DIVERSITY JURISDICTION FOR UNINCORPORATED ASSOCIATIONS

Although unincorporated associations—joint stock companies, labor unions, partnerships, fraternal orders, etc.—exist in a "myriad of structural arrangements,"[1] as a general proposition each is liable for the activities of its members when the activity has been authorized, supported, or ratified by the association.[2] Therefore, when the association is sued in a federal court, under diversity jurisdiction, the court must determine the association's citizenship. Since, according to *Strawbridge v. Curtiss*,[3] diversity jurisdiction requires that *all* plaintiffs be of citizenship different from *all* defendants, associations will often have limited access to federal courts if they have citizenship in every state in which a member has citizenship.

The Supreme Court dealt with this problem first in *Chapman v. Barney*[4] which established the rule that citizenship of the association's members controlled for diversity purposes. In that case the Court refused to extend to associations the rule of *Marshall v. Baltimore & O.R.R.*,[5] which presumed that all stockholders of a corporation were citizens of the state of incorporation, and treated the corporation as a citizen of that state.[6] Two recent circuit court opinions, however, have

1. ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS, 74 (Proposed Final Draft No. 1, 1965), [hereinafter cited as ALI, PROPOSED FINAL DRAFT].

2. In Sperry Products, Inc. v. Association of American Railroads, 132 F.2d 408, 410-12 (2d Cir. 1942), *cert. denied*, 319 U.S. 744 (1943), the court held that the liability for actions of members could be imputed to the entire association provided that those members were authorized to act by the association. See also Fredstrom v. Giroux Post No. 11 of American Legion, 94 F. Supp. 983 (W.D. Mich. 1951). For a discussion of the liability of labor union see Witmar, *Trade Union Liability: The Problem of the Unincorporated Corporation*, 51 YALE L.J. 40 (1941). *Cf.*, UMW v. Coronado Coal Co., 259 U.S. 344, 391 (1922) (International not held liable for the actions of the local since it was acting upon its own initiative).

3. 7 U.S. (3 Cranch) 267 (1806).

4. 129 U.S. 677 (1889). In *Chapman* the Court held that a joint stock association was incapable of possessing citizenship since it lacked a corporate charter. 129 U.S. at 682. An earlier district court case had taken judicial notice of the fact that under the laws of New York joint stock associations were "corporations without the name," and held that such an association was a citizen of New York. Maltz v. American Express Co., 16 Fed. Cas. 566 (No. 9002) (C.C.E.D. Mich. 1876).

5. 57 U.S. (16 How.) 314 (1853).

6. Marshall modified the earlier holding, in Louisville R.R. v. Leston, 43 U.S. (2 How.) 497, 558 (1844), that a corporation is "capable of being treated as a citizen of [the state of its incorporation], as much as a natural person," by creating the fiction that although

forced reconsideration of this issue. In *Mason v. American Express Co.*,[7] the Second Circuit rejected the old rule and held that an unincorporated joint stock association should be treated as a citizen of the state under whose laws it was organized and in which it had its principal place of business. The circuit court claimed that the Supreme Court's opinion in *Puerto Rico v. Russell*[8] "abandoned the artificial and mechanical rule . . . in favor of a more flexible test for capacity for citizenship,"[9] and allowed the circuit court to treat the American Express Company like a corporation.[10] In *Bouligny, Inc. v. United Steelworkers*[11] the Fourth Circuit rejected the Second Circuit's decision[12] and applied the *Chapman* rule. The Fourth Circuit properly found *Russell* completely inapplicable.

> The Court [in *Russell*] by analogy to a common law corporation held that the defendant, a civil law Sociedad, had a domicil in Puerto Rico and thus could not claim the domicil of its individual members to acquire the non-resident status required by the Organic Act. 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.[13]

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a corporation's citizenship was that of all its stockholders, it was to be irrebutably presumed that those stockholders were citizens of the state of incorporation. *Louisville* had itself changed the early rule of corporate citizenship set out in the Bank of the United States v. Devaux, 9 U.S. (5 Cranch) 61, 89-91 (1809), which was similar to that announced for associations in *Chapman*.

