

July 2015

Achieving the Purpose of Federal Diversity Jurisdiction: Why Courts Should Abandon the Current Treatment of LLCs under Section 1332

Kristen Curley

Follow this and additional works at: <http://digitalcommons.tourolaw.edu/lawreview>

 Part of the [Business Organizations Law Commons](#)

Recommended Citation

Curley, Kristen (2015) "Achieving the Purpose of Federal Diversity Jurisdiction: Why Courts Should Abandon the Current Treatment of LLCs under Section 1332," *Touro Law Review*: Vol. 31: No. 3, Article 13.

Available at: <http://digitalcommons.tourolaw.edu/lawreview/vol31/iss3/13>

This The New York LLC Act at Twenty is brought to you for free and open access by Digital Commons @ Touro Law Center. It has been accepted for inclusion in Touro Law Review by an authorized administrator of Digital Commons @ Touro Law Center. For more information, please contact ASchwartz@tourolaw.edu.

ACHIEVING THE PURPOSE OF FEDERAL DIVERSITY JURISDICTION: WHY COURTS SHOULD ABANDON THE CURRENT TREATMENT OF LLCs UNDER SECTION 1332

*Kristen Curley**

I. INTRODUCTION

The Limited Liability Company (“LLC”) is an increasingly popular business form that allows its owners to enjoy the benefits of both pass-through taxation and limited liability.¹ Given the flexibility in organizing an LLC, it may be functionally and structurally similar to a corporation.² Nevertheless, the LLC receives different treatment for the purpose of diversity jurisdiction.³ Since the Supreme Court held that the citizenship of a limited partnership is determined by the citizenship of each of its partners, the federal courts have applied this rule to other unincorporated associations, including the LLC.⁴ This approach can result in unfair denial of diversity jurisdiction to an LLC party.

The current citizenship analysis for the LLC should be reconsidered. The legislative intent behind U.S.C. § 1332(c),⁵ as well as

* J.D. Candidate 2016, Touro College Jacob D. Fuchsberg Law Center; M.S.W., Adelphi University; B.A. Sociology, St. Joseph’s College. I would like to thank Professor Meredith Miller. Most importantly, I thank my family.

¹ Robert B. Thompson, *The Taming of Limited Liability Companies*, 66 U. COLO. L. REV. 921, 928 (1995) [hereinafter Thompson].

² Larry E. Ribstein, *The Emergence of the Limited Liability Company*, 51 BUS. LAW. 1, 6 (1995).

³ See *Carden v. Arkoma Assocs.*, 494 U.S. 185, 195-96 (1990).

⁴ See, e.g., *Johnson-Brown v. 2200 M St. LLC*, 257 F. Supp. 2d 175 (D.D.C. 2003); *JPMCC 2005-CIBC13 Collins Lodging, LLC v. Philips S. Beach, LLC*, No. 10-20636-CIV, 2010 WL 4317000 (S.D. Fla. Oct. 22, 2010).

⁵ S. REP. NO. 1830, 85th Cong., 2d Sess. 2, reprinted in 1958 U.S.C.C.A.N. 3099, 3101-02. 28 U.S.C. § 1332(c) (2014) provides in part as follows: “For the purposes of this section . . . (1) a corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business.”

other long-held rules of diversity jurisdiction, supports the LLC being treated as a corporation for diversity purposes.⁶ Courts should apply the citizenship analyses enjoyed by other unincorporated associations to LLCs, or categorically treat all LLCs as corporations for diversity purposes. These alternative approaches would result in fair treatment of LLCs while preserving the integrity of federal diversity jurisdiction.

This article will argue that, as an alternative to the current approach, courts should either use a functional approach to evaluating the LLC citizenship, or categorically treat LLCs as corporations for diversity purposes. Section II will discuss the structure and function of the LLC as a business entity, as well as its potential similarity to the corporation. Section III will provide a history and summary of the citizenship of business organizations for purposes of federal diversity jurisdiction. Finally, Section IV will compare and contrast the current treatment of LLC citizenship for diversity purposes with that of a corporation, and discuss how legislative intent as well as other long-held rules of federal diversity jurisdiction supports the treatment of the LLC as a corporation under § 1332(c).

II. THE LIMITED LIABILITY COMPANY

The LLC was developed as an alternative to the close corporation for business owners who wished to enjoy the combined benefits of flexibility in management, limited liability, and favorable tax treatment.⁷ It combines the partnership trait of pass-through taxation with the corporate trait of owner limited liability.⁸ Since its inception, the LLC has become an increasingly popular business form among closely held business organizations and “has evolved from an experiment combining partnership and corporate attributes to a popular alternative to the corporate form.”⁹ LLC statutes have been adopted in every state, and the business form continues to grow in popularity as an alternative to the corporation.¹⁰

⁶ See *Navarro Sav. Ass’n v. Lee*, 446 U.S. 458 (1980); see also *People of Puerto Rico v. Russell & Co., Sucesores, S. En. C.*, 288 U.S. 476 (1933).

⁷ Thompson, *supra* note 1, at 928-29.

⁸ Debra R. Cohen, *Limited Liability Company Citizenship: Reconsidering an Illogical and Inconsistent Choice*, 90 MARQ. L. REV. 269, 271 (2006).

⁹ Christine M. Kailus, *Diversity Jurisdiction and Unincorporated Businesses: Collapsing the Doctrinal Wall*, 2007 U. ILL. L. REV. 1543, 1548-49 (2007).

¹⁰ Thompson, *supra* note 1, at 921.

A. An Entity Separate from Its Owners

Just as a corporation is formed by filing “articles of incorporation,” an LLC is formed by filing “articles of organization” with the state.¹¹ Details of the structure and operation of the LLC should be contained in a separate operating agreement, which also sets forth the rights and duties of the members and managers.¹² Most LLC statutes provide that the operating agreement sets forth the rules concerning the internal governance of the LLC, while the statutes provide default rules that address any areas for which the members have not specifically provided.¹³ In many ways, the LLC is treated as a legal entity separate from its owners.¹⁴ It may sue and be sued, own property, and its members cannot be held liable for its debts and obligations.¹⁵

Under most LLC statutes, the default rule is for the organization to be managed by its members, similar to the manner in which partners would manage a partnership.¹⁶ However, LLC statutes also provide the option of centralized management similar to that of a corporation.¹⁷ While the corporate form assumes a separation of function among the owners and those who participate in the corporation, the LLC has the freedom to create its structure and identify the roles of its members and managers.¹⁸ Thus, if an LLC elects to be manager-managed, it can structure its management so that only managers can act on behalf of the LLC.¹⁹ In this respect, the management structure of the LLC can closely resemble that of a corporation, with a board of managers akin to a corporate board of directors. As the

¹¹ See, e.g., COLO. REV. STAT. § 7-80-401 (West 2006) (providing that articles of organization can vest management in either members or managers).

¹² Douglas K. Moll, *Minority Oppression & the Limited Liability Company: Learning (or Not) From Close Corporation History*, 40 WAKE FOREST L. REV. 883, 920 (2005).

¹³ Ribstein, *supra* note 2, at 9-10.

¹⁴ Daniel S. Kleinberger, *The Closely Held Business Through the Entity-Aggregate Prism*, 40 WAKE FOREST L. REV. 827, 838-40 (2005).

¹⁵ *Id.*

¹⁶ Kailus, *supra* note 9, at 1547; see Thompson, *supra* note 1, at 933: “Texas continues to have centralized control as a default rule. All other states expressly permit centralized control, a choice that usually can be made simply by stating in the original organization document that the enterprise will be manager-run.” See also, e.g., DEL. CODE ANN. tit. 6, § 18-402 (West 1999) (stating that “[u]nless otherwise provided in a limited liability company agreement, the management of a limited liability company shall be vested in its members . . .”).

¹⁷ Kailus, *supra* note 9, at 1547.

¹⁸ *Id.*

¹⁹ *Id.* at 1547.

LLC continues to rise as a popular alternative to the corporate form, an increasing number of newly formed LLCs mirror the structure and function of corporations with striking similarity.²⁰

B. Limited Liability for Owners

Corporate statutes in all states provide shareholders with limited liability, either explicitly or implicitly, and LLC owners enjoy the same protection.²¹ Limited liability encourages investment as it allocates the risk to the organization itself rather than to investors and participants.²² Historically, the feature of limited liability made the corporate form most appealing to business owners; however, hybrid organizations such as the LLC now combine limited liability with the attractive features of the partnership.²³ All members of an LLC who act in the ordinary course of business are protected by limited liability, but may still be liable for wrongful acts of individuals.²⁴ This protection tends to result in a secondary market for ownership interest.²⁵ Similarly, free transferability of ownership interest in the LLC permits investors to sell shares in the public market.²⁶ This liquidity of shares encourages increased entity permanence, as ownership interest is easily liquefied and transferred.²⁷

The feature of limited liability does not exist for the general partnership, as partners may be held liable for the debts and obligations of the partnership.²⁸ As a result of the potentially unlimited personal liability of the partners, partnerships have a far less robust market for ownership interest.²⁹ While there are some partnership business forms whose partners enjoy limited liability, differences in the business structure tend to prevent the creation of a secondary market for ownership interests.³⁰

²⁰ *Id.* at 1548.

²¹ *See, e.g.*, MODEL BUS. CORP. ACT § 6.22(a) (1984).

²² Thompson, *supra* note 1, at 921.

²³ Kailus, *supra* note 9, at 1547.

²⁴ *Id.*

²⁵ Thompson, *supra* note 1, at 924.

²⁶ *Id.*

²⁷ *Id.*

²⁸ REV. UNIF. P'SHIP ACT § 306 (1997).

²⁹ Robert B. Thompson, *The Limits of Liability in the New Limited Liability Entities*, 32 WAKE FOREST L. REV. 1, 7-8 (1997).

³⁰ Thompson, *supra* note 1, at 924.

C. Pass-Through Taxation Combined with Free Transferability of Shares

The LLC's hybrid nature offers owners many of the benefits of a corporate structure and function, with the added benefit of pass-through taxation.³¹ Pass-through taxation was traditionally reserved for sole proprietorships and partnerships, and is an attractive feature for owners of closely held businesses. Likewise, the LLC's popularity is largely attributable to the availability of this type of taxation.³² By combining pass-through taxation with limited liability and free transferability of shares, LLCs "go the furthest of all hybrid entities in creating a corporation-like entity with pass-through tax treatment."³³

In recent years, the rapid adoption of LLC statutes has transformed business organization law in the United States. Since the Internal Revenue Service ("IRS") acknowledged that LLCs could receive partnership tax treatment in 1988, LLC provisions have been adopted in every state and the District of Columbia.³⁴ Initially, tax treatment of the LLC was determined by the Kintner regulations.³⁵ The Kintner regulations were guidelines used by the IRS to determine whether a business entity more closely resembled a corporation or a partnership, and then taxed it accordingly.³⁶ A business was taxed as a corporation if it possessed more than two of the factors identified by the IRS which distinguish corporations from partnerships, including perpetual life, centralized management, limited liability, and free transferability of ownership shares.³⁷ In the late 1990s, the use of Kintner was abandoned and unincorporated associations began to select their own tax treatment, eliminating any uncertainty about the tax treatment of an LLC.³⁸

The combination of limited liability and favorable tax treat-

³¹ *Id.*

³² Thomas Earl Geu, *A Single Theory of Limited Liability Companies: An Evolutionary Analysis*, 42 SUFFOLK U. L. REV. 507, 521 (2009).

³³ Kailus, *supra* note 9, at 1548.

³⁴ Joseph A. McCahery, *Comparative Perspectives on the Evolution of the Unincorporated Firm: An Introduction*, 26 J. CORP. L. 803, 803 (2001).

³⁵ Thompson, *supra* note 1, at 931.

³⁶ *Id.* at 931-32.

³⁷ *Id.*

³⁸ Kailus, *supra* note 9, at 1546-47. LLC features that most clearly resemble those of corporations are limited liability, centralized management, and distribution of ownership interests.

ment has long been available for certain entities organized as corporations that elect Subchapter S tax treatment, providing its owners with pass-through taxation and thereby modifying the corporate norm of double taxation.³⁹ This desired combination can be achieved by forming the business as a corporation under the business corporation act of a particular state to achieve limited liability, making a Subchapter S election under the Internal Revenue Code to achieve pass-through tax treatment, and using a shareholders agreement or amending the articles of incorporation to modify the corporate governance norms.⁴⁰ Under the standards of Subchapter S, however, certain organizations such as those with complex financial structures cannot access this corporate tax loophole.⁴¹

LLCs similarly provide the ideal taxation structure and provide business owners with limited liability.⁴² Pass-through tax treatment that exists for corporations electing Subchapter S tax treatment blurs the distinction between corporate entities and hybrid organizations such as the LLC.

Many corporations are termed “closely held corporations” as they are owned by a small number of stockholders, lack a large secondary market for the corporation’s stock, and are managed by shareholders.⁴³ In the traditional public corporation, the shareholder is normally a detached investor who neither contributes labor nor participates in management of the corporation. In a close corporation, “a more intimate and intense relationship exists between capital and labor.”⁴⁴ Close corporation shareholders “usually expect employment and a meaningful role in management, as well as a return on the money paid for [their] shares.”⁴⁵ Furthermore, close corporation investors are often linked by family or other personal relationships that result in a familiarity among the participants.⁴⁶ The LLC is a popular alternative to the close corporation as it has many corporate attributes with the added benefit of favorable tax treatment.

³⁹ Thompson, *supra* note 1, at 928.

⁴⁰ *Id.* at 929.

⁴¹ *Id.* at 945.

⁴² Thompson, *Limits of Liability in the New Limited Liability Entities*, *supra* note 29, at 3-4.

⁴³ *Donahue v. Rodd Electrotype Co.*, 328 N.E.2d 505, 511 (Mass. 1975).

⁴⁴ Moll, *supra* note 12, at 888.

⁴⁵ Robert B. Thompson, *The Shareholder’s Cause of Action for Oppression*, 48 BUS. LAW. 699, 702 (1993).

⁴⁶ Moll, *supra* note 12, at 888-89.

The LLC bundles together the favorable attributes of the corporation with the flexibility and tax treatment of the partnership, improving the “menu” of business features available to owners.⁴⁷ As the popularity of the LLC increases, newly forming closely held businesses are choosing to structure not as corporations, but as LLCs. Because of the LLC’s ideal attributes, choosing an LLC over a closely held corporation has become the norm.⁴⁸ Firms in a wide variety of industries are now using the LLC structure, and the increase is expected to continue.⁴⁹

III. DIVERSITY JURISDICTION: § 1332(C) AND CITIZENSHIP OF BUSINESS ORGANIZATIONS

Article III of the United States Constitution provides that “[t]he judicial Power shall extend to . . . Controversies . . . between Citizens of different States.”⁵⁰ Diversity jurisdiction provides a federal forum for parties hailing from different states in order to prevent either party from facing local prejudice.⁵¹ Congress first authorized the federal courts to exercise diversity jurisdiction in the Judiciary Act of 1789,⁵² which currently provides that “[t]he district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds . . . \$75,000 . . . and is between . . . citizens of different States”⁵³ The exercise of federal diversity jurisdiction requires complete diversity, meaning that “no plaintiff may be a citizen of the same state as any defendant.”⁵⁴ Although a corporation’s citizenship under U.S.C. § 1332(c) is its principal place of business or state of incorporation,⁵⁵ the citizenship of unincorporated business organizations such as LLCs is comprised of the citizenship of its members.⁵⁶

⁴⁷ McCahery, *supra* note 34, at 803.

⁴⁸ Kailus, *supra* note 9, at 1548.

⁴⁹ *Carden*, 494 U.S. at 197 (“The 50 states have created, and will continue to create, a wide assortment of artificial entities possessing different powers and characteristics, and composed of various classes and members with varying degrees of interest and control.”).

⁵⁰ U.S. CONST. art. III, § 2, cl. 1.

⁵¹ 28 U.S.C. § 1332(a) (2014).

⁵² Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 78 (1789).

⁵³ 28 U.S.C. § 1332(a).

⁵⁴ Kailus, *supra* note 9, at 1549.

⁵⁵ 28 U.S.C. § 1332(c)(1).

⁵⁶ *See Carden*, 494 U.S. at 175-76.

A. Citizenship of Corporations and the Legislative Intent of § 1332(c)

Initially, the citizenship of a corporation was comprised of the citizenship of its shareholders.⁵⁷ In *Louisville, C. & C.R. Co. v. Letson*,⁵⁸ the Supreme Court first acknowledged a corporation as a “juridical person” whose citizenship could be determined by the state of incorporation.⁵⁹ The concept of corporate citizenship was further defined in *Marshall v. Baltimore & Ohio R. Co.*,⁶⁰ where the Supreme Court created the fiction that shareholders of a corporation would be conclusively presumed to be citizens of the corporation’s state of incorporation for diversity purposes.⁶¹ The Court stated that since the controversy dealt directly with the representatives of the shareholders, i.e., the directors and officers, the Court should not address the citizenship of the shareholders who exercise no control over the litigation for the purpose of establishing jurisdiction.⁶² The Court acknowledged the corporation as its own entity, rather than a mere aggregate of shareholders, and based this reasoning upon the concept that a corporation is a “juridical person” in the sense that it is its own entity in which directors and officers represent the shareholders.⁶³

The Court’s characterization of the corporation as a “juridical person” provided the rationale for Congress’s enactment of §1332(c) in 1958.⁶⁴ This subdivision provides that, for the purpose of diversity

⁵⁷ G. David Porter, Note, “Incorporating” Limited Partnerships into Federal Diversity Jurisdiction: Correcting *Carden v. Arkoma Associates*, 65 NOTRE DAME L. REV. 287, 294 (1990).

⁵⁸ *Louisville, C. & C.R. Co. v. Letson*, 43 U.S. (2 How.) 497, 500 (1844).

⁵⁹ *Id.* at 500 (stating that “when a suit is brought in a Circuit Court of the United States, by or against a corporation, the court with reference to the question of jurisdiction, depending on the character of the parties, overlooks the artificial [sic] person, the mere legal entity, which cannot be either citizen or alien, and regards only the natural persons of whom it is composed”).

⁶⁰ *Marshall v. Baltimore & Ohio R.R. Co.*, 57 U.S. (16 How.) 314 (1854).

⁶¹ The Court in *Marshall* held that:

The persons who act under these faculties, and use this corporate name, may be justly presumed to be resident in the State which is the necessary *habitat* of the corporation, and where alone they can be made subject to suit; and should be estopped in equity from averring a different domicile [sic] as against those who are compelled to seek them there, and can find them there and nowhere else.

Id. at 328.

⁶² *Id.* at 327.

⁶³ *Id.* at 328.

⁶⁴ Kailus, *supra* note 9, at 1550.

jurisdiction, “a corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business”⁶⁵ Before the enactment of § 1332(c), corporations were essentially precluded from invoking diversity jurisdiction if they had many shareholders because the corporation’s citizenship was determined based upon the citizenship of its shareholders.⁶⁶ Currently, under § 1332(c), for jurisdictional purposes, a corporation is a separate entity rather than an aggregate of its shareholders. Because of the growth of interstate commerce and increase in number of corporations and shareholders, Congress acknowledged that, for jurisdictional purposes, a corporation was an entity independent of its shareholders.⁶⁷

Because diversity jurisdiction was intended to allow diverse parties access to federal courts, courts have been careful not to extend diversity jurisdiction in actions purely local in character, where neither party would face perceived or actual bias in state court.⁶⁸ Furthermore, § 1332(c) should not be so broadly read as to include any entity that a state labels a “corporation.”⁶⁹ The Fifth Circuit, in *Freeman v. Northwest Acceptance Corp.*,⁷⁰ chose to ignore “corporate formalities” and denied the existence of diversity jurisdiction when an action was purely “local in character.”⁷¹ In this case, the defendant corporation, Northwest Acceptance Corp. (“Northwest”), acted through a wholly-owned subsidiary corporation.⁷² Although Northwest’s corporate citizenship was diverse from the citizenship of all plaintiffs, the court disregarded the state of incorporation on the ground that the corporation was acting locally, and found that diversity did not exist.⁷³ That court held that “[f]ederal diversity jurisdiction never was intended to extend to local corporations that, because of a legal fiction, are considered citizens of another state. Such corporate formalities should be ignored, when doing so serves the congression-

⁶⁵ 28 U.S.C. § 1332(c)(1).

⁶⁶ *Bank of U.S. v. Deveaux*, 9 U.S. (5 Cranch) 61, 64-65 (1809).

⁶⁷ *Kailus*, *supra* note 9, at 1549.

⁶⁸ *Riley v. Gulf, M. & O. R. Co.*, 173 F. Supp. 416, 419 (S.D. Ill. 1959).

⁶⁹ *Diversity Jurisdiction - Definition of Corporation under 28 U.S.C. § 1332(c) - Seventh Circuit Holds That the Term “Corporation” Is Entirely State-Defined.* - Hoagland v. Sandberg, Phoenix & Von Gontard, P.C., 385 F.3d 737, 118 HARV. L. REV. 1347, 1351 (2005).

⁷⁰ *Freeman v. Nw. Acceptance Corp.*, 754 F.2d 553 (5th Cir. 1985).

⁷¹ *Id.* at 558.

⁷² *Id.* at 556.

⁷³ *Id.*

al purpose of denying a federal forum to actions wholly local in character.”⁷⁴ Notably, this court relied upon the legislative intent of § 1332(c) rather than the state label of “corporation” in order to preserve the integrity of diversity jurisdiction.

B. Citizenship of Unincorporated Associations

It is clear that § 1332(c) applies to corporations; however, many unincorporated associations have been barred from federal suits grounded in diversity jurisdiction because of a drastically different citizenship analysis.⁷⁵ It is counterintuitive that unincorporated associations with an analogous, if not identical, business form to that of a corporation face this obstacle when seeking access to federal court. Nevertheless, courts have used considerable discretion in some circumstances and have circumvented § 1332(c) with a variety of citizenship analyses in order to promote fair treatment of unincorporated parties.

In *Carden v. Arkoma Associates*,⁷⁶ a limited partnership, Arkoma Associates, sued Louisiana citizens, Carden and Limes, in federal court under diversity jurisdiction.⁷⁷ The Louisiana citizens moved to dismiss the suit for lack of subject matter jurisdiction, as one of the Arkoma partners was also a Louisiana citizen.⁷⁸ The district court ruled in favor of the limited partnership, and the decision was affirmed by the Fifth Circuit.⁷⁹ The Supreme Court reversed, granting Carden’s motion to dismiss, and reasoning that an artificial entity cannot invoke diversity jurisdiction “based on the citizenship of some but not all of its members.”⁸⁰ The Court held that the citizenship of a partnership is that of the partners.⁸¹ While *Carden* dealt with limited partnerships, not LLCs, the decision has been applied to

⁷⁴ *Id.* at 558.

⁷⁵ *Carden*, 494 U.S. at 185; *United Steelworkers v. Bouligny, Inc.*, 382 U.S. 145, 145 (1965) (holding that an unincorporated labor union’s citizenship was that of its members); *Chapman v. Barney*, 129 U.S. 677, 677 (1889) (holding that a joint stock company should be treated as a partnership for the purpose of federal diversity jurisdiction).

⁷⁶ 494 U.S. 185 (1990).

⁷⁷ *Carden*, 494 U.S. at 185.

⁷⁸ *Id.*

⁷⁹ *Id.* at 186.

⁸⁰ *Id.* at 185.

⁸¹ *Id.* at 195-96 (relying upon *Deveaux*, 9 U.S. (5 Cranch) at 90-91, *Marshall*, 57 U.S. (16 How.) at 328-29, and *Navarro*, 446 U.S. at 476.

all unincorporated associations.⁸²

In 1997, a district court in Michigan became the first court to extend *Carden* to an LLC.⁸³ In *International Flavors & Textures, LLC v. Gardner*,⁸⁴ the court analogized members of an LLC to shareholders in a corporation and acknowledged that the Michigan Act grants to LLCs “all powers granted to corporations . . . includ[ing] the powers to sue and be sued.”⁸⁵ Nonetheless, the court held that LLCs could not be considered citizens because they are not corporations and cited Michigan’s LLC Act, which defines an LLC as an “entity that is an unincorporated association having 2 or more members and is formed under this act.”⁸⁶ In reaching its result, the court applied a bright-line rule, considering neither the form nor function of the LLC.

In contrast, the Supreme Court has held that a foreign unincorporated association may be treated as a corporation.⁸⁷ In *People of Puerto Rico v. Russell & Co.*,⁸⁸ the Supreme Court examined the characteristics of the *sociedad en comandita*, an unincorporated association organized under Puerto Rican law, in order to determine whether diversity jurisdiction existed under §1332(c).⁸⁹ The Court determined that the *sociedad en comandita*’s characteristics, including limited liability of owners, ability to “contract, own property, and transact business, sue and be sued in its own name and right,” were substantially similar to that of a corporation.⁹⁰ The Supreme Court reasoned that the *sociedad en comandita* was such a “complete juridical person” that, like a corporation, was deemed to have entity citizenship.⁹¹ By evaluating the characteristics of the business entity, the Court held that the *sociedad en comandita* should be treated as a cor-

⁸² Gen. Tech. Applications, Inc. v. Exro Ltd., 388 F.3d 114, 120 (4th Cir. 2004); GMAC Commercial Credit LLC v. Dillard Dep’t Stores, Inc., 357 F.3d 827, 828-29 (8th Cir. 2004); Rolling Greens MHP, L.P. v. Comcast SCH Holdings LLC, 374 F.3d 1020, 1022 (11th Cir. 2004); Handelsman v. Bedford Vill. Assocs. Ltd. P’ship, 213 F.3d 48, 51 (2d Cir. 2000); Cosgrove v. Bartolotta, 150 F.3d 729, 731 (7th Cir. 1998).

⁸³ Int’l Flavors & Textures, LLC v. Gardner, 966 F. Supp. 552, 554 (W.D. Mich. 1997).

⁸⁴ 966 F. Supp. 552 (W.D. Mich. 1997).

⁸⁵ *Id.* at 554.

⁸⁶ MICH. COMP. LAWS § 450.4102(k) (2013).

⁸⁷ People of Puerto Rico v. Russell & Co., Sucesores, S. En. C., 288 U.S. 476, 481 (1933).

⁸⁸ 288 U.S. 476 (1933).

⁸⁹ *Id.* at 481.

⁹⁰ *Id.* The Supreme Court’s characterization of the *sociedad en comandita* can also be used to describe an LLC. See Kleinberger, *supra* note 14, at 838-40.

⁹¹ *People of Puerto Rico*, 288 U.S. at 476.

poration for diversity purposes.

The Seventh Circuit applied similar reasoning in *Lear Corp. v. Johnson Electric Holdings Ltd.*,⁹² in which it determined that a Bermuda business entity “limited by shares” under Bermuda law had legal attributes adequately similar to a corporation.⁹³ The court held that this business entity was a corporate citizen of a foreign state for diversity jurisdiction purposes and applied § 1332(c) accordingly.⁹⁴ The Seventh Circuit looked to factors such as the entity’s perpetual existence, governance by a board of directors, ability to issue tradable shares, and separateness from its investors, to determine that the entity was legally equivalent to a corporation.⁹⁵ The Seventh Circuit assessed factors that suggested the Bermudan business entity functioned as a corporation for the purpose of diversity jurisdiction.

Despite the federal courts’ stringent application of the *Carden* bright-line rule to unincorporated associations such as the LP and the LLC, the courts use different citizenship analyses in cases involving foreign business entities.⁹⁶ Further, as will be explained, the courts are also flexible in determining the citizenship of business trusts and unincorporated associations in a class action suit.⁹⁷ For example, when determining the citizenship of foreign business entities for the purpose of diversity jurisdiction, the Supreme Court evaluates the traits of the statutes under which the entity was formed and compares the statutes to those of corporations in the United States.⁹⁸ Instead of examining whether the entity is labeled a corporation, the Court examines the characteristics of the entity.

C. Real and Substantial Parties to the Litigation

Early cases held that only individual persons could be real parties to a controversy.⁹⁹ Business organizations were considered artificial legal creatures and were not citizens of any State.¹⁰⁰ The courts later began to acknowledge the corporation as an entity whose

⁹² 353 F.3d 580 (7th Cir. 2003).

⁹³ *Id.* at 583

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *See People of Puerto Rico*, 288 U.S. at 479-80.

⁹⁷ *See Navarro*, 446 U.S. at 465; *see also* 28 U.S.C. § 1332(d) (2005).

⁹⁸ *See People of Puerto Rico*, 288 U.S. at 479-80.

⁹⁹ *See, e.g., Deveaux*, 9 U.S. (5 Cranch) at 82.

¹⁰⁰ *Id.*

citizenship was determined by corporate domicile rather than shareholders' citizenship.¹⁰¹ Although corporations suing in diversity have been deemed citizens of the state of incorporation or principal place of business, unincorporated associations remain mere collections of individuals. When an unincorporated association sues or is sued in federal court in a diversity action, it is the citizenship of the "persons composing such association" which determines the diversity jurisdiction of a federal court.¹⁰²

In *Navarro Savings Association v. Lee*,¹⁰³ the Supreme Court examined a business trust to determine its citizenship in the context of diversity jurisdiction.¹⁰⁴ The Court reviewed the features of the trust and determined that only the citizenship of the trustees would be considered because, given their degree of control in the trust, they were the "real parties to the controversy."¹⁰⁵ *Navarro* sent the clear message that federal courts must look beyond "nominal or formal parties and rest jurisdiction only on the real parties to the controversy."¹⁰⁶ The decision in *Navarro* echoed and refined the entity theory developed by *Marshall*, as the citizenship of the association was determined by the locus of management and control.¹⁰⁷

Navarro has been extended and applied to subsequent cases involving business trusts, despite the *Carden* "rule" that the citizenship of any unincorporated association is that of its members. Indeed, a bankruptcy court in Arizona disregarded *Carden* as dicta in a matter involving the citizenship of a trust.¹⁰⁸ That court held that "necessarily anything [*Carden*] might have had to say about diversity jurisdiction involving trusts would be at best *dictum*."¹⁰⁹ This court determined the "real parties to the controversy" rather than using a strict application of § 1332 in its effort to make a fair determination of citizenship for diversity purposes.

¹⁰¹ *Carden*, 494 U.S. at 201.

¹⁰² *Great S. Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 456 (1900); *United Steelworkers*, 382 U.S. at 145; *Chapman v. Barney*, 129 U.S. 677 (1889); *Navarro*, 446 U.S. at 460-61.

¹⁰³ 446 U.S. 458 (1980).

¹⁰⁴ *Navarro*, 446 U.S. at 460-61.

¹⁰⁵ *Id.* at 476.

¹⁰⁶ *Id.* at 461.

¹⁰⁷ *Marshall*, 57 U.S. at 327-28.

¹⁰⁸ *In re Mortgs. Ltd.*, 452 B.R. 776, 779 (Bankr. D. Ariz. 2011) (holding that the *Carden* decision spoke only to the citizenship of limited partnerships for the purpose of diversity jurisdiction, and cannot therefore be extended to the citizenship of a trust).

¹⁰⁹ *Id.*

Finally, although Congress has not defined the citizenship of the LLC for diversity purposes, it has defined the citizenship of unincorporated associations, including the LLC, under the Class Action Fairness Act (“CAFA”).¹¹⁰ Under CAFA, “an unincorporated association is deemed to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized.”¹¹¹ Therefore, the LLC is treated like a corporation for diversity purposes when involved in a class action suit. According to the Senate Committee Report, this amendment was intended to increase the federal courts’ jurisdiction over class action suits in order to promote fairness and reduce bias against out-of-state parties.¹¹² CAFA brings LLCs, and other unincorporated associations, into parity with corporations for class action suits; however, the courts are left without explicit direction on how to determine citizenship of LLCs outside the scope of class actions. The courts continue to define the citizenship of the LLC as that of its owners and acknowledge an inherent unfairness in this definition by deferring this issue to Congress.¹¹³ Although CAFA does not address how unincorporated associations should be treated for diversity jurisdiction outside the scope of class action suits, CAFA broadens the statutory definition of federal diversity jurisdiction to allow for its use by unincorporated associations.¹¹⁴

IV. SIMILAR BUSINESS ENTITIES SHOULD RECEIVE SIMILAR TREATMENT FOR DIVERSITY JURISDICTION

Currently, outside of the class action lawsuit, courts treat the LLC’s citizenship as that of its members. While the current rule is clear and simple to understand, it has failed to evolve with the changes in business realities, can result in prejudice to the LLC, and may give undue consideration to the federal court’s workload. Courts could instead use a functional approach, evaluating an LLC party’s similarity to the corporate form, and determining whether it will be treated as a corporation accordingly. Alternatively, courts could acknowledge the LLC’s increasing popularity as an alternative to the

¹¹⁰ 28 U.S.C. § 1332(d) (2005).

¹¹¹ Steven M. Puiszis, *Developing Trends with the Class Action Fairness Act of 2005*, 40 J. MARSHALL L. REV. 115, 132-33 (2006).

¹¹² S. REP. NO. 109-14, at 5 (2005), reprinted in 2005 U.S.C.C.A.N. 3, 43.

¹¹³ Kailus, *supra* note 9, at 1553.

¹¹⁴ *Id.*

corporate form by categorically treating all LLCs as corporations for diversity purposes. This formal approach offers the benefit of a bright-line rule, while taking into account the Congressional intent behind § 1332(c). Either of these alternative approaches would yield more logical results than the current approach. This section will address the issues with treating the LLC as a non-corporation for diversity jurisdiction, and explain how the legislative intent behind § 1332(c), as well as other long-held rules of diversity jurisdiction, support alternative approaches that would allow the LLC to be treated as a corporation for diversity purposes.

The LLC is an organization that falls within the Congressional intent of § 1332(c) because of its potential remarkable similarity to the corporation. The LLC can be structured nearly identically to a corporation and shares many of the attributes of entities that have been treated like corporations for the purpose of diversity jurisdiction. The current approach uses the bright-line rule set forth in *Carden*: that the citizenship of an unincorporated association is that of its members. Courts should look beyond *Carden*, which applied to limited partnerships, and no longer extend this reasoning to LLCs. Instead, courts should treat the LLC as a corporation by analogy, as an “entity” under the *Marshall* analysis, or as a “real party in interest” under *Navarro*. Courts have used this type of discretion in the cases of foreign business organizations.¹¹⁵ If treated as the *sociedad* in *Puerto Rico v. Russell*, the LLC would receive the same treatment as corporations for the purpose of diversity jurisdiction based on its structure and characteristics.¹¹⁶ Rather than continue to rely on the current approach, courts could use a functional approach and treat LLCs as corporations when they are substantially similar to corporations, or use a formal approach in which LLCs are categorically treated as corporations for diversity purposes. Both of these alternative approaches offer advantages over the current citizenship analysis for LLCs, which can often yield unfair and illogical results.

Whether the citizenship of the LLC is treated as that of a corporation or as that of its members for diversity purposes will make a substantial difference to the interests of the LLC in litigation. LLCs are among those business organizations for which diversity jurisdiction was created as a protection. These organizations have a func-

¹¹⁵ *People of Puerto Rico*, 288 U.S. at 476; *Lear Corp.*, 353 F.3d at 583.

¹¹⁶ *People of Puerto Rico*, 288 U.S. at 482.

tionally similar structure with other types of organizations that have access to federal courts in diversity suits, such as corporations, business trusts, and some foreign business organizations.

A. The Current Approach: Outdated, Prejudicial to LLCs, and Unsupported by the Legislative Intent of § 1332(c)

While the Supreme Court has not yet spoken to the citizenship of LLCs for the purpose of diversity jurisdiction, the present rule is that citizenship of an LLC is that of its members for diversity jurisdiction purposes. However, determining the citizenship of LLC members individually presents challenges.¹¹⁷ The current citizenship analysis can be resource intensive, it can result in LLCs being barred from ever bringing a federal suit in diversity, and it might prevent a derivative suit from being brought in federal court.¹¹⁸ Unlike a corporation, whose citizenship is determined by its state of incorporation and principal place of business, an LLC's citizenship is comprised of the citizenship of its members. In many cases, an LLC party's membership is comprised of individuals as well as other unincorporated associations. This citizenship analysis, therefore, could extend to multiple layers of organizational hierarchy, including owners that are themselves LLCs or other business organizations. This would effectively bar many LLCs from ever being heard in federal court.¹¹⁹

The purpose of corporate citizenship for federal diversity jurisdiction is to limit the workload of the federal court and prevent abuses, neither of which is specific to a certificate of incorporation.¹²⁰ The Judicial Conference of the United States was concerned with frauds and abuses of diversity jurisdiction, and with preserving the integrity of diversity jurisdiction as a way of providing a federal forum "to those who might otherwise suffer from local prejudice against out-of-state parties."¹²¹ While courts may reduce their case-

¹¹⁷ Matthew C. Dodge, Comment, *Determining the Citizenship of LLC Members for Diversity Purposes: Seemingly Simple, Difficult Enough to Compel an Amendment to 28 U.S.C. 1332(c)(1)*, 80 TUL. L. REV. 661, 670 (2005).

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ Debra R. Cohen, *Citizenship of Limited Liability Companies for Diversity Jurisdiction*, 6 J. SMALL & EMERGING BUS. L. 435, 459 (2002).

¹²¹ *Hertz Corp. v. Friend*, 559 U.S. 77, 85 (2010) (citing S. REP. NO. 530, 72d Cong., 1st Sess., 2, 4-7 (1932)). The Court quoted the report: "Since the Supreme Court has decided

loads by restricting the opportunities for unincorporated associations to satisfy the requirements of diversity jurisdiction, this is not a sufficient reason to restrict access to federal courts. The federal courts must be careful not to give undue consideration to workload when making judicial decisions.¹²²

LLCs have a need for federal diversity jurisdiction due to structural and functional similarities to the corporation, as well as the need to avoid prejudice in state court.¹²³ When a suit involves an LLC and a third party, diversity jurisdiction will depend on the citizenship of each of the members at the time the action is filed. It must also be noted that diversity cannot be established when a member sues the LLC.¹²⁴ Diversity may also be destroyed in the case when a derivative suit is brought by members, as the LLC cannot be a diverse party from one of its members. While entities such as business trusts and foreign business entities are given the benefit of judicial discretion, the current bright line rule can severely prejudice LLCs or their members if they are denied access to federal courts despite the possibility of local bias in state court.

B. The Functional Approach: Similar Treatment for Similar Business Organizations

A functional approach would allow the LLC to be treated as a corporation for diversity jurisdiction when the LLC functions similarly to a corporation. Courts have allowed foreign entities to access the federal courts by means of diversity jurisdiction when they were substantially similar to corporations, and they could use the same reasoning for local entities. Both the *sociedad en comandita* in *Puerto Rico v. Russell* and the Bermudan business entity in *Lear Corp. v. Johnson Electric Holdings Ltd.* were treated as corporations for diversity purposes because of their functional similarities to corporations.¹²⁵ Courts have extended this reasoning to treat business trusts as corpo-

that a corporation is a citizen . . . it has become a common practice for corporations to be incorporated in one State while they do business in another. And there is no doubt but that it often occurs simply for the purpose of being able to have the advantage of choosing between two tribunals in case of litigation.” *Id.*

¹²² Kailus, *supra* note 9, at 1556.

¹²³ *Id.*

¹²⁴ A derivative action against an LLC cannot consist of truly diverse parties, as the LLC’s citizenship will consist of each member’s citizenship.

¹²⁵ Kailus, *supra* note 9, at 1557.

rations for diversity purposes.¹²⁶ These cases evidence the courts' ability to use discretion to determine whether an unincorporated association may be treated as a corporation for diversity purposes. If courts considered the legislative intent of § 1332(c) and looked beyond a certificate of incorporation, the LLC could receive the same treatment as corporations for the purpose of diversity jurisdiction based on its structure and characteristics.¹²⁷ While this approach may require the use of time and resources to determine an LLC party's similarity to a corporation, it is arguably similar to the resource-intensive nature of the citizenship analysis under the current approach.¹²⁸

The long-held rules of *Marshall* and *Navarro* support the use of a functional approach. Courts could look to whether the LLC is an "entity" under *Marshall* and a "real party in interest" under *Navarro* for diversity jurisdiction.¹²⁹ The *Marshall* theory, that the corporation should be treated as an "entity" for the purposes of determining citizenship, could be seamlessly applied to many LLCs, particularly those LLCs that are manager-managed. The Supreme Court has also established that the "citizens" upon whose diversity a plaintiff grounds jurisdiction must be real and substantial parties to the controversy.¹³⁰ Thus, a federal court must disregard nominal or formal parties and rest jurisdiction only upon the citizenship of real parties to the controversy.¹³¹ Courts recognize the corporation as an entity and a "real party in interest" in part because of centralization of management and control.¹³² This corporate law principle should be considered for application to LLCs as well. The question of whether an LLC qualifies as a "real party in interest" could also turn on its structural and functional similarity to the corporation. For example, courts could look to whether the LLC is manager-managed or member-managed in order to assess its governance structure and determine whether the LLC is an "entity" or "real party in interest." In doing so, courts would exercise their discretion to determine whether a

¹²⁶ *Navarro*, 446 U.S. at 460; *In re Mortgs. Ltd.*, 452 B.R. at 779.

¹²⁷ *Navarro*, 446 U.S. at 460.

¹²⁸ Cohen, *supra* note 8, at 274.

¹²⁹ *Marshall*, 57 U.S. (16 How.) at 327-28; *Navarro*, 446 U.S. at 460.

¹²⁹ *Id.* at 459.

¹³⁰ *McNutt v. Bland*, 43 U.S. (2 How.) 9, 14-15 (1844).

¹³¹ *Id.* at 14.

¹³² *Navarro*, 446 U.S. at 459.

business organization has “real and substantial” diversity, rather than looking merely for a certificate of incorporation.

Although a functional approach would allow some LLCs to be treated as individuals for diversity purposes, it would involve the time and resources of evaluating the complex structure of each LLC in order to determine the appropriate citizenship analysis. Nevertheless, the courts already use this reasoning to determine the citizenship of other unassociated entities, and cases such as *Puerto Rico v. Russell*, *Navarro Savings Association v. Lee*, and *Freeman v. Northwest* evidence the propriety of evaluating substance over form in a diversity jurisdiction action.¹³³

When determining whether an LLC is substantially similar to a corporation, courts must consider whether an LLC could face local bias in a state court and allow access to the federal court in those cases.¹³⁴ The courts should read § 1332(c) dynamically and treat the LLC as a corporation by analogy in order to respect the legislative intent behind the statute. Courts have used discretion in preventing the use of diversity jurisdiction by corporations. This is evident from the decision in *Freeman v. Northwest*, where the court denied the existence of diversity jurisdiction when a corporation was purely “local in character.”¹³⁵ Courts may use discretion in determining whether diversity jurisdiction is appropriate and falls within the intent of the diversity statute. If the court has the ability to ignore “corporate formalities,” as it did in that case, it would be prudent to acknowledge the substance and function of the LLC when determining whether diversity exists. Courts could evaluate the substance and function of a business entity over a statutory label, which would logically result in similar treatment for similar business entities.

It appears that, because of the LLC’s remarkable similarity to the corporation, courts view its citizenship using a strict application of § 1332(c) rather than employing the “real parties to the controversy” test. This is an anachronistic gap in reasoning that courts must begin to address. LLCs could be granted citizenship for diversity purposes either as an “entity” by using the *Marshall* rationale,¹³⁶ or by considering only the citizenship of the “real parties to the contro-

¹³³ Porter, *supra* note 58, at 298.

¹³⁴ Cohen, *supra* note 8, at 476-77.

¹³⁵ *Nw. Acceptance Corp.*, 754 F.2d at 558.

¹³⁶ *Marshall*, 57 U.S. (16 How.) at 327-28.

versy” rule set forth in *Navarro*.¹³⁷ Courts have been willing to use this reasoning to determine the citizenship of unincorporated associations such as foreign business entities and business trusts, and have yielded fair and logical results.¹³⁸

The Kintner regulations, which were once used to determine the tax treatment of the LLC, would be useful in determining whether an LLC more closely resembles a corporation or a partnership and simplify the Court’s reasoning process for qualifying a claim of diversity jurisdiction.¹³⁹ Courts could look to such factors as perpetual life, centralized management, and free transferability of ownership interest in order to implement a functional approach in determining LLC citizenship for diversity purposes. A key characteristic of the corporation is the law’s recognition of the corporation as separate from its owners. The LLC is treated as an entity under state law and yet, unlike the corporation, federal law treats the LLC as an aggregate of its members. However, the LLC structure is often so analogous to the corporate form that an aggregate theory seems arbitrary, applied simply because the organization is not labeled as a corporation. A functional approach would allow many LLCs to have access to the federal courts under diversity jurisdiction when they are substantially similar to the corporation.

C. The Formal Approach: A Bright-Line Rule Aligned with the Legislative Intent of § 1332(c)

The LLC is an organization that has a right to sue and be sued and, in some statutes, “all the powers of a corporation.”¹⁴⁰ The Supreme Court has yet to address the issue of whether an LLC may be considered in its own right a “citizen” of the State that created it, or whether courts should look to the citizenship of each of its members when determining whether there is complete diversity of citizenship.¹⁴¹ A formal approach that categorically treats all LLCs as corporations for diversity purposes is logical because of the LLC’s increasing popularity as an alternative to the corporate form.¹⁴²

¹³⁷ *Navarro*, 446 U.S. at 459.

¹³⁸ *In re Mortgs. Ltd.*, 452 B.R. at 779; *People of Puerto Rico*, 288 U.S. at 476; *Lear Corp.*, 353 F.3d at 580.

¹³⁹ Thompson, *supra* note 1, at 931.

¹⁴⁰ *Int’l Flavors & Textures, LLC*, 966 F. Supp. at 554.

¹⁴¹ Kailus, *supra* note 9, at 1553.

¹⁴² Dodge, *supra* note 118, at 667.

Individual LLC members should be disqualified from consideration as parties in interest, and their citizenship should be irrelevant to a jurisdictional analysis. As stated previously, the legislative intent behind § 1332(c), as well as other long-held rules of diversity jurisdiction, supports the LLC being treated as a corporation for diversity purposes. Furthermore, determinations of citizenship of business organizations must evolve with the changes in business realities, such that the relevant characteristics and interests of the parties are respected rather than the label of the organization.¹⁴³

Newly forming closely held businesses are increasingly choosing to structure not as close corporations, but as LLCs.¹⁴⁴ Most of these businesses are now using the LLC structure, and the increase is expected to continue.¹⁴⁵ The trend toward a hybrid business entity that combines the preferred attributes of corporations and partnerships will certainly continue to evolve. The courts should recognize the trend as a change in the business environment and adapt accordingly in order to treat business entities similarly in accordance with their structural and functional attributes.

Corporations generally have centralized management, entity permanence, a readily available secondary market for shares, and limited liability for investors.¹⁴⁶ The LLC, in many cases, takes on each of these corporate attributes.¹⁴⁷ In fact, all LLC statutes support the adoption of these corporate attributes, while some go so far as to mandate centralized management.¹⁴⁸ The main distinction between an LLC and a corporation is tax treatment, a distinction that can be blurred by the pass-through tax treatment of the S Corporation, which is treated as a corporation under § 1332(c).¹⁴⁹ The flexibility inherent in the LLC allows its owners to organize the LLC identically to a corporation if they so desire. Courts should respond to the changing business environment by acknowledging the LLC as an alternative to the corporation and as a business organization that, as a result, falls within the intent of § 1332(c). Even when an LLC is structured more like a partnership than a corporation, it is nevertheless a hybrid or-

¹⁴³ Cohen, *Citizenship of Limited Liability Companies for Diversity Jurisdiction*, *supra* note 121, at 476-77.

¹⁴⁴ Thompson, *supra* note 1, at 922.

¹⁴⁵ *Id.* at 922-23.

¹⁴⁶ *See, e.g.*, MODEL BUS. CORP. ACT, § 6.22(a).

¹⁴⁷ *See supra* notes 7-20 and accompanying text.

¹⁴⁸ Thompson, *supra* note 1, at 932-33.

¹⁴⁹ *Id.* at 928.

ganization that shares similarities with the corporation, the business trust, and the *sociedad en comandita*.¹⁵⁰ Courts may acknowledge the LLC as an “entity” under *Marshall*,¹⁵¹ or a “real party in interest” under *Navarro*,¹⁵² and elevate substance over form in order to define the “real party to the controversy.”¹⁵³

Finally, while Congress has not specifically addressed how unincorporated entities are to be treated for diversity purposes, Congress explicitly provided a citizenship analysis for unincorporated associations under CAFA.¹⁵⁴ Congress has corrected the anomaly for class action suits, but it has not yet addressed the citizenship of unincorporated associations despite repeated deferment of this issue by the judiciary.¹⁵⁵ Congress has taken a step in acknowledging the similarity of the LLC to the corporation under CAFA. Congress’s intention to increase federal courts’ jurisdiction over class action suits in order to promote fairness can apply to LLCs and other unincorporated associations involved in other types of suits as well.¹⁵⁶ Although Congress has been silent about treatment of the LLC for diversity purposes, courts may acknowledge that Congress’s citizenship analysis for unincorporated associations under CAFA can provide clues as to the intent behind § 1332(c).¹⁵⁷

By categorically treating all LLCs as corporations for diversity purposes, courts would retain the current benefit of a bright-line rule, preserve the integrity of diversity jurisdiction, and protect the interests of an increasingly popular business organization. As the citizenship of the LLC has yet to be explicitly defined by Congress, this formal approach is supported by Congress’s definition under CAFA, the legislative intent behind § 1332(c), and the increasing use of the LLC as an alternative to the corporation.

¹⁵⁰ *Lear Corp.*, 353 F.3d at 583; *People of Puerto Rico*, 288 U.S. at 476.

¹⁵¹ *Marshall*, 57 U.S. (16 How.) at 327-28.

¹⁵² *Navarro*, 446 U.S. at 459.

¹⁵³ *Id.* at 461.

¹⁵⁴ 28 U.S.C. § 1332(d) (2005).

¹⁵⁵ See Puiszis, *supra* note 112, at 132-33.

¹⁵⁶ S. REP. NO. 109-14, at 5 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 43.

¹⁵⁷ *Id.*

V. CONCLUSION

Many LLCs are structured similarly, if not identically, to the corporation. It is apparent that the current citizenship analysis for LLCs results in unfair prejudice to many business organizations involved in litigation. The functional similarity of the LLC to other organizations that enjoy access to federal courts based on diversity jurisdiction suggests that LLCs should receive similar treatment. The current citizenship analysis for the LLC should be reconsidered. The legislature should amend § 1332(c) to provide for the fair treatment of LLCs similar to the protection afforded to corporations. Until then, the courts should address this issue by applying the existing statute to LLCs by using the citizenship analyses enjoyed by other unincorporated associations. Courts could treat LLCs as corporations when they are structured more like a corporation than a partnership, or they could categorically treat all LLCs as corporations for the purpose of diversity jurisdiction. Either of these alternative approaches would protect the interests of this increasingly popular business entity. LLCs are entitled to have the same access to the federal courts as their corporate equivalents and, until there is legislative action, courts must begin to acknowledge the current disparity in access to the federal courts.