). Judge Adams feared that the "[r]elaxation of diversity requirements, intentional or otherwise, inevitably [would] increase access to the federal courts by litigants now confined to state courts, thereby augmenting the volume of business of the federal tribunals." *Id.* at 1256; *see, e.g.*, Indianapolis v. Chase Nat'l Bank, 314 U.S. 63, 76 (1941); McSparran v. Weist, 402 F.2d 867, 876 (3d Cir. 1968), *cert. denied*, 395 U.S. 903 (1969).

[20] 554 F.2d 1254 (3d Cir. 1977).

[21] *Id.* at 1262.

[22] *Id.* at 1258. Specifically, the court stated that in the case of unincorporated associations, including partnerships, "the courts should look to the citizenship of the persons comprising such organizations in . . . determin[ing] whether . . . [the association has] compl[ied] with the diversity standard." *Id.* Essentially, the court viewed "an unincorporated association . . . as a citizen of each state in which it ha[d] a member." *Id.*

jected Carlsberg's contentions. Carlsberg had argued for the exclusion of limited partnerships from the "traditional" rule, therefore, requesting the court to examine the citizenship of only those persons who had capacity to sue[23]—in this case, the general partner.[24]

In his dissenting opinion, Judge Hunter advocated the applicability of the capacity to sue theory posited by Carlsberg.[25] Since limited partners do not possess the capacity to sue or be sued,[26] he considered it unfair to examine the citizenship of such partners for diversity purposes when they are not proper parties to the action.[27]

In determining whether diversity of citizenship exists, federal courts, as courts of limited jurisdiction,[28] entertain a presumption against jurisdiction.[29] The courts guide themselves by constitutional[30] and congressional strictures,[31] as well as judicially imposed

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[23] *Id.* at 1260–62; 413 F. Supp. at 882; Brief for Appellant, *supra* note 2, at 24.

[24] 554 F.2d at 1260; *see* 59 PA. CONS. STAT. ANN. § 545 (Purdon Cum. Supp. 1978-1979). For text of this section, see note 3 *supra*. *See also* 59 PA. CONS. STAT. ANN. § 523 (Purdon Cum. Supp. 1978-1979). Section 523 defines the "[r]ights, powers, and liabilities of a general partner." *Id.* It provides that "[a] general partner shall have all the rights and powers, and be subject to all the restrictions and liabilities, of a partner in a partnership without limited partners. . . ." *Id.*

[25] 554 F.2d at 1262–66.

[26] *Id.* at 1265; *see* 59 PA. CONS. STAT. ANN. § 545 (Purdon Cum. Supp. 1978-1979).

[27] 554 F.2d at 1265.

[28] *E.g.*, Miller & Lux, Inc. v. East Side Canal & Irrigation Co., 211 U.S. 293, 302 (1908); Thomas v. Trustees of the Ohio State Univ., 195 U.S. 207, 210 (1904); Lehigh Mining & Mfg. Co. v. Kelly, 160 U.S. 327, 337 (1895); Bingham v. Cabot, 3 U.S. (3 Dall.) 382, 383 (1798).

[29] *E.g.*, Miller & Lux, Inc. v. East Side Canal & Irrigation Co., 211 U.S. 293, 302 (1908); Thomas v. Trustees of the Ohio State Univ., 195 U.S. 207, 210 (1904); Lehigh Mining & Mfg. Co. v. Kelly, 160 U.S. 327, 337 (1895). "[W]hen the inquiry involves the jurisdiction of a Federal court—the presumption in every state of a cause . . . [is] that it is without the jurisdiction of a court of the United States, unless the contrary appears from the record." 160 U.S. at 337; FED. R. CIV. P. 12(h)(3) (1976), codified in 28 U.S.C., App.

[30] At the Constitutional Convention of 1787, the belief "[t]hat there should be a national judiciary was readily accepted by all." M. FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 79 (1913). Yet, "the Convention's unhesitant agreement upon such a power cloaked lively disagreements about . . . the exact scope of the jurisdiction they [federal courts] should have." P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 6 (2d ed. 1973) [hereinafter cited as HART & WECHSLER].

Although diversity jurisdiction was eventually accepted at the Convention, some anti-Federalists believed that it "deprived the state courts of jurisdiction in all cases falling within the sphere allotted to the federal judiciary" and that the federal judicial system prevented state judicial power from equalling its legislative power. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 488 (1928). Alexander Hamilton answered both contentions by reminding the anti-Federalists that state courts held jurisdiction concurrently with the federal courts in all diversity cases. *Id.* The resulting constitutional provisions defining the areas of federal court jurisdiction are contained in article III, section 2 of the United States Constitution, which provides that "the judicial Power shall extend to . . . controversies . . . between citizens of different States . . . ." U.S. CONST. art. III, § 2.

limitations.[32] In every case, a federal court may raise the issue of jurisdiction sua sponte,[33] and thereby initially subject the parties to the judicially imposed jurisdictional hurdle of perfect diversity.[34]

It has since been established that these jurisdictional provisions of the Constitution are not self-executing. Sheldon v. Sill, 49 U.S. (8 How.) 441, 448–49 (1850). Therefore, to have effect, congressional jurisdictional grants must implement them. *Id.* at 449.

[31] Congress does not have the power to expand or contract the grant of original jurisdiction given to the Supreme Court by the Constitution. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174–75 (1803). However, the proposition that the Constitution mandates that Congress grant the full scope of judicial power to lower federal courts and the Supreme Court's appellate jurisdiction was rejected by the Supreme Court in Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 630–33 (1875). *See* Herb v. Pitcairn, 324 U.S. 117, 125–26 (1945). Therefore, Congress possesses the ultimate power to adjust the jurisdiction of both the lower federal courts and the Supreme Court's appellate jurisdiction, subject only to the applicable provisions of the Constitution. Ex parte McCardle, 74 U.S. (7 Wall.) 506, 513–15 (1868); Battaglia v. General Motors Corp., 169 F.2d 254, 257 (2d Cir.), *cert. denied*, 335 U.S. 887 (1948).

[32] One all-encompassing judicially imposed stricture is the concept of limited jurisdiction. This concept first arose in the 1798 Supreme Court decision of Bingham v. Cabot, 3 U.S. (3 Dall.) 382, 383–84 (1798). Friendly, *supra* note 30, at 505. The *Bingham* Court held that "it was necessary to set forth the citizenship . . . of the respective parties, in order to bring the case within the jurisdiction of the Circuit Court." 3 U.S. at 383–84. Later cases wherein the Court strictly interpreted its jurisdiction include: Indianapolis v. Chase Nat'l Bank, 314 U.S. 63, 69–71 (1941) (Court realigned parties according to interest in suit, thereby destroying diversity); Miller & Lux, Inc. v. East Side Canal & Irrigation Co., 211 U.S. 293, 302–03, 306 (1908) (Court held that manufactured diversity, in guise of corporate dissolution in one state and reformation in another state, violated concept of limited jurisdiction and did not operate to vest federal court with jurisdiction); Thomas v. Trustees of the Ohio State Univ., 195 U.S. 207, 210 (1904) (Court found lack of diversity because defendant was not a corporation and did not sufficiently aver citizenship of members in order to overcome Court's limited jurisdiction); Lehigh Mining & Mfg. Co. v. Kelly, 160 U.S. 327, 337–39 (1895) (manufactured diversity violated concept of limited jurisdiction). Another important judicial means of limiting federal jurisdiction exists in the form of the perfect diversity rule. Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 267–68 (1806). For a further discussion of the *Strawbridge* perfect diversity rule, see note 34 *infra*.

The federal courts have also provided disincentives to litigants in bringing their actions in a federal forum. *E.g.*, Erie R.R. v. Tompkins, 304 U.S. 64, 78–79 (1938) (Court annihilated federal general common law and required federal courts to apply state law, including state decisional law, in federal diversity cases).

[33] Thomas v. Trustees of the Ohio State Univ., 195 U.S. 207, 211 (1904); Underwood v. Maloney, 256 F.2d 334, 340 (3d Cir.), *cert. denied*, 358 U.S. 864 (1950).

[34] Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 267–68 (1806). Confronted with a fact situation wherein all the plaintiffs were citizens of Massachusetts and the defendants were citizens of Massachusetts and Vermont, the *Strawbridge* Court assumed the stance "that the presence of Massachusetts people on both sides of a case [would] neutralize any possibility of bias affecting litigants from . . . [the state of Vermont]." Currie, *The Federal Courts and the American Law Institute*, 36 U. CHI. L. REV. 1, 18 (1968). On that basis, the *Strawbridge* Court dismissed the case, relegating it to disposition in state court. 7 U.S. at 267.

Some dispute exists as to whether the Constitution mandated the *Strawbridge* decision. Currie, *supra* at 19 n.100. The case of State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523 (1967), answered this question in the negative when it held that the *Strawbridge* perfect diversity rule was the product of statutory interpretation of the Federal Judiciary Act of 1789. 386 U.S. at 530–31. Rejecting the existence of even a statutory mandate, one author relegated the *Strawbridge* decision to one merely based on policy. Friendly, *supra* note 30, at 509. Other

The rule of perfect diversity demands that all plaintiffs be citizens of different states from all defendants.[35] Historically, this rule operated to exclude unincorporated,[36] as well as incorporated,[37] associations from federal court.

Where a court applies entity treatment to an association, the association fulfills the perfect diversity requirement so long as the citizenship of the association differs from the citizenship of the opposing parties.[38] In contrast, a court's application of aggregate treatment

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commentators have argued for the abrogation of the perfect diversity rule on the theory that the Judiciary Act of 1789, which the rule purported to construe, has since been amended. *Id.* at 509 n.126. Furthermore, one commentator has indicated that "*Strawbridge* has been uncritically extended beyond [its type of fact pattern to] . . . situations in which its rationale seems somewhat less compelling." Currie, *supra* at 18. For a detailed analysis of the fact patterns to which *Strawbridge* has been "uncritically extended," *see id.* at 18–19. Thus, in the area of corporate diversity, the *Strawbridge* rule forced the creation of "entity treatment." *See* Moore & Weckstein, *Diversity Jurisdiction: Past, Present and Future*, 43 TEX. L. REV. 1, 7 (1964) [hereinafter cited as *Diversity Jurisdiction*]. Due to the dual application of the *Strawbridge* rationale and aggregate treatment, corporations which had grown to national proportions "could rarely gain the protection of a federal court." Green, *Corporations as Persons, Citizens, and Possessors of Liberty*, 94 U. PA. L. REV. 202, 214 (1946). To remedy this situation, instead of applying the traditional aggregate treatment of examining the citizenship of corporate members, the courts created the entity fiction, deeming corporations to be citizens of their state of incorporation. *See* text accompanying notes 58–67 *infra*.

The *Strawbridge* perfect diversity rule still controls as a construction of the diversity statute and is subject to change by Congress. C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 24, at 95–96 (3d ed. 1976). Congress has not changed the perfect diversity rule, however, it has created at least one exception to it, *i.e.*, interpleader. *Id.* at 95.

[35] Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 267 (1806); C. WRIGHT, *supra* note 34, at 95; *see* Currie, *supra* note 34, at 18.

[36] United Steelworkers v. R.H. Bouligny, Inc., 382 U.S. 145, 146, 152 (1965) (labor union); Great S. Fire Proof Hotel Co. v. Jones, 177 U.S. 449, 454–56, 457 (1900) (limited partnership association); Chapman v. Barney, 129 U.S. 677, 682 (1889) (joint stock company); Baer v. United Servs. Auto. Ass'n, 503 F.2d 393, 396 (2d Cir. 1974) (interinsurance exchange); Underwood v. Maloney, 256 F.2d 334, 338 (3d Cir.), *cert. denied*, 358 U.S. 864 (1958) (labor union); Jim Walter Investors v. Empire-Madison Inc., 401 F. Supp. 425, 428, 429 (N.D. Ga. 1975) (real estate investment trust); Stein v. American Fed'n of Musicians, 183 F. Supp. 99, 100–01 (M.D. Tenn. 1960) (labor union); International Allied Printing Trades Ass'n v. Master Printers Union, 34 F. Supp. 178, 181 (D.N.J. 1940) (labor union).

[37] The perfect diversity rule operated to exclude incorporated associations from those federal courts which followed the *Deveaux* rationale. McGovney, *A Supreme Court Fiction: Corporations In The Diverse Citizenship Jurisdiction Of The Federal Courts*, 56 HARV. L. REV. 853, 872 (1943). *See, e.g.*, Commercial & R.R. Bank of Vicksburg v. Slocomb, Richards & Co., 39 U.S. (14 Pet.) 60, 64 (1840); Bank of the United States v. Martin, 30 U.S. (5 Pet.) 479, 479–80 (1831); Breithaupt v. Bank of Ga., 26 U.S.(1 Pet.) 238, 238–39 (1828); Sullivan v. Fulton Steam Boat Co., 19 U.S. (6 Wheat.) 450, 451–52 (1821). For a full discussion of the *Deveaux* rationale and its role in the growth of the aggregate and entity treatments of corporations under the perfect diversity rule, see notes 48–56 *infra* and accompanying text.

[38] Originally, corporations were presumed to be citizens solely of their state of incorporation. Marshall v. Baltimore & O. R.R., 57 U.S. (16 How.) 314, 328 (1853); Louisville, Cincinnati & Charleston R.R. v. Letson, 43 U.S. (2 How.) 497, 558 (1844). In 1958, however, the

requires that it look to the citizenship of all the members of the association in determining the existence of diversity. Aggregate treatment thus effectively bars many associations from federal court because perfect diversity is destroyed if one member of the association bears the same citizenship as that of the opposing party.[39]

In an attempt to achieve entity treatment and thereby negate the impact of the perfect diversity rule, proponents of the availability of federal court jurisdiction to associations have formulated three distinct theories—the "label" theory,[40] the "characteristics" theory,[41] and the "capacity to sue" theory.[42]

The label theory would result in entity treatment only for incorporated associations and would relegate all other associations to aggregate treatment.[43] The characteristics theory, in contrast to the

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amendment of the diversity statute made corporations citizens of both their state of incorporation and their principal place of business. 28 U.S.C. § 1332(c) (1976).

[39] For a listing of cases where associations have been barred from federal courts due to aggregate treatment, see note 40 *infra*.

[40] The main thrust of the label theory is that an association must possess a corporate "birth certificate" in order to receive entity treatment. *E.g.*, United Steelworkers v. R.H. Bouligny, Inc., 382 U.S. 145, 149–52 (1965); Thomas v. Trustee of the Ohio State Univ., 195 U.S. 207, 217 (1904); Great S. Fire Proof Hotel Co. v. Jones, 177 U.S. 449, 454 (1900); Chapman v. Barney, 129 U.S. 677, 682 (1889); Baer v. United Servs. Auto. Ass'n, 503 F.2d 393, 395 (2d Cir. 1974); Arbuthnot v. State Auto. Ins. Ass'n, 264 F.2d 260, 261 (10th Cir. 1959); Swan v. First Church of Christ Scientist, 225 F.2d 745, 747–48 (9th Cir. 1955); Fred Macey Co. v. Macey, 135 F. 725, 727–28 (6th Cir. 1905); Jim Walter Investors v. Empire-Madison Inc., 401 F. Supp. 425, 428 (N.D. Ga. 1975); Larwin Mortgage Investors v. Riverdrive Mall, Inc., 392 F. Supp. 97, 99 (S.D. Tex. 1975); Feldmann Ins. Agency v. Brodsky, 195 F. Supp. 483, 485 (D. Md. 1961); Stein v. American Fed'n of Musicians, 183 F. Supp. 99, 101 (M.D. Tenn. 1960).

[41] Cases employing the characteristics theory do not require that the association be a corporation, but that it merely be similar to a corporation. *E.g.*, Puerto Rico v. Russell & Co., 288 U.S. 476, 481–82 (1933); Marshall v. Baltimore & O. R.R., 57 U.S. (16 How.) 314, 327–28 (1853); Louisville, Cincinnati & Charleston R.R. v. Letson, 43 U.S. (2 How.) 497, 558 (1844); Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61, 88–92 (1809); Mason v. American Express Co., 334 F.2d 392, 393, 397, 399–400 (2d Cir. 1964); *cf.* Brocki v. American Express Co., 279 F.2d 785, 788 (6th Cir.), *cert. denied*, 364 U.S. 871 (1960) (where court denied entity treatment to association because it lacked corporate status, while approving *Russell* characteristics test).

[42] Cases utilizing the capacity to sue theory focus on the citizenship of only those members of an unincorporated association who possess capacity to sue under state law. *E.g.*, Colonial Realty Corp. v. Bache & Co., 358 F.2d 178, 183–84 (2d Cir.), *cert. denied*, 385 U.S. 817 (1966); Erving v. Virginia Squires Basketball Club, 349 F. Supp. 709, 711 (E.D.N.Y.), *aff'd on other grounds*, 468 F.2d 1064 (2d Cir. 1972); *see* Van Sant v. American Express Co., 169 F.2d 355, 372 (3d Cir. 1948); C.P. Robinson Constr. Co. v. National Corp. for Hous. Partnerships, 375 F. Supp. 446, 449 (M.D.N.C. 1974). *But see* Feldmann Ins. Agency v. Brodsky, 195 F. Supp. 483, 485 (D.Md. 1961); International Allied Printing Traders Ass'n v. Master Printers Union, 34 F. Supp. 178, 181 (D.N.J. 1940).

[43] *Compare* Louisville, Cincinnati & Charleston R.R. v. Letson, 43 U.S. (2 How.) 497, 554, 558 (1844) (incorporated association viewed as entity) *and* Marshall v. Baltimore & O. R.R., 57 U.S. (16 How.) 314, 328 (1853) (incorporated association treated as entity) *with* Chapman v.

label theory, would broaden the types of associations that could receive entity treatment.[44] Rather than applying the mechanical determinative of whether an association is incorporated, this theory determines, on a case-by-case basis, whether an association possesses characteristics sufficiently similar to a corporation so as to warrant entity treatment.[45] The capacity to sue theory, a hybrid approach, would mandate aggregate treatment of the association, but would limit the members relevant to the question of diversity to those who have capacity to sue under state law.[46] Furthermore, policy considerations of federalism and judicial economy have also played a significant role as to which theory the courts will employ.[47]

The characteristics theory first arose in application to corporations.[48] The courts, in their treatment of corporations, gradually developed the theory to allow corporations access to federal courts as entities, *i.e.*, citizens of their place of incorporation.[49] In *Bank of*

Barney, 129 U.S. 677, 682 (1889) (joint stock association dealt with as aggregate) *and* United Steelworkers v. R.H. Bouligny, Inc., 382 U.S. 145, 149–53 (1965) (unincorporated labor union relegated to aggregate treatment).

[44] The characteristics theory would broaden the type of associations that could acquire access to federal courts by granting entity treatment, not only to those associations that have incorporated, but also to those unincorporated associations which possess characteristics similar to a corporation, *i.e.*, limited partnerships, joint stock companies and unincorporated labor unions.

[45] Puerto Rico v. Russell & Co., 288 U.S. 476, 481–82 (1933); Mason v. American Express Co., 334 F.2d 392, 397–400 (2d Cir. 1964). For a detailed discussion of the *Russell* and *Mason* decisions, see notes 83–92, 102–08 *infra* and accompanying text.

[46] Colonial Realty Corp. v. Bache & Co., 358 F.2d 78, 183–84 (2d Cir.), *cert. denied*, 385 U.S. 817 (1966); Erving v. Virginia Squires Basketball Club, 349 F. Supp. 709, 711 (E.D.N.Y.), *aff'd on other grounds*, 468 F.2d 1064 (2d Cir. 1972). In the foregoing cases, the capacity to sue theory mandated that the general partners of the limited partnership would be the members relevant to the question of diversity jurisdiction. *Colonial Realty*, 358 F.2d at 183–84; *Erving*, 349 F. Supp. at 711. For a variation on the capacity to sue approach, see ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS § 1301(b)(2), at 10, 114–17 [hereinafter cited as ALI STUDY], *discussed in* note 118 *infra*.

[47] The courts have always strictly construed their diversity jurisdictional power in order to comport with their federalist mandate "of avoiding offense to state sensitiveness," and with their judicial economy policy "of relieving the federal courts of the overwhelming burden of 'business that intrinsically belongs to the state courts;' in order to keep them free for their distinctive federal business." Indianapolis v. Chase Nat'l Bank, 314 U.S. 63, 76 (1941).

[48] Marshall v. Baltimore & O. R.R., 57 U.S. (16 How.) 314, 327–28 (1953); Louisville, Cincinnati & Charleston R.R. v. Letson, 43 U.S. (2 How.) 497, 558 (1844); Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61, 85–92 (1809). The characteristics theory as applied to corporations consisted of determining whether a corporation possessed characteristics sufficiently similar to those of a natural person to warrant entity treatment. *Marshall*, 57 U.S. at 327–28; *Letson*, 43 U.S. at 558; *Deveaux*, 9 U.S. at 85–92.

[49] Marshall v. Baltimore & O. R.R., 57 U.S. (16 How.) 314, 328–29 (1853); Louisville, Cincinnati & Charleston R.R. v. Letson, 43 U.S. (2 How.) 497, 558 (1844).

the United States v. Deveaux,[50] the first case dealing with the diversity status of corporations,[51] the Supreme Court recognized the characteristics theory, but refused to employ it for the purpose of determining federal jurisdiction.[52] Although the Court agreed that corporations possessed many of the attributes of natural persons,[53] and should, therefore, be treated as entities for limited purposes,[54] it questioned whether a corporation was a citizen within the constitutional diversity grant.[55] Consequently, the Court, in determining jurisdiction, examined the citizenship of all the members of the corporation.[56]

Louisville, Cincinnati & Charleston Railroad v. Letson,[57] changed the precedent established in the *Deveaux* case by relying upon the characteristics theory to determine the existence of diver-

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[50] 9 U.S. (5 Cranch) 61 (1809).

[51] *See* Moore & Weckstein, *Corporations and Diversity of Citizenship Jurisdiction: A Supreme Court Fiction Revisited*, 77 HARV. L. REV. 1426, 1427 (1964) [hereinafter cited as *Corporate Diversity Jurisdiction*]. Cases prior to *Deveaux* failed to raise questions as to corporate diversity and, instead, assumed that corporations were citizens for federal jurisdictional purposes. *Id.*

[52] 9 U.S. at 88–92.

[53] *Id.* at 85, 88–89. The *Deveaux* decision enumerated the similarities between corporations and natural persons: "capacity to make contracts and to acquire property, [capacity] . . . 'to sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in courts of record, or any other place whatsoever.' " *Id.* at 85.

[54] *Id.* at 88–89. The *Deveaux* Court recognized that the characteristics theory called for entity treatment of a corporation in certain instances—suits involving the levying of taxes, and the levying of the poor rates. *Id.*

[55] *Id.* at 86–87; Green, *supra* note 34, at 216; McGovney, *supra* note 37, at 866.

Since the United States Constitution and the Judiciary Act of 1789 failed to address the issue of whether corporations could be considered citizens for diversity purposes, corporate diversity status remained an open question until the *Deveaux* decision. Comment, *Corporate Diversity of Citizenship Under* 28 *U.S.C.* §1332(*c*), 26 BAYLOR L. REV. 211, 211 (1974); *see* Green, *supra* at 211.

[56] 9 U.S. at 91–92. Under *Deveaux's* application of aggregate treatment, if one shareholder of the corporation was a citizen of the same state as that of the opposing party, complete diversity would not exist and the perfect diversity rule would bar the suit from federal court. Comment, *supra* note 55, at 211. This result, however, did not occur in the *Deveaux* case even under the purported application of aggregate treatment because the Court did not look behind the averment in the complaint to determine the actual citizenship of the parties. Instead, it relied on the statement that all members possessed citizenship diverse from that of the opposing party. 9 U.S. at 92; Green, *supra* note 34, at 211–12; *Corporate Diversity Jurisdiction*, *supra* note 51, at 1427 n.9. The *Deveaux* Court rationalized its decision by stating that "[b]eing authorized to sue in their corporate name, [the plaintiffs] could make the averment [of citizenship], and it must apply to the plaintiffs as individuals, because [the averment] could not be true as applied to the corporation." 9 U.S. at 92.

[57] 43 U.S. (2 How.) 497 (1844).

sity.[58] In *Letson*, a New York citizen sued the railroad in federal court for nonperformance of a contract requiring the railroad to construct a road.[59] The railroad challenged the existence of diversity jurisdiction, alleging that six of its members were citizens of New York—the same citizenship as that of Letson.[60] In repudiating the aggregate treatment of corporations developed by *Deveaux*, the *Letson* Court stated that since the characteristics of the corporation vested it with powers similar to those of a natural person,[61] the corporation should receive entity treatment for diversity purposes.[62] Granting corporations entity treatment, *Letson* deemed the corporation to be a citizen of its state of incorporation,[63] and therefore diverse from the New York appellee.

In *Marshall v. Baltimore & Ohio Railroad*,[64] the Court essentially followed the characteristics approach of *Letson*.[65] Rather than treating the corporation as a citizen of the state of its incorporation,[66] the *Marshall* Court held that the members would be "justly presumed to be resident[s] in the State which is the necessary *habitat* of

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[58] *Id.* at 554–55; Comment, *supra* note 55, at 211. The *Letson* Court voiced its disenchantment with the *Deveaux* reasoning. 43 U.S. at 555. The interrelationship of *Deveaux* and the perfect diversity rule forced the *Letson* Court to reach its decision. *Id.* at 554–55; McGovney, *supra* note 37, at 879.

[59] 43 U.S. at 497.

[60] *Id.* at 497–98. It is interesting to note that the six non-diverse parties were stockholders of corporations which were members of the Louisville, Cincinnati & Charleston Railroad. *Id.* The *Letson* Court recognized the unfairness in this fact situation, when it overruled *Deveaux* and employed the characteristics theory. McGovney, *supra* note 37, at 879. The *Letson* Court examined such corporate/natural person similarities as capacity to contract, to commit torts, to sue and be sued, to hold property, to manage its own affairs, and the ability to do business in a particular state. 43 U.S. at 557–58; Currie, *supra* note 34, at 34. Another underlying reason for the *Letson* decision was the danger of bias: "a corporation can be the victim or the beneficiary of prejudice against foreigners just as if it were a human being." Currie, *supra* at 34.

[61] 43 U.S. at 558.

[62] *Id.* at 557–58.

[63] *Id.* at 558–59; *Corporate Diversity Jurisdiction*, *supra* note 51, at 1428. The *Letson* decision, in effect, constituted a repudiation of *Strawbridge* in that the *Letson* Court felt that "[t]he presence of a shareholder from the same state as the opposing party was not enough to remove the danger of bias." Currie, *supra* note 34, at 34–35.

[64] 57 U.S. (16 How.) 314 (1853).

[65] *Id.* at 328. The Court stated that because stockholders have the capacity to contract, sue and be sued in their corporate name, plaintiffs who dealt with these stockholders as a corporation should not be barred from bringing their action in federal court because of the application of aggregate treatment. *Id.* at 327–28. Since the corporation possessed the characteristics of a natural person, although in a representative capacity, plaintiffs who dealt with it as an entity should be able to sue it in federal court as such. *Id.*

[66] Some cases subsequent to the *Marshall* decision ignored the *Marshall* manipulation of terms and employed the *Letson* formula. McGovney, *supra* note 37, at 893.

the corporation, and where alone they can be made subject to suit."[67] The *Marshall* rationale prevailed until Congress,, in a 1958 amendment to section 1332 of the diversity statute,[68] mandated judicial recognition of a corporation as a citizen of both the state of its incorporation and the state of its principal place of business.[69] In addition to codifying the Supreme Court's policy of permitting corporations access to federal court,[70] this statutory scheme operated to eliminate some of the anomalies inherent in basing corporate diversity jurisdiction solely upon the state of incorporation.[71]

The label theory, initially appearing in application to unincorporated associations,[72] operated to bar these associations from federal court. Relying upon this theory, the Supreme Court, in the 1889 decision of *Chapman v. Barney*,[73] concluded that a joint stock company could not be a citizen of the state of New York for diversity purposes.[74] The Court failed to examine the characteristics of the stock

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[67] 57 U.S. at 328. The *Marshall* holding had the same effect as the *Letson* decision. Its main contribution to the diversity status of corporations was the avoidance of the constitutional question of whether a corporation could be deemed a "citizen." McGovney, *supra* note 37, at 886; *Corporate Diversity Jurisdiction*, *supra* note 51, at 1428. To reach its result, the *Marshall* Court followed a four-step analysis. As a threshold issue, the Court determined that a corporation " '[could] not be a citizen,' " McGovney, *supra* at 886, and that the *Deveaux* case controlled even though *Letson* overruled it. *Id.* Therefore, the determinative of the existence of diversity jurisdiction should have followed the *Deveaux* rationale that "a suit by or against a corporation may be regarded as a suit by or against its shareholders, and if their citizenship is appropriate, jurisdiction exists." *Id.* However, "to make [the shareholders'] citizenship appropriate [to the sanctioning of diversity jurisdiction, the court] cut off inquiry and deem[ed] all the shareholders of every state corporation to be citizens of the state that incorporate[d] it." *Id.*

[68] *Corporate Diversity Jurisdiction*, *supra* note 51, at 1428.

[69] 28 U.S.C. § 1332(c) (1976). For the text of the amendment to the diversity statute, see note 7 *supra*.

[70] S. REP. NO. 1830, 85th Cong., 2d Sess. 2, *reprinted in* [1958] U.S. CODE CONG. & AD. NEWS 3099, 3119 [hereinafter cited as S. REP. NO. 1830]; H.R. REP. NO. 1706, 85th Cong., 2d Sess. 3–4 (1958) [hereinafter cited as H.R. REP. NO. 1706]. "The amended provision embodies the same policy that originally motivated judicial employment of a fiction to justify treatment of a corporation as a citizen . . . . " Comment, *Unincorporated Associations: Diversity Jurisdiction and the ALI Proposal*, 1965 DUKE L.J. 329, 336.

[71] S. REP. NO. 1830, *supra* note 70, at 3119–20; H.R. REP. NO. 1706, *supra* note 70, at 4; *Corporate Diversity Jurisdiction*, *supra* note 51, at 1430–32; 65 COLUM. L. REV. 162, 166–67 (1965); 78 HARV. L. REV. 1661, 1663 (1965).

[72] Prior to the creation of the label theory, at least one form of unincorporated association, the joint stock company, received entity treatment under the *Marshall* rationale. 65 COLUM. L. REV. 162, 163 (1965).

[73] 129 U.S. 677 (1889).

[74] *Id.* at 682. The *Chapman* Court employed the label theory to

> den[y] unincorporated associations citizenship independent of that of their members for purposes of federal diversity jurisdiction. Consequently, even if an association could sue and be sued as an entity under state law, diversity jurisdiction was defeated where any member was a citizen of the same state as an adverse party.

company in determining whether it qualified under the *Marshall* rationale.[75] Rather, the Court reasoned that since state law did not label the joint stock company a corporation, it did not qualify for entity treatment.[76]

Similarly, in the 1900 case of *Great Southern Fire Proof Hotel Co. v. Jones*,[77] the Supreme Court applied the *Chapman* reasoning to a limited partnership association.[78] Writing for the majority, Mr. Justice Harlan held that the limited partnership association was not a corporation under the law of its state of organization,[79] and that its capacity to sue in its association name did not serve to qualify the association as a corporation.[80] Consequently, the Court relegated the limited partnership association to aggregate treatment.[81]

In many of the circuits, the label theory became a popular short form determinative of the diversity status of unincorporated associations.[82] However, in a 1933 case, *Puerto Rico v. Russell & Co.*,[83]

Comment, *Citizenship of Unincorporated Associations for Diversity Purposes*, 50 VA. L. REV. 1135, 1135 (1964).

[75] 129 U.S. at 682. The Court examined only one characteristic of the joint stock company—its capacity to sue. The Court found that

> although [the joint stock company] may be authorized by the laws of the State of New York to bring suit in the name of its president, that fact cannot give the company power, by that name, to sue in a Federal court.

Id.

[76] *Id.* The *Chapman* Court, focusing on the failure of the association in question to incorporate, stated:

> the express company cannot be a citizen of New York, within the meaning of the statutes regulating jurisdiction, unless it be a corporation. The allegation that the company was organized under the laws of New York is not an allegation that it is a corporation. In fact, the allegation is, that the company is not a corporation, but a joint-stock company . . . .

Id.

[77] 177 U.S. 449 (1900).

[78] *Id.* at 454–57. The limited partnership association differs from the limited partnership in that all the members of the association have equal status, none bearing personal liability. A. BROMBERG, CRANE & BROMBERG'S LAW OF PARTNERSHIPS § 26A, at 151 (1968) [hereinafter cited as CRANE & BROMBERG]. In the limited partnership, however, the general partners are personally liable, while the limited partners are not. *Id.* § 26, at 146–47.

[79] 177 U.S. at 454.

[80] *Id.* at 455–56. Citing *Louisville, Cincinnati & Charleston R.R. v. Letson*, the Supreme Court stated that the *Letson* holding "has been so long recognized and applied that it is not now to be questioned. No such rule however has been applied to partnership associations although such associations may have some of the characteristics of a corporation." *Id.* at 456.

[81] *Id.*

[82] The courts that employed the label theory in this manner limited their analysis of the diversity question to the determination of whether the particular association was a corporation. *E.g.*, Thomas v. Trustees of the Ohio State Univ., 195 U.S. 207, 215 (1904) (sixth circuit); Great

the Supreme Court extended the characteristics theory[84] by applying it to the limited partnership—a unique form of unincorporated association.[85] Upon examining the association's characteristics as defined under Puerto Rico law,[86] the *Russell* Court decided to treat the *sociedad en comandita* as an entity[87] "for purposes of federal jurisdiction."[88] The focus of *Russell* created confusion among the federal circuits.[89] The controversy concerned: first, whether courts should accept *Puerto Rico v. Russell & Co.* as precedent in the common law, as well as the civil law, diversity area;[90] second, whether the courts

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S. Fire Proof Hotel Co. v. Jones, 177 U.S. 449, 455 (1900) (sixth circuit); Levering & Garrigues Co. v. Morrin, 61 F.2d 115, 117 (2d Cir. 1932), *aff'd*, 289 U.S. 103 (1933); Taylor v. Weir, 171 F. 636, 639 (3d Cir. 1909); Rountree v. Adams Express Co., 165 F. 152, 154 (8th Cir. 1908); Fred Macey Co. v. Macey, 135 F. 725, 726–27 (6th Cir. 1905).

[83] 288 U.S. 476 (1933).

[84] *Id.* at 481; 65 COLUM. L. REV. 162, 163 (1965). *Russell* "[f]ollowe[d] the 'careful analysis' of *Marshall* rather than the reliance on 'labels' [which] characterize[d] *Chapman*. . . . " Comment, *supra* note 74, at 1135–36.

[85] 288 U.S at 481. The major distinction between limited partnerships and other unincorporated associations, such as general partnerships and joint stock associations, exists in the limited liability of the limited partners as opposed to the general liability of the members of other unincorporated associations. CRANE & BROMBERG, *supra* note 78, § 34, at 179.

[86] 288 U.S. at 481–82. These characteristics include the power to contract, own property and transact business, and sue and be sued in its own name and right. Furthermore,

> [i]ts members are not thought to have a sufficient personal interest in a suit brought against the entity to entitle them to intervene as parties defendant . . . . It is created by articles of association filed as public records . . . . Where the articles so provide, the *sociedad* endures for a period prescribed by them regardless of the death or withdrawal of individual members . . . . Powers of management may be vested in managers designated by the articles from among the members whose participation is unlimited, and they alone may perform acts legally binding on the *sociedad* . . . . Its members are not primarily liable for its acts and debts . . . , and its creditors are preferred with respect to its assets and property over the creditors of individual members, although the latter may reach the interests of the individual members in the common capital . . . . Although the members whose participation is unlimited are made contingently liable for the debts of the *sociedad* in the event that its assets are insufficient to satisfy them . . . , this liability is of no more consequence for present purposes than that imposed on corporate stockholders by the statutes of some states.

Id. (citations omitted).

[87] 288 U.S. at 481–82. "[T]he Court held in *Puerto Rico v. Russell & Co.* that a *sociedad en comandita*, an unincorporated creature of the civil law, should, because of its similarity to a corporation, be treated as one for jurisdictional purposes." Comment, *supra* note 74, at 1136.

[88] 288 U.S. at 482. The *Russell* case has been criticized as involving "only a close analogue of diversity jurisdiction. . . ." Comment, *supra* note 74, at 1136; *see* notes 179, 186–88 *infra* and accompanying text.

[89] *See* notes 90–95 *infra* and accompanying text.

[90] Both Mason v. American Express Co., 334 F.2d 392, 398–99 (2d Cir. 1964), and R.H. Bouligny, Inc. v. United Steelworkers, 336 F.2d 160, 162–63 (4th Cir. 1964), *aff'd*, 382 U.S.

should employ the *Russell* approach only in the narrower field of limited partnerships;[91] and, third, whether the federal courts should apply the label or characteristics theory to all unincorporated associations.[92]

Illustrative of this confusion were the 1964 circuit court decisions of *Mason v. American Express Co.*,[93] and *R.H. Bouligny, Inc. v. United Steelworkers.*[94] The *Mason and Bouligny* courts differed in their evaluation of the governing law.[95] In an attempt to limit the *Russell* decision,[96] the Fourth Circuit in the *Bouligny* case stated that "the

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145 (1965), addressed this issue. *Bouligny* limited the *Russell* decision to the interpretation of a civil law statute, 336 F.2d at 162–63, while *Mason* argued for its extension to both the common law and civil law, 334 F.2d at 398–99.

[91] *See* Swan v. First Church of Christ Scientist, 225 F.2d 745, 747 (9th Cir. 1955); Stein v. American Fed'n of Musicians, 183 F. Supp. 99, 99–100 (M.D. Tenn. 1960).

[92] R.H. Bouligny, Inc. v. United Steelworkers, 336 F.2d 160, 161–64 (4th Cir. 1964) (applying label theory to unincorporated labor union); Mason v. American Express Co., 334 F.2d 392, 393 (2d Cir. 1964) (applying characteristics theory to joint stock association). Before the advent of the *Russell* application of characteristics theory to the limited partnership, the courts had consistently employed label theory in determining the diversity jurisdictional status of unincorporated associations. *E.g.*, Thomas v. Trustees of the Ohio State Univ., 195 U.S. 207, 215–17 (1940) (Board of Trustees); Great S. Fire Proof Hotel Co. v. Jones, 177 U.S. 449, 454 (1900) (limited partnership association); Chapman v. Barney, 129 U.S. 677, 682 (1889) (joint stock company); Taylor v. Weir, 171 F. 636, 639 (3d Cir. 1909) (joint stock association); Rountree v. Adams Express Co., 165 F. 152, 154 (8th Cir. 1908) (joint stock company); Fred Macey Co. v. Macey, 135 F. 727, 727–28 (6th Cir. 1905) (limited partnership association). However, the characteristics theory had appeared prior to 1933, but in application to corporations. Marshall v. Baltimore & O. R.R., 57 U.S. (16 How.) 314, 327–28 (1853); Louisville, Cincinnati & Charleston R.R. v. Letson, 43 U.S. (2 How.) 497, 558 (1844); Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61, 88–92 (1809). Subsequent to *Russell*, label theory still survived where courts dealt with associations such as an unincorporated labor union, United Steelworkers v. R.H. Bouligny, Inc., 382 U.S. 145, 152 (1965); Levering & Garrigues Co. v. Morrin, 61 F.2d 115, 117 (2d Cir. 1932); Stein v. American Fed'n of Musicians, 183 F. Supp. 99, 100–01 (M.D. Tenn. 1960); inter-insurance exchange, Baer v. United Servs. Auto. Ass'n, 503 F.2d 393, 395–96 (2d Cir. 1974); Arbuthnot v. State Auto. Ins. Ass'n, 264 F.2d 260, 261 (10th Cir. 1959); insurance company, Feldmann Ins. Agency v. Brodsky, 195 F. Supp. 483, 485 (D. Md. 1961); unincorporated religious society, Swan v. First Church of Christ Scientist, 225 F.2d 745, 747 (9th Cir. 1955); real estate investment trust, Jim Walter Investors v. Empire-Madison, Inc., 401 F. Supp. 425, 428 (N.D. Ga. 1975); Larwin Mortgage Investors v. Riverdrive Mall, Inc., 392 F. Supp. 97, 99 (S.D. Tex. 1975).

[93] 334 F.2d 392 (2d Cir. 1964).

[94] 336 F.2d 160 (4th Cir. 1964), *aff'd*, 382 U.S. 145 (1965).

[95] Comment, *supra* note 70, at 332–33. "The divergent results in *Mason* and *Bouligny* are attributable, *inter alia*, to differing interpretations of the Supreme Court's decisions in *Chapman v. Barney* and *Puerto Rico v. Russell & Co.*" *Id.* at 333 (footnote omitted).

[96] 336 F.2d at 162–63. The *Bouligny* court also distinguished two other cases that might be construed to support an extension of corporate entity treatment to unincorporated associations—United Mineworkers v. Coronado Coal Co., 259 U.S. 344 (1922), and American Fed'n of Musicians v. Stein, 213 F.2d 679 (6th Cir.), *cert. denied*, 348 U.S. 873 (1954). 336 F.2d at 162–63. The *Coronado* Court's characterization of unions with the capacity to sue and be

question before the [*Russell*] Court was simply one of the interpretation of the [Puerto Rico] statute[97]—not a question of constitutional diversity jurisdiction."[98] Relying upon the label theory as posited in *Chapman*[99] and, in the alternative, the 1958 amendment to the diversity statute,[100] the *Bouligny* court held that a labor union could not qualify for entity treatment.[101]

Contrary to the *Bouligny* approach, the Second Circuit in the *Mason* case distinguished the *Chapman* decision[102] and opted for the

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sued as entities was disposed of by the *Bouligny* court on the basis that *Coronado* involved a federal question and did not intend to address the union's status for diversity purposes. *Id.* at 162. *Bouligny* found *American Fed'n of Musicians v. Stein* inapplicable to the diversity issue since *Stein* only dealt with a grant of a temporary injunction while the question of diversity jurisdiction was pending. The ultimate resolution of this jurisdictional issue resulted in a denial of entity treatment to the labor union. *Id.* at 163; Stein v. American Fed'n of Musicians, 183 F. Supp. 99, 101–02 (M.D. Tenn. 1960).

[97] 336 F.2d at 163. The *Bouligny* court felt that the *Russell* case was construing only the Organic Act of Puerto Rico:

> Although in view of the character of the plaintiff, the suit could on no theory be entertained as a diversity suit by an Article III court, the Supreme Court [*Russell*] said that "admittedly, if the individual members of the *Sociedad* are 'parties' within the meaning of the Organic Act . . . the suit is one within the jurisdiction of the District Court because of their non-residence, diversity of citizenship being unnecessary."

Id. (quoting Puerto Rico v. Russell & Co., 288 U.S. 476, 478 (1933) (emphasis in original)).

[98] *Id.* at 163. The *Bouligny* court stated:

> Clearly the case does not by any stretch of the imagination hold that the *Sociedad* was a citizen of Puerto Rico for purposes of diversity jurisdiction under Article III. Nor can the Court's analogy between the civil law *Sociedad* and the common law corporation justify a contention that it was consciously expanding federal diversity jurisdiction.

Id.

[99] *Id.* at 161–62. Adopting the aggregate result of *Chapman*, the *Bouligny* court reiterated that "for purposes of diversity jurisdiction, the actual citizenship of each of the members of an unincorporated association . . . is controlling." *Id.* at 161. Therefore, the unincorporated labor union was barred from federal court. *Id.* at 164.

[100] *Id. Bouligny* held that 28 U.S.C. § 1332(c) (1976) barred any effect the *Russell* holding might have had on the diversity status of an unincorporated labor union because the statute "refer[s] specifically to corporations, providing that they shall be 'deemed' citizens." *Id.* Furthermore, the statute, with reference to corporations, "now provides dual citizenship: a corporation is to be treated as a citizen of any state by which it is incorporated, and also of the state in which it maintains its principal place of business." *Id.* Finally, the court believed that "unincorporated associations cannot be equated with corporations . . . . They are incapable of dual citizenship and hence would be treated more favorably than corporations for diversity purposes." *Id.*

[101] *Id.*

[102] 334 F.2d at 395–96.

The Second Circuit indicated five major flaws in the *Chapman* decision: *Chapman* rendered its decision without the benefit of briefs or oral arguments on the jurisdictional question; the label theory was administered as a short form determinative with little analysis of the diversity

"more flexible test" of *Russell* in application to unincorporated associations.[103] This test "demand[ed] that consideration be given to whether an organization's essential characteristics sufficiently invest[ed] it, like a corporation, with a complete legal personality distinct from that of the members it represents."[104] *Mason* interpreted *Russell* as determining, in accordance with the reasoning of *Marshall*,[105] "whether the essential characteristics of a *sociedad* under Puerto Rican law demanded that it, like a corporation, be considered capable of possessing a separate citizenship."[106] *Russell* had held in the affirmative and *Mason* followed suit. *Mason* found that, under New York law,[107] the characteristics of this particular joint stock association justified its treatment as a citizen of the state of its creation for federal diversity purposes.[108]

The United States Supreme Court attempted to eliminate the divergent approaches to unincorporated associations[109] created by the circuit court opinions of *Bouligny* and *Mason* by granting certiorari[110]

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issue and the application of the *Marshall* rationale to unincorporated associations; the Court failed to consider Liverpool Ins. Co. v. Massachusetts, 77 U.S. (10 Wall.) 566 (1870), which applied the characteristics theory to a joint stock company granting it entity treatment for purposes of the privileges and immunities clause; *Chapman* neglected to examine all the characteristics that the joint stock association might have possessed which would have warranted entity treatment, due to its overriding concern that state capacity to sue laws would become a determinative of diversity jurisdiction; *Chapman* confused the concept of capacity to sue with that of capacity for citizenship. 334 F.2d at 395–96.

[103] *Id.* at 393, 399–400. The *Mason* court indicated that the characteristics theory employed by *Russell* has also been used by the federal courts in federal question cases, *e.g.*, United States v. Adams Express Co., 229 U.S. 381 (1913). *Id.* at 396. *See also* United Mineworkers v. Coronado Coal Co., 259 U.S. 344, 385–91 (1922).

[104] 334 F.2d at 393.

[105] *Id.* at 397; *see* Currie, *supra* note 34, at 35.

[106] 334 F.2d at 397.

[107] *Id.* at 399–400. The *Mason* court felt that the "New York joint stock association resemble[d] the *sociedad* which was subject to review in *Puerto Rico v. Russell & Co.*" to a "remarkable extent." *Id.* at 399. Under New York law, the unincorporated joint stock association possessed characteristics similar to a corporation: "creat[ion] pursuant to written articles of association which must be filed, like a certificate of incorporation, as a public record," *id.*; management "concentrated in the sole hands of the directors," *id.* at 400; the association's ability to "purchase, take, hold, and convey real property in the name of its president," *id.*; its capacity to sue or be sued in the name of its president, *id.*; the authorization of the shareholders of the association to sue the association, *id.*; the shareholders' "personal . . . liab[ility] for the debts of the association." *Id.* at 400; 65 COLUM. L. REV. 162, 164–65 (1965).

[108] 334 F.2d at 393; 65 COLUM. L. REV. 162, 165 (1965).

[109] United Steelworkers v. R.H. Bouligny, Inc., 382 U.S. 145, 149–50 (1965). Although the issue was once purportedly settled by the *Chapman* decision, "[i]t is evident that *Mason* and *Bouligny* have reopened directly the question of the citizenship of unincorporated enterprises in diversity litigation." Comment, *supra* note 74, at 1136–37.

[110] 379 U.S. 958 (1965).

in *United Steelworkers v. R.H. Bouligny, Inc.*[111] In *Bouligny*, the Court adhered to the *Chapman* rule, regarding it as a complement to the congressional intent to limit federal court jurisdiction.[112] Writing for the majority, Justice Fortas distinguished *Russell* as a decision which attempted to "[fit] an exotic creation of the civil law, the *sociedad en comandita*, into a federal scheme which knew it not."[113] Despite the allegations of injustice due to local prejudice urged by the parties in support of federal jurisdiction,[114] the Court, giving great weight to the problem of determining the citizenship of a labor union with local as well as national organizations,[115] deferred to Congress to change the *Chapman* rule through legislation.[116]

To vitiate the impact of the label theory on limited partnerships, and to circumvent what some courts deemed the questionable effect of *Russell* on the diversity status of limited partnerships, courts have entertained the capacity to sue theory. The Second Circuit in *Colonial Realty Corp. v. Bache & Co.*[117] was the first court to employ this theory.[118] On the basis of section 115 of the New York Partner-

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[111] 382 U.S. 145 (1965).

[112] *Id.* at 148–49. The *Chapman* case was decided "in [a] climate," where Congress was "enact[ing] sharp curbs" on diversity litigation. *Id.* These sharp curbs included: "quadrupl[ing] the jurisdictional amount, confin[ing] the right of removal to non-resident defendants, reinstitut[ing] protections against jurisdiction by collusive assignment, and narrow[ing] venue." *Id.* at 148.

[113] *Id.* at 151.

[114] *Id.* at 150. The petitioner argued that the danger of local prejudice was particularly onerous in the case of labor unions. Instances of prejudice include:

> local juries [which] may be tempted to favor local interest at [the union's] expense . . . [and which] may also be influenced by the fear that unionization would adversely affect the economy of the community and its customs and practices in the field of race relations.

Id. The petitioner therefore reasoned that the labor union's access to a federal forum with its concomitant benefits of "judges less exposed to local pressures . . ., juries selected from wider geographical areas, review in appellate courts reflecting a multi-state perspective, and more effective review by . . . [the Supreme] Court" would greatly mitigate the danger of prejudice. *Id.*

[115] *Id.* at 152–53. The labor union possesses no state of incorporation, and in addition has local and national organizations located across the country. *Id.*

[116] *Id.* at 153. Although the Court denied its power to recognize the labor union as an entity, it implicitly favored a congressional enactment to this effect. *Id.*; 34 GEO. WASH. L. REV. 793, 796 (1966).

[117] 358 F.2d 178 (2d Cir.), *cert. denied*, 385 U.S. 817 (1966).

[118] *Id.* at 183. Under the *Colonial Realty* rationale, the capacity to sue theory is a unique approach which requires the application of aggregate treatment to the association, but only examines the citizenship of those members that possess capacity to sue. *Id.* at 183–84. Therefore, since the general partners of the limited partnership possessed citizenship diverse from that of the opposing party, the court sustained federal court jurisdiction. *Id.*; C.P. Robinson Constr. Co. v. National Corp. for Hous. Partnerships, 375 F. Supp. 446, 449 (M.D.N.C. 1974);

ship Law,[119] which stated that limited partners lacked capacity to sue, the court only looked to the citizenship of the general partners of the limited partnership in determining the existence of diversity.[120]

The first court to engage in an extended analysis of the diversity status of the limited partnership was the Court of Appeals for the Third Circuit in *Carlsberg Resources Corp. v. Cambria Savings & Loan Ass'n.*[121] Approaching the issue from a label perspective,[122] the majority neglected to discuss the characteristics theory of *Russell*, and trimmed their argument with federalism and judicial economy policy concepts[123] to reach an aggregate result.[124]

Erving v. Virginia Squires Basketball Club, 349 F. Supp. 709, 711 (E.D.N.Y.) *aff'd on other grounds*, 468 F.2d 1064 (2d Cir. 1972).

The capacity to sue concept has been rejected by other courts as a basis of federal court jurisdiction for unincorporated associations. *See* Thomas v. Trustees of the Ohio State Univ., 195 U.S. 207, 217 (1904); Great S. Fire Proof Hotel Co. v. Jones, 177 U.S. 449, 455 (1900); Chapman v. Barney, 129 U.S. 677, 682 (1889); Feldmann Ins. Agency v. Brodsky, 195 F. Supp. 483, 485 (D.Md. 1961). "Although the [joint stock company] may be authorized by the laws of the State of New York to bring suit in the name of its president, that fact cannot give the company power, by that name, to sue in Federal court." 129 U.S. at 682.

Capacity to sue is also a dimension of the characteristics theory because it is one of the characteristics that invests an unincorporated association with qualities sufficiently similar to a corporation to receive entity treatment. For a listing of cases supportive of this theory, see note 41 *supra*.

Another interesting variation of the capacity to sue theory is that proposed by the American Law Institute (ALI). This approach grants entity treatment to those associations which possess capacity to sue as entities under the law of the state where the action is being heard. ALI STUDY, *supra* note 46, § 1301(b) (2), at 10, 114. For diversity purposes the situs of citizenship for such an association is the association's principal place of business. *Id.* The purposes of the ALI proposal include a desire

> not to deprive an out-of-state plaintiff suing such an association in the state of its principal activity from access to the federal court because a member of the association is of the same citizenship as the plaintiff. Also, the association with its principal place of business in another state suing as a plaintiff will not be barred from a federal forum simply because one of its members is of the same citizenship as the defendant.

Id. at 115. This variation had initially appeared in 1948 where the Third Circuit held that an association's ability under state law to sue in its own name entitled it to entity treatment for diversity purposes. Van Sant v. American Express Co., 169 F.2d 355, 372 (3d Cir. 1948). However, this decision has been criticized as confusing "capacity for suit . . . [with] capacity for citizenship for jurisdictional purposes." *Mason*, 334 F.2d at 396 n.7; Comment, *supra* note 74, at 1143 n.65.

[119] 358 F.2d at 183–84. Section 115 provides that a limited partner "is not a proper party to proceedings by or against a partnership, except where the object is to enforce a limited partner's right against or liability to the partnership . . . ." N.Y. PARTNERSHIP LAW § 115 (McKinney Cum. Supp. 1977-1978).

[120] 358 F.2d at 183–84.

[121] 554 F.2d 1254 (3d Cir. 1977).

[122] *Id.* at 1258–59.

[123] *Id.* at 1256–57.

[124] *Id.* at 1259; *see* note 130 *infra*.

In affirming the district court's sua sponte treatment of the jurisdictional question,[125] Judge Adams writing for the *Carlsberg* majority, set the stage for an analysis of the diversity power by discussing the concepts of judicial economy and federalism.[126] In the court's opinion, judicial economy and federalism require federal courts "to adhere meticulously to the constitutional and statutory standards governing diversity jurisdiction."[127] Two factors are manifestly inherent in this standard. First, "the federal courts should resolve any questions that they may have as to the existence of diversity jurisdiction before proceeding to a decision on the merits."[128] Second, "federal tribunals should be demanding in evaluating whether diversity jurisdiction subsists."[129] Applying this standard of meticulous adherence to the specific issue of the diversity status of limited partnerships, coupled with a traditional application of the label theory to unincorporated associations, the majority barred the *Carlsberg* limited partnership from federal court.[130]

The majority stated that the label theory constituted the only test of diversity jurisdiction.[131] The court asserted that "where noncorporate entities—including partnerships—are concerned, the courts should look to the citizenship of the persons comprising such organizations in order to determine whether there is compliance with the diversity standard."[132] Relying on *Chapman v. Barney* as the cornerstone of the label test,[133] the court cited it for the proposition that

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[125] 554 F.2d at 1256. The defendants failed to raise the issue of diversity jurisdiction, so the district court, in keeping with the policy of limited jurisdiction, raised the issue on its own motion. 413 F.Supp. 880, 881; 554 F.2d at 1255–56. The policy of limited jurisdiction has repeatedly appeared. *See* cases cited in notes 28–29 *supra*.

[126] 554 F.2d at 1256–57; *see* notes 18–19 *supra*.

[127] 554 F.2d at 1257.

[128] *Id.*

[129] *Id.*

[130] *Id.* at 1258. The perfect diversity rule greatly limits federal diversity jurisdiction when applied to a large unincorporated association treated as an aggregate by the courts. This result occurred in the *Carlsberg* case where the majority applied label theory with its concomitant aggregate effect. *Id.* The *Carlsberg* court meticulously adhered to the concept that "all parties on one side of . . .[the] litigation must be of a different citizenship from all of those on the other." *Id.* With this rule in mind, the court determined that "parties," as related to Carlsberg, included all 1500 limited partners and the one general partner. *Id.* at 1259. Yet, the court did not relate "parties" to Cambria adopting the district court's assumption that Cambria was a Pennsylvania corporation and therefore should be treated as an entity for diversity purposes. *Id.* 1254–62; 413 F. Supp. at 881 n.1.

[131] 554 F.2d at 1258.

[132] *Id.* (footnotes omitted).

[133] *Id.* at 1258–59.

"varying membership status should not bear on the fundamental inquiry whether diversity exists."[134] On the basis that the *Chapman* status was coterminous with the varying membership status of the limited partnership, the majority deemed *Chapman* persuasive authority.[135]

Great Southern Fire Proof Hotel Co. v. Jones provided further support for the court's application of the *Chapman* rule to limited partnerships.[136] Despite a recognition that the limited partnership association of *Great Southern* differed from the *Carlsberg* limited partnership,[137] the court adopted *Great Southern's* application of the *Chapman* analysis to a limited partnership association.[138] Although the majority conceded that these cases failed to "squarely address the exact question posed"[139] in *Carlsberg*, they refused to fashion a new rule in light of the *Bouligny* court's deference to congressional action.[140]

While reinforcing the label theory, the Third Circuit rejected the capacity to sue argument[141] posited by Carlsberg on appeal. The majority criticized *Colonial Realty Corp. v. Bache & Co.* as containing a superficial analysis of the capacity to sue issue.[142] Troubled by that case's reliance on New York's capacity to sue law,[143] the

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[134] *Id.* at 1259. The varying membership status in *Chapman* consisted of a president-partner with capacity to sue, occupying one status, and non-president-partners without capacity to sue occupying another status. *Id.*

[135] *Id.*

[136] *Id.* at 1258.

[137] *Id.* All the partners of the limited partnership association were of equal status, while the partners of the *Carlsberg* limited partnership occupied two different statuses. *Id.*

[138] *Id.*

[139] *Id.* at 1259.

[140] *Id.* *Carlsberg* characterized the *Bouligny* "hands off" attitude as taking "a rather hard line, demanding that existing principles respecting diversity jurisdiction be strictly followed." *Id.* However, at least one commentator disagrees as to the necessity of the *Bouligny* "hands off" attitude:

> federal diversity jurisdiction is a constitutional grant, and the question of citizenship can be characterized as one of constitutional construction. Absent congressional specificity, this leaves the federal courts free to determine whether unincorporated associations shall be deemed citizens for diversity purposes. Congress, of course, remains free to explicitly restrict or modify any judicial extensions which it deems unwise.

Comment, *supra* note 70, at 336–37.

[141] 554 F.2d at 1260–62.

[142] *Id.* at 1260. However, the *Carlsberg* court did indicate that the *Colonial Realty* rationale "that a limited partner should not be 'counted' for diversity purposes if such individual himself has no capacity to sue or be sued on behalf of the partnership" was "easily grasped." *Id.*

[143] *Id.* Since "jurisdiction is the most elemental concern of the federal courts in evaluating the cases which come before them," the court felt that the determination as to who has capacity

Carlsberg court discussed the interrelationship between Federal Rules of Civil Procedure 17b and 82,[144] emphasizing that the existence of diversity jurisdiction should not be determined by state capacity to sue laws.[145] Furthermore, the court found neither judicial or congressional directives nor policy reasons for adhering to the *Colonial Realty* rationale.[146]

In his dissenting opinion, Judge Hunter, refusing to include limited partnerships within the all-encompassing category of unincorporated associations,[147] focused upon the limited partnership as a "unique business entity."[148] In examining the elements of a limited partnership[149]—the limited partners incapacity to sue, their lack of authorization to control the business, and their sole function as contributors of capital[150]—Judge Hunter found it inappropriate to analogize *Carlsberg* to associations bearing characteristics different from those of limited partnerships. He found it anomalous for the court to determine diversity jurisdiction on the basis of the citizenship of limited partners whom the court would later eliminate from the suit because of their lack of capacity to sue and consequent inability to participate in argument on the merits.[151]

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to sue should be addressed "only after the jurisdiction of the federal court has been firmly established." *Id.*

[144] *Id.* at 1261. Although Rule 17(b) provides that state law determines who has capacity to sue, the *Carlsberg* court found that Rule to be limited by Rule 82 in that courts could not employ it to enlarge their jurisdiction. *Id.*

[145] *Id.* The court feared that consideration of state capacity to sue laws in determining diversity jurisdiction might allow the states to contract and expand federal jurisdiction through legislation. *Id.*

[146] *Id.* at 1261–62.

[147] *Id.*

[148] *Id.* at 1263.

[149] *Id.* at 1263–65. Judge Hunter compared the limited partnership to the general partnership. He noted that, in determining diversity jurisdiction of a general partnership, the courts look to state law to determine the parties and he questioned the court's refusal to treat limited partnerships similarly. *Id.* at 1263.

> Just as with general partnerships it was state law that informed us to count each member's citizenship, here, too, it is state law that informs us of the nature of these uniform limited partnerships and tells us we should look only to the general partners, since it is the general partners who function as ordinary partners—the limited partners are a distinct breed.

Id. at 1264–65.

[150] *Id.* at 1265.

[151] *Id.* Attempting to allay the majority's fear that states would legislate with a view to controlling federal jurisdiction, Judge Hunter observed that the courts have consistently exercised their power to pierce the veil of manufactured diversity. *Id.* The courts' methods of dealing

Although the majority and dissent discussed the diversity jurisdictional status of limited partnerships at length, both focused upon only two of the pertinent theories—the label theory and the capacity to sue theory. Neither opinion dealt with the characteristics theory in any great detail.[152]

The *Carlsberg* court adopted a restrictive approach toward federal diversity jurisdiction by applying the concepts of limited jurisdiction, federalism and judicial economy.[153] Stressing the congressional intent to limit federal court jurisdiction, the court failed to acknowledge those factors favoring diversity which formed the basis of the original diversity grant,[154] and occasional congressional expansions of that jurisdiction.[155]

One enactment which courts have employed as evidence of restrictive congressional intent in the area of the diversity jurisdictional status of unincorporated associations is the 1958 amendment to the

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with manufactured diversity are best illustrated by cases involving the appointment of guardians. *E.g.*, McSparran v. Weist, 402 F.2d 867 (3d Cir. 1968), *cert. denied*, 395 U.S. 903 (1969); Fallat v. Gouran, 220 F.2d 325 (3d Cir. 1955).

[152] The majority, however, appeared to have made a peripheral rejection of the characteristics theory in its discussion of *Great Southern*. 554 F.2d at 1258. It remains unclear whether the majority relied upon *Great Southern* as a rejection of the capacity to sue theory, or as a rejection of the characteristics theory on the basis that the characteristic of capacity to sue did not clothe the association with an identity sufficiently similar to that of a corporation so as to warrant entity treatment.

[153] The concepts of federalism and judicial economy are the mainstays of the arguments to abolish diversity. Frank, *The American Law Institute's Proposals on the Division of Jurisdiction between State and Federal Courts—Federal Diversity Jurisdiction—An Opposing View*, 17 S.C. L. REV. 677, 680–81 (1965).

[154] Fear that state courts would favor their own residents in suits against out-of-state litigants constituted the major catalyst of the diversity grant. C. WRIGHT, *supra* note 34, at 85, 89; *Corporate Diversity Jurisdiction*, *supra* note 51, at 1448. One historical basis of diversity consisted of the purported necessity of diversity jurisdiction in the implementation of the privileges and immunities clause of the United States Constitution. C. WRIGHT, *supra* at 90. Other factors favoring diversity included: (1) the superiority of federal courts to state courts, *id.*; *Corporate Diversity Jurisdiction*, *supra* at 1449–50; (2) the inequity in forcing an out-of-state litigant to litigate in an inferior court where he possesses no opportunity to work for the improvement of that court, C. WRIGHT, *supra* at 90; (3) diversity jurisdiction's positive contribution to the expansion of business, *id.* at 91; *Corporate Diversity Jurisdiction*, *supra* at 1448–49; (4) the policy of encouraging state tribunals to improve their system of justice, C. WRIGHT, *supra* at 90–91; *Corporate Diversity Jurisdiction*, *supra* at 1450; (5) the desirability of uniformity of law, *Corporate Diversity Jurisdiction*, *supra* at 1450.

[155] *E.g.*, *Diversity Jurisdiction*, *supra* note 34, at 9 (noting that Federal Interpleader Act, 28 U.S.C. § 1335 (1976), constituted an expansion of diversity jurisdiction); 28 U.S.C. § 1332(c) (1976) (1958 amendment codifying extension of diversity jurisdiction to corporations); *see* note 70 *supra* and accompanying text. Congress has periodically expanded and then contracted different aspects of diversity jurisdiction, *e.g.*, removal jurisdiction, venue provisions, amount in controversy. *Diversity Jurisdiction*, *supra* at 6–9.

diversity statute, section 1332(c).[156] While confirming the *Marshall* grant of corporate entity status for diversity purposes, this amendment indisputably limited the scope of corporate access to federal court.[157] Section 1332(c), however, does not address the diversity status of unincorporated associations,[158] and therefore, lends no support to the *Carlsberg* court's denial of diversity jurisdiction to the limited partnership. Congress recently considered several bills which proposed the abolition of diversity jurisdiction.[159] Yet, to date, Congress has not abolished diversity jurisdiction and it, therefore, still survives with some growth and contraction as Congress sees fit.[160]

The *Carlsberg* court's restrictive approach toward determining the jurisdictional status of the limited partnership parallels the position assumed by the *Deveaux* Supreme Court in denying corporations entity treatment. However, the *Letson* and *Marshall* courts corrected *Deveaux's* narrow holding by granting corporations the full benefit of the diversity statute. Irrespective of the differing views as to the validity of the diversity statute, as long as Congress has addressed the diversity issue and has not limited it to corporations, diversity jurisdiction should be as accessible to unincorporated associations as it is to corporations. Access to federal court on a diversity basis should not depend on incorporation or lack thereof. Therefore, *Carlsberg* could have followed the lead of the *Letson* and *Marshall* decisions in determining the diversity status of the limited partnership by way of one of four alternate paths. First, it might have granted absolute entity treatment to all unincorporated associations on the basis of the

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[156] R.H. Bouligny, Inc. v. United Steelworkers, 336 F.2d 160, 164 (4th Cir. 1964). *Cf.* Baer v. United Servs. Auto. Ass'n, 503 F.2d 393, 396 (2d Cir. 1974); Jim Walter Investors v. Empire-Madison, Inc., 401 F. Supp. 425, 428 (N.D. Ga. 1975) (citing *Bouligny* as an explication of Congress' intent in enacting section 1332(c)).

[157] *See* notes 68–71 *supra* and accompanying text.

[158] The amendment operated as a redefinition of the term citizenship for purposes of corporations and not as a total revamping of the term within the sphere of diversity jurisdiction. 65 COLUM. L. REV. 162, 166–67 (1965).

[159] During the 1977-1978 congressional session, two bills were proposed to abolish diversity jurisdiction, H.R. 761, H.R. Rep. No. 761, 95th Cong., 1st Sess. 3–4 (1977) and H.R. 9622, H.R. REP. NO. 9622, 95th Cong., 1st Sess. 248–51 (1977). Three other bills proposed to limit federal diversity jurisdiction. H.R. 9123, H.R. Rep. No. 9123, 95th Cong., 1st Sess. 25–26 (1977) and H.R. 7243, H.R. Rep. No. 7243, 95th Cong., 1st Sess. 22 (1977) "preclud[ed] a plaintiff from invoking [diversity] jurisdiction in any district court located in a state of which he is a citizen." H.R. Rep. No. 7243, *supra* at 23 (letter, Sept. 14, 1977). H.R. 5546, H.R. Rep. No. 5546, 95th Cong., 1st Sess. 5, 6 (1977) embodied the ALI proposed capacity to sue hybrid approach.

[160] *See* note 155 *supra*.

same considerations which *Marshall* stressed in allowing corporations access to federal court.[161] If unincorporated associations were to receive entity treatment, the determination of the associations' diversity status, consistent with 28 U.S.C. § 1332(c), would focus on either the unincorporated associations' state of organization and/or its state of principal place of business. Second, the court could have determined on a case-by-case basis whether the particular type of association,[162] the limited partnership, possessed characteristics sufficiently similar to a corporation so as to entitle it to entity treatment.[163] As a third alternative, the majority might have employed the capacity to sue theory advocated by both Carlsberg and Judge Hunter in his dissent. By this approach, only the citizenship of those association members with capacity to sue would affect the existence of diversity.[164] Fourth, the court could have utilized an approach, as put forth by the American Law Institute (ALI), which combines entity treatment with the capacity to sue theory. The ALI approach examines whether an unincorporated association is "capable of suing or being sued as an entity in the state where an action is brought."[165] Where state law provides for suability as an entity, the unincorporated association would "be deemed a citizen of the state where it has its principal place of business."[166]

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[161] 53 GEO. L.J. 513, 517–18 (1965). The *Marshall* court stressed considerations of state prejudice, implementation of the privileges and immunities clause, and the right of a citizen who has dealt with an association as an entity to sue the association as an entity. 57 U.S. at 326–29.

[162] This case-by-case basis could focus upon the type of unincorporated association, granting diversity jurisdiction to, for example, all limited partnerships. Alternatively it could focus on each individual limited partnership, examining beyond the type of association into such characteristics as the size of the limited partnership, and susceptibility to state prejudice.

[163] *See* notes 64–67, 83–92, 102–108 *supra* and accompanying text.

[164] *See* notes 117–120 *supra* and accompanying text.

[165] ALI STUDY, *supra* note 46, at 114.

[166] *Id.*; *see* note 118 *supra*. Two methods for determining the state of an association's business are: "The 'nerve-center' approach [which] seeks to ascertain the locus of control of multistate operations . . . [and the] combination of factors approach [which] includ[es] the percentages of assets, employees, and income derived within a particular state." Comment, *supra* note 70, at 345 (footnotes omitted) (emphasis in original). For a further discussion of these methods, *see id.* at 345–48. The ALI proposal would increase an unincorporated association's initial access to federal court. However, section 1302(b)(2) acts as a check on this increased access by providing that corporations and unincorporated associations cannot invoke federal diversity jurisdiction in a state where they have maintained a local establishment for more than two years. ALI STUDY, *supra* note 46, at 125–26. The purpose of section 1302(b)(2) is

> to limit the ability of a corporation or other business organization to claim the stranger's right to a federal forum in a state where it has engaged in regular business activity to a sufficient extent to warrant its being treated as domesticated.

Id. at 125.

The first alternative presents a desirable approach in that the same considerations favoring corporate entity status also apply to unincorporated associations. Furthermore, this alternative would alleviate the artificial label distinction between unincorporated and incorporated associations.[167] However, the Supreme Court decisions of *Chapman*, *Great Southern* and *Bouligny* appear to negate such a result.

The case-by-case limitation of the characteristics theory better serves the policy of limited jurisdiction,[168] while granting diversity jurisdiction in accordance with the prevailing case law. The *Carlsberg* court could have distinguished the *Chapman*, *Great Southern*, and *Bouligny* cases as factually inapposite, while paralleling the characteristics of the *Russell sociedad* to those of the limited partnership.[169]

The *Chapman* case involved a joint stock company whose members, unlike the *Carlsberg* limited partners, bore equal liability and exercised equal control of their respective associations.[170] The limited partners in *Carlsberg* were characterized by the limited role of contributors of capital, possessing no control of the business, and lacking capacity to sue.[171] Despite these distinctions, the *Carlsberg* court construed *Chapman* as standing for the proposition that "varying membership status should not bear on the fundamental inquiry whether diversity exists."[172] However, the two levels of membership status in *Chapman* were held to differ only in their capacity to

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[167] *See* CRANE & BROMBERG, *supra* note 78, § 26A, at 151 (limited partnership associations resemble corporations); *id.* § 34, at 178 (joint stock companies resemble corporations). For an example of the artificiality of the label distinction, *compare* R.H. Bouligny, Inc. v. United Steelworkers, 336 F.2d 160, 161–64 (4th Cir. 1964) (where court employed label theory to deny unincorporated labor union entity treatment) *with* Rew v. International Organization, Masters, Mates & Pilots, Inc., 349 F. Supp. 542, 545–46 (E.D. Pa. 1972) (where court distinguished *Bouligny* as determining citizenship of unincorporated labor union, and applied label theory to grant diversity jurisdiction to incorporated labor union).

[168] However, the characteristics theory would thwart the policy of judicial economy since it requires federal courts to determine the characteristics of the individual association on an *ad hoc* basis. Comment, *supra* note 70, at 337.

[169] "The histories of the civil law partnership in commendam and the common law limited partnership reveal the fact of common institutional ancestry." Comment, *Partnership In Commendam—Louisiana's Limited Partnership*, 35 TUL. L. REV. 815, 815 (1961). New York Law, on which the Uniform Limited Partnership Act was based, modelled its enactment along the lines of the French law. *Id.* at 817. For a discussion of the similarities and differences between the common law limited partnership and the civil law *sociedad en comandita*, see Comment, *Symposium: A Survey of the Louisiana Law of Partnership*, 45 TUL. L. REV. 329, 361–64 (1971); Comment, *supra* at 815–27.

[170] *See* CRANE & BROMBERG, *supra* note 78, § 34, at 178–79.

[171] 554 F.2d at 1265.

[172] *Id.* at 1259; *see* note 134 *supra* and accompanying text.

sue while the two-level partnership of *Carlsberg* was attended by the additional distinctions of differing degrees of liability, differing levels of control of the business, and distinctions in their capacity to sue. Thus, any analogy between the two cases appears to be tenuous at best.

Great Southern can be specifically distinguished from *Carlsberg* in as much as the former case involved a limited partnership *association*, while the latter case dealt with a limited partnership. The two types of associations are similar in that the limited partners in both associations bear limited liability. However, the limited partnership association is only comprised of limited partners with equal limited liability,[173] whereas the *Carlsberg* limited partnership is composed of both general and limited partners with distinctive roles within the association.[174]

In *Bouligny*, the Court barred the unincorporated labor union from federal court essentially because it feared the prospect of deciding in which state a national labor union was organized, and/or had its principal place of business for diversity purposes.[175] The *Carlsberg* court could have distinguished the *Bouligny* holding as one tailored to the unique problems of a union "with its complicated structure of locals and internationals,"[176] therefore, finding it inapplicable to the limited partnership.

The precedential value of the *Russell* case depends upon several factors: whether the Court intended to deal solely with a civil law association;[177] whether Congress' action in amending section 1332 evidenced an intent to circumvent *Russell*;[178] and whether the fact that *Russell* involved an issue only analogous to diversity jurisdiction precluded its application to the *Carlsberg* case.[179]

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[173] CRANE & BROMBERG, *supra* note 78, § 26A, at 151.

[174] 554 F.2d at 1255.

[175] 382 U.S. at 152.

[176] Currie, *supra* note 34, at 35.

[177] *Bouligny* limited *Russell* to the civil law area. 382 U.S. at 151; *see* text accompanying note 113 *supra*.

[178] "*Bouligny* also argued that even if *Russell* could be interpreted as a departure from the traditional view, it was overruled for diversity purposes by the 1958 amendment to section 1332." Comment, *supra* note 70, at 335 (footnote omitted); 336 F.2d at 164. Although the amendment to the diversity statute was designed to decrease the caseload of the federal courts, it was only intended to " 'reduc[e] the number of cases involving corporations which came into Federal District Courts on the fictional premise that a diversity of citizenship exists.' " Comment, *supra* note 55, at 213; *see* notes 70–71 *supra* and accompanying text.

[179] *Bouligny* held that *Russell* involved an issue only closely analogous to diversity jurisdiction and therefore was not controlling. Comment, *supra* note 70, at 334; 382 U.S. at 151. However, *Mason* answered *Bouligny's* contention:

Those who argue for the limitation of *Russell* to the civil law sphere support this proposition by referring to *Russell's* citation of, but failure to overrule, *Chapman*,[180] and *Russell's* reference to common law entity treatment as distinguishable from that of the civil law.[181] There was, however, no need for *Russell* to overrule *Chapman*.[182] *Chapman's* analysis rested solely on a capacity to sue distinction between the two levels of joint stock association members. It did not preclude the *Russell* characteristics analysis of the numerous distinctions between the *sociedad's* limited and general partners.[183]

The holding in *Russell* was not circumvented by section 1332(c) of the diversity statute. By amending the diversity statute, Congress did not intend to bar unincorporated associations from federal court.[184] Rather, the amendment was directed toward correcting the abuses of manufactured corporate diversity.[185] The statute focused on a specific evil that was not present in the *Russell* case.

In addressing the construction of the Organic Act of Puerto Rico,[186] admittedly *Russell* involved an issue only analogous to diversity jurisdiction.[187] However, the Supreme Court expressed its intention to reach all facets of federal jurisdiction with its *Russell* holding when it stated that "an unincorporated association may be treated as a citizen separate and distinct from its members 'for purposes of *federal jurisdiction.*' "[188]

The third alternative, the capacity to sue theory, proffered by Carlsberg Resources Corporation and the dissent, would grant all unincorporated associations access to a federal forum. Each unincorpo-

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the same phrase "citizens of a State" was employed by Congress in section 1332 and the special jurisdictional statute in *Russell;* thus, it seems reasonable to presume that where two statutes employ the same term for creating jurisdiction in federal courts, the term is generic for definitional purposes.

Comment, *supra* note 70, at 335 (footnote omitted); 334 F.2d at 397–98.

[180] *Mason*, 334 F.2d at 397–99; Brocki v. American Express Co., 279 F.2d 785, 788–89 (6th Cir.), *cert. denied*, 364 U.S. 871 (1960); *see* 78 HARV. L. REV. 1661, 1662 (1965).

[181] 334 F.2d at 398–99; *see* 78 HARV. L. REV. 1661, 1662 (1965).

[182] 334 F.2d at 398–99.

[183] *Id.* at 399. *Russell* cited *Chapman* to indicate that for purposes of the characteristics theory, the characteristic of capacity to sue, alone, is not sufficient to warrant entity treatment. *Id.*; 78 HARV. L. REV. 1661, 1662 n.4 (1965).

[184] *See* note 158 *supra*.

[185] One abuse which the amendment intended to correct was the practice of corporations "incorporating in a state other than the [state of their] principal place of business" so to gain increased access to federal courts. 65 COLUM. L. REV. 162, 166–67 (1965); 34 GEO. WASH. L. REV. 793, 795 (1966); *see* notes 70, 71, 158 *supra*.

[186] Comment, *supra* note 74, at 1136 n.11. For a further explanation of the facts in *Russell*, see 78 HARV. L. REV. 1661, 1662 (1965).

[187] Comment, *supra* note 74, at 1136.

[188] Comment, *supra* note 70, at 335; *see Russell*, 288 U.S. at 482.

rated association would purportedly receive aggregate treatment with the determination of diversity jurisdiction focusing on those members of the association with capacity to sue under state law. However, the practical effect of this theory would vary from state to state.[189] In those states where the association has capacity to sue in its own name, the capacity to sue theory would actually result in entity treatment. Where an association can only be sued in the name of one of its officers,[190] the court would examine the residence of that officer to determine diversity jurisdiction. Under Judge Hunter's analysis in *Carlsberg*, the law would be uniform only in the case of the limited partnership, where, by virtue of the Uniform Limited Partnership Act, only the general partners possess capacity to sue.[191] Problems would arise in connection with the varying state laws: associations would favor states which grant entity treatment; courts would be faced with the question as to whether the grant of entity treatment in this situation should be subjected to the section 1332(c) principal place of business limitation on diversity; and manufactured diversity could pose a problem where state law focuses on the citizenship of an officer of the association. A possible method of alleviating these problems would be to limit the application of the capacity to sue theory to limited partnerships on the basis of their unique nature.

The practical operation of the ALI capacity to sue theory would also vary from state to state.[192] The ALI proposal would effectively limit the number of unincorporated associations afforded access to federal court since it applies only to those associations which are empowered under state law to sue as entities.[193] The ALI proposal dis-

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[189] For an enumeration of the possible state law variations, see Comment, *supra* note 70, at 352–53.

[190] Comment, *supra* note 70, at 353; *Chapman*, 129 U.S. at 682 (1889) (where association had capacity to sue in name of president). It seems reasonable to expect that an association would choose a president who resides outside of the association's states of organization and principal place of business in order to bring a majority of its suits with local residents to federal court. Such action would thwart the policies fostering diversity jurisdiction. *See* note 153 *supra*.

[191] Judge Hunter appears to have taken a practical approach toward the capacity to sue issue. 554 F.2d at 1262–66. While Pennsylvania Rule of Civil Procedure 2127 requires that a limited partnership bring suit in the name of the individual partners "trading in the firm name," PA. R. CIV. PRO. 2127, 42 PA. CONS. STAT. ANN. (Purdon Cum. Supp. 1978-1979), Rule 2128 allows suit against the limited partnership in the firm name, PA. R. CIV. PRO. 2128, 42 PA. CONS. STAT. ANN. (Purdon 1975). Arguably, Rule 2128 invests a limited partnership with capacity to be sued as an entity. However, the practical effect of the Uniform Limited Partnership Act, as indicated by Judge Hunter, is to designate only the general partners as proper parties to the suit. 59 PA. CONS. STAT. ANN. § 545 (Purdon Cum. Supp. 1978-1979). For text of § 545, see note 3 *supra*. Therefore, the courts should examine the citizenship of only the general partners in determining diversity.

[192] Comment, *supra* note 70, at 352–53.

[193] *Id.* at 351.

posed of the problems of manufactured diversity and that of associations organizing in states which grant entity treatment, by focusing not on the law of the state of organization, but on the law of the state where suit is brought.[194] The ALI also designated the situs of the association's citizenship as the state of its principal place of business.[195]

Extending the application of label theory with its concomitant aggregate result to the limited partnership, the *Carlsberg* court, for the first time, resolved the question of the diversity jurisdictional status of the limited partnership. The majority appears to have effectively overruled the capacity to sue theory by its criticism of the *Colonial Realty* case. In failing to address the characteristics approach of the *Russell* decision, arguably the court has left one avenue open for other courts to circumvent its holding and grant entity treatment to the limited partnership.[196] *Carlsberg*, as it now stands, represents the *Deveaux* of unincorporated associations. It reaps its destruction by tempting courts to dismiss *en masse* cases involving limited partnerships—cases over which the courts heretofore thought they had jurisdiction.[197] The federal courts should take an affirmative step in the area of the diversity status of unincorporated associations by following the *Marshall* lead. The diversity jurisdictional grant exists for natural persons and corporations, and should also exist for unincorporated associations. The label that state law attaches to an association should not determine the existence of federal diversity jurisdiction.

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[194] ALI STUDY, *supra* note 46, at 114.

[195] *Id.*

[196] One case that may have made some inroads into the *Carlsberg* holding is National City Bank v. Fidelco Growth Investors, 446 F. Supp. 124 (E.D. Pa. 1978). In determining the diversity status of a business trust, the court held that the issue was not whether Fidelco was a corporation, but whether it was a conventional trust. *Id.* at 126. The court then proceeded to examine the characteristics of the business trust to determine if it was sufficiently similar to a conventional trust so as to possess citizenship only in those states where its trustees were citizens. *Id.* at 126–29. Since Fidelco did not possess characteristics sufficiently similar to the conventional trust, the court examined the citizenship of all the shareholders, resulting in the destruction of diversity jurisdiction. *Id.* at 129.

[197] Edward Hansen, Inc. v. Kearny Post Office Assocs., No. 1401-71 (D.C.N.J. Oct. 12, 1977). The *KPOA* case originally found its way into federal court six years ago under the *Colonial Realty* rationale. However, the court dismissed it on the basis of the *Carlsberg* holding since some of the limited partners of the *KPOA* limited partnership possessed citizenship in New Jersey, the same citizenship as that of the Hansen corporation. *See* Grynberg v. B.B.L. Assocs., 436 F. Supp. 564, 567–68 (D. Colo. 1977).