7. 334 F.2d 392 (2d Cir. 1964).

8. 288 U.S. 476 (1933).

9. 334 F.2d at 393. *Cf.* Van Sant v. American Express Co., 159 F.2d 355 (3d Cir. 1948).

10. The characteristics which the American Express Company possessed which made it similar to a corporation were listed in the opinion of the district court: 1) the association did not dissolve or liquidate on the death of an associate as did a partnership; 2) the association could hold real property in the name of its President; 3) the powers of management could be concentrated in a few associates who formed a self perpetuating managing body; and 4) the association could sue or be sued without making all of the associates parties to the action. 224 F. Supp. at 290.

But after finding that the American Express Company had these characteristics of a corporation, the district court held that the association differed from a corporation in a significant respect—individual shareholders could be held liable for the debts of the association, and therefore the express company could not be treated as a corporation for purposes of federal jurisdiction. The Second Circuit found, however, the "theoretical liability of individual shareholders actually becoming operative . . . highly unlikely." 334 F.2d at 401.

11. 336 F.2d 160 (4th Cir. 1964), *cert. granted*, 379 U.S. 958 (1965).

12. 336 F.2d at 163 n.3.

13. *Id.* at 163. The Organic Act, ch. 145, § 41, 39 Stat. 965 (1917), 48 U.S.C. § 863 (1958), reads: "The United States District Court for the District of Puerto Rico shall . . . have jurisdiction of all controversies where all of the parties on either side of the controversy are citizens . . . of a State, Territory, or District of the United States not domiciled in Puerto Rico . . . ." *Compare* the Organic Act *with* 28 U.S.C. § 1332(a) (1958) which

The Supreme Court has granted certiorari in the *Bouligny* case[14] and presumably the conflict between the Fourth and Second Circuits will be resolved this term. It would not be sufficient for the Supreme Court merely to rest its decision upon *Chapman*. More than sixty years have passed since the Court considered directly the citizenship of unincorporated associations.[15] In that period there has been extensive reevaluation of diversity jurisdiction,[16] as well as congressional action based in part upon this reevaluation.[17] These developments suggest that the Court should reconsider the *Chapman* rule.

Originally federal jurisdiction over controversies "between citizens of different states"[18] was considered necessary to protect out-of-state litigants from local prejudice in state courts.[19] It was feared that a foreign litigant would be prejudiced by placing his case before a hostile and provincial jury[20] and by litigating in a court with unfamiliar and perhaps inadequate procedure.[21] Furthermore, impartial application of

reads: "The district courts shall have original jurisdiction of all civil actions where the matter in controversy . . . is between—(1) citizens of different states; . . ." See, Puerto Rico v. Russell & Co., 288 U.S. 476, 478-79 (1933).

14. 379 U.S. 958 (1965).

15. The Court has not faced the question directly since Thomas v. Board of Trustees, 195 U.S. 207 (1904).

16. See Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483 (1928); Frankfurter, *Distribution of Judicial Power between United States and State Courts*, 13 CORNELL L.Q. 499 (1928); ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS, pp. 37-38 (Tent. Draft No. 1, 1963) [Hereinafter cited as ALI TENT. DRAFT No. 1]; Parker, *The Federal Jurisdiction and Recent Attacks Upon It*, 18 ABAJ 433 (1932).

17. 28 U.S.C. § 1332 (c) (1958). See S. REP. No. 1830, 85th Cong., 2d Sess., 18 (1958), for the considerations underlying this congressional action.

18. U.S. CONST. art. III, § 2.

19. See authorities cited at note 16 *supra*.

20. It is true that both the state and federal courts draw their juries from the district in which a case is to be tried, but

> State venue provisions often localize the place of trial in small constituencies. In these circumstances justice is likely to be impeded by the provincialism of the local judge and jury. . . . But the federal courts, with their juries drawn on a district-wide basis and with their judges appointed for life . . . have always protected out-of-staters from this type of inadequacy of justice.

ALI, TENT. DRAFT No. 1, p. 41.

21. *Id.* at 37-38. Not only might the procedures in a state be inadequate with respect to such important safeguards for an out-of-state plaintiff as procedures by which the judge can control the jury, but also, the out-of-stater who is familiar with the practices of his own state might find himself totally at a loss in a foreign state.

But see Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1 (1963), where he points out that the procedural disadvantages that the out-of-stater would face would have been no less in the federal courts, as the federal courts, prior to the Federal Rules, were required to follow state procedural rules. Professor Baxter suggests that "the kind of prejudice to be avoided was the application, in cases involving noncitizens of the

the law could not always be expected from judges whose method of appointment and tenure often placed them at the mercy of local politics.[22]

Some commentators have questioned the validity of these fears.[23] Some argue that even if local prejudice existed in 1789 it does not exist now.[24] There are others, however, who feel that actual or feared prejudice still exists to support the continuation of diversity jurisdiction.[25] These claim that a belief in local prejudice, even if unsubstantiated, justifies federal diversity jurisdiction, since it forestalls the development of a foreign party's animosity towards citizens of a sister state whose tribunals gave him what he believed to be less than a fair trial.[26] The tendency to defend diversity jurisdiction on the grounds of apprehension about local prejudice is understandable. It is extremely difficult to obtain evidence concerning the actual effect of prejudice upon the outcome of state litigation,[27] but it is relatively easy to obtain opinion samples which stress apprehension.[28]

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forum, of the rules of law of the forum," as it was thought that "unworthy principles" might be enacted by the states, and men should be protected from such principles of states other than their own by resort to federal law. *Id.* at 37-39.

22. Friendly, *supra* note 16 at 497.

23. See, *e.g.*, *id.* at 493-94.

24. Friendly points out that "[Diversity jursdiction] had its origin in fears of local hostilities, which had only a speculative existence in 1789, and are still less real today. The unifying tendencies of America here make for a recession of jurisdiction to the states, rather than an extension of federal authority." *Id.* at 510.

It has been suggested that since Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938), requiring the federal courts to follow the substantive law of the forum state in diversity cases, it is no longer reasonable to continue diversity jurisdiction, as the state courts are much more competent to apply their own substantive law than are the federal courts.

> . . . With the increasing permeation of national feeling and the mobility of modern life, little excuse is left for diversity jurisdiction, now that *Erie* . . . has put a stop to the unwarranted freedom of the federal courts to fashion rules of local law in defiance of local law.

Lumbermen's Casualty Co. v. Elbert, 348 U.S. 48, 56 (1954) (Frankfurter, J. concurring).

25. "There is a great bulk of expert opinion from those who litigate in the courts that local prejudice continues to exist, and that the Federal courts are in truth a strong protection against it." S. REP. No. 1830, 85th Cong., 2d Sess. 18 (1958). A recent survey of Virginia lawyers revealed that the great majority of them preferred a federal forum whenever possible in order to avoid the consequences of local prejudice. Note, *The Choice Between State and Federal Court in Diversity Cases in Virginia*, 51 VA. L. REV. 178 (1965); Moore & Weckstein, *Diversity Jurisdiction: Past, Present, and Future*, 43 TEXAS L. REV. 1, 15-16 (1965).

26. *Id.* at 18-19; ALI, PROPOSED FINAL DRAFT, 55-56.

27. Since diversity jurisdiction has been continuously provided by various statutes since the first Judiciary Act of 1789, it is difficult to assess the degree to which local prejudice would effect the outcome of litigation in the absence of the jurisdiction.

28. See, *e.g.*, Note, *The Choice Between State and Federal Court in Diversity Cases in Virginia*, 51 VA. L. REV. 178 (1965).

Professors Moore and Weckstein agree with the apprehension rationale, but also feel that federal jurisdiction in cases arising under similar state statutes, such as uniform commercial codes and uniform partnership acts, will lead to greater consistency in the interpretation of these statutes.[29] However, a posited higher quality of federal justice, which Moore and Weckstein describe as "perhaps the most 'common sense' contemporary justification for the jurisdiction,"[30] is probably their foremost reason for supporting diversity. However persuasive these arguments may be they apply to federal jurisdiction generally and not specifically to the fact of diverse citizenship.[31]

It is clear that the traditional functions of diversity jurisdiction are a questionable basis for its continuation. None of the proponents of diversity can state unequivocally that local prejudice exists, or that it is a significant factor in the outcome of state court litigation. Nor are they able to state precisely what the effect of fear of prejudice would be if diversity jurisdiction did not exist. It is equally clear, though, that the critics of the jurisdiction have been unable to prove the absence of local prejudice, the absence of apprehension, or the absence of harmful effects resulting from the apprehension.

This failure of the commentators to establish a conclusive case either for or against diversity jurisdiction is reflected in a failure of Congress to adopt a consistent approach towards the jurisdiction. In 1958, Congress amended the diversity statute[32] to make corporations citizens of the state in which they have their principal place of business and of the state in which they are incorporated. Congress reasoned that a corporation "is so closely tied to the local commercial fabric of that state [of its principal place of business] as to be properly considered a citizen thereof, even though it may have been incorporated elsewhere."[33] Foreign corporations which were "closely tied to the commercial fabric" of a state could not realistically claim that they were strangers to that state and therefore subject to prejudice. But the 1958 legislation did not

29. Moore & Weckstein, *supra* note 25 at 20.

30. *Id.* at 21.

31. Arguments similar to those presented by Moore & Weckstein, *supra* note 25, are advanced by Frank, *For Maintaining Diversity Jurisdiction*, 73 YALE L.J. 7 (1963).

32. 28 U.S.C. § 1332(c) (1958).

33. Report of the Committee on Jurisdiction and Venue of the Judicial Conference of the United States, S. REP. No. 1830, 85th Cong., 2d Sess. 20-21 (1958). It was felt that the 1958 amendment, by eliminating "cases involving corporations which come into Federal district courts on the fictional premise that diversity of citizenship exists" would reduce the workload of the federal courts. S. REP. No. 1830, 85th Cong., 2d Sess. 3 (1958); *Hearing Before the House Committee on Jurisdiction of the Federal Courts Concerning Diversity of Citizenship*, 85th Cong., 2d Sess. 5 (1957).

completely correlate the citizenship of corporations with the possibility of prejudice. Congress might have prevented a corporation from invoking diversity jurisdiction against citizens of states in which the corporation had local establishments when the cause of action arose out of the activities of the local establishment.[34] Here, too, the corporation could not claim that it was really a stranger. But Congress had conflicting purposes. Although it did wish to correlate diversity jurisdiction with local prejudice, perhaps inconsistently it did not desire a great restriction of corporate access to the federal courts.[35]

In spite of this conflict it is fair to say that Congress has accepted, at least in part, the theory that diversity jurisdiction protects against local prejudice. The Supreme Court should begin its review of *Bouligny*, then, by finding a rule which best effectuates this policy of diversity. The two rules presently used by the courts to treat unincorporated associations are unsuccessful.

The *Chapman* rule is inconsistent with the functions of diversity jurisdiction since it prevents access to a federal court if merely one of the hundreds or thousands of members of an association is a citizen of the same state as an opposing party. If a New Jersey plaintiff sued an association which was active solely in New York and most of whose members were citizens of that state, the local prejudice he would suffer at the hands of a New York court would not be affected by the fact that one or several members of the association lived in New Jersey.

Also inconsistent with the purposes of diversity is the rule which allows class actions against unincorporated associations. In a class action

34. The ALI has proposed that:

> No corporation . . . and no partnership, unincorporated association, or sole proprietorship . . . which has and for a period of more than two years has maintained a local establishment in a State, can invoke [diversity] jurisdiction . . . in any district in that State in any action arising out of the activities of that establishment. . . . .
>
> The provisions of this subsection shall apply only to entities organized or operated primarily for the purposes of conducting a trade, investment, or other business enterprise.

ALI PROPOSED FINAL DRAFT § 1302(b).

35. Proposals have been made that corporations should be treated as a citizen of any state in which they are doing business. H.R. 1987, 82 Cong., 2d Sess. (1952). But the Committee on Jurisdiction and Venue of the Judicial Conference of the United States felt that this would too greatly deny corporations "the sort of protection which they need against local prejudice and the benefit of the salutory rules and practice of the Federal Courts." S. REP. No. 1830, 85th Cong., 2d Sess. 20 (1958).

The conflict of purpose is also revealed in the congressional treatment of diversity jurisdiction for individuals. No restrictions are placed upon bringing a diversity action in one's own state, where there could be no danger of local prejudice. 28 U.S.C. § 1332 (1958). But, an individual may not remove to a federal court a case brought against him in the courts of his own state. 28 U.S.C. § 1441(b) (1948).

only the citizenship of the named representatives is considered in determining whether diversity exists. Thus if an association wishes to sue in the federal courts it can create diversity by carefully selecting certain members as representatives of the class. In a similar manner, an individual plaintiff suing an association can create diversity. For example, in *Calagaz v. Calhoon*[36] the plaintiff, a local union, sued the national union for activities which had taken place in the plaintiff's state, Alabama. Since some officials of the national union were citizens of Alabama, to name it as a party to the suit would have defeated diversity jurisdiction. Therefore, the local elected to sue the national in a class action and selected as representatives of the class only officers who were not citizens of Alabama. Such a class action allows federal jurisdiction even when the majority of the association's members have the same citizenship as the opposing party and presumably local prejudice would not be a factor.

Since neither treatment of unincorporated associations relates to local prejudice, the Supreme Court should reject both and seek more responsive rules. The Court could avoid the effects of *Chapman* by overruling *Strawbridge v. Curtiss*,[37] which required complete diversity. However, this treatment would not be related to local prejudice since diversity of citizenship between only one member of an association and an opposing party would suffice to bring a case into federal court.[38] Moreover, overruling *Strawbridge* would expand federal diversity jurisdiction in many other areas and therefore would be contrary to recent congressional action.[39]

The Court might turn to the treatment adopted by the Second Circuit in *Mason v. American Express Co.*[40] Relying upon the similarity between a joint stock company and a corporation, the court gave the

36. 309 F.2d 248 (5th Cir. 1962).

37. 7 U.S. (3 Cranch) 267 (1806).

38. Professors Moore and Weckstein argue that the complete diversity requirement of *Strawbridge* is not demanded by the terms of the jurisdictional grant in the Constitution, and that if any plaintiff and one defendant are of diverse citizenship, the terms of the Constitutional grant of jurisdiction will be met. *Diversity Jurisdiction: Past, Present and Future*, 43 TEX. L. REV. 1, 27-28 (1965). See also *Supporting Memorandum A*, ALI PROPOSED FINAL DRAFT 127-38, which draws a similar conclusion concerning the Constitutional status of *Strawbridge*.

39. The congressional hearings on the 1958 amendment to 28 U.S.C. § 1332 refer to the aim of reducing the burden of federal courts. See materials cited at note 33 *supra*. See also 28 U.S.C. § 1332(d) (1964) which dealt specifically with diversity of citizenship when a plaintiff sues an insurance company, whether incorporated or not, under a direct action statute, but which indicated Congress' desire to limit access to the federal courts.

40. 334 F.2d 392 (2d Cir. 1964). See text following note 7 *supra*.

association the same citizenship it would have had if it were in fact a corporation—the state where it maintained its principal place of business. *Mason* was more responsive to the functions of diversity jurisdiction than *Chapman*. Since the association was located in and directed its operations from New York, it would face no more prejudice in that state than a New York corporation. However, *Mason* would not be successful in all cases. The American Express Company, while so involved in New York that it should not be entitled to invoke the stranger's right to a federal forum, might also be similarly involved in other states. Yet, under *Mason*, the association would be allowed a federal forum in actions against the citizens of these states.

An alternative approach would be to make an association a citizen of every state in which it is locally established.[41] It might be argued that if an association has active branches or locals within a state, it should not be treated as an out-of-stater who is likely to suffer prejudice in the state's courts.[42] The association has chosen to be present in the state, and it has ample opportunity to become acquainted with and even to affect the administration of the state's judicial system.[43] However, if an association was involved in state litigation but its local branches were not, the court might never know of the existence of the local branch, and the association would face the same prejudice as any other foreign party. Conversely, a plaintiff who sued an association in a state in which it exercised a dominant influence would not be protected from local prejudice simply because a branch of the association was located in his home state.

The most responsive alternative would treat an association as a citizen only of that state in which it had its principal place of business,[44] but would not allow it to invoke diversity jurisdiction in a state in which it had a local business establishment when the action arose out of the activities of that establishment.[45] Also, no party could invoke diver-

41. See note 35 *supra*.

42. See ALI, PROPOSED FINAL DRAFT 57.

43. *Id.* at 56-57.

44. [T]he district courts shall have jurisdiction, original or on removal of any civil action between—
(1) citizens of different States . . .
(b) For the purposes of this section . . .
(2) . . . . A partnership or other unincorporated association capable of suing or being sued as an entity in the State in which the action is brought shall be deemed a citizen of the State . . . where it has its principal place of business. . . .

Id. § 1301(a)(b).

45. *Id.* § 1302(b), quoted at note 34 *supra*.

sity jurisdiction in his own state.[46] This proposal avoids many of the difficulties of the previous suggestions. First, it does not prevent the association from invoking diversity jurisdiction unless it is clear that the local state court will be aware of the local establishment's existence. And second, the proposal does not deprive the association's opponent of his right to federal diversity jurisdiction unless his state and the association's principle place of business are the same, even though the association might have a local establishment in his state.[47] Unfortunately a court cannot adopt this proposal without disregarding Congress since the proposal contravenes the diversity and removal statutes,[48] and is inconsistent with the present treatment of individuals and corporations, both of whom can invoke diversity jurisdiction in their own state. If the proposal is adopted it is Congress which must authorize these inconsistencies.[49]

The Court, then, is left with two alternatives. Either it can simply follow *Chapman* upon the theory that the policies of predictability and stabilization of expectations should be advanced. Or the Court can overrule *Chapman* and treat associations as much like corporations as possible. The first of these alternatives would be a misapplication of *stare decisis*. The *Chapman* rule has not, in fact, proven predictable. The use of class actions and decisions like *Mason* have undercut the rule significantly, and have made following *Chapman* on the grounds of predictability senseless.

The second alternative is the only feasible one for the Court. The Court should rationalize the law dealing with associations and the law dealing with corporations by adopting a principal place of business test for association citizenship since it is the only test closely resembling the treatment of corporations. Prior to the 1958 amendment, this ratio-

46. *Id.* § 1302(a).

47. The fact that the association has a branch in the plaintiff's state would seem to eliminate any disadvantage to either party in state courts, but were the plaintiff to sue the national association in the state of its principal place of business, the fact that the association was located in his home state would not save him from the partiality towards the national association, nor would it help him surmount the difficulty of facing an unfamiliar state procedure.

48. See 28 U.S.C. §§ 1332, 1391, and 1441. If the association's citizenship were defined as being in the state of its principal place of business, under these statutes, the association would be allowed to bring a diversity action in any state where all plaintiffs or all defendants reside, and it would be able to remove an action on grounds of diversity jurisdiction.

49. The ALI's proposals were advanced as a part of a comprehensive legislative scheme which would, if enacted, significantly change the statutes cited *supra* note 48, providing for the bringing and removing of diversity actions. They would treat corporations, associations and individuals similarly in limiting their access to federal courts in those states in which they are active participants. See generally ALI, PROPOSED FINAL DRAFT.

nalization would have been more difficult, since the earlier treatment of corporations was based upon the existence of a charter, a basis which could not be applied to unnicorporated associations. But the 1958 legislation, by attributing to corporations a citizenship of their principal place of business, also provided a means that could be used to deal with unincorporated associations.[50] The application of this test would allow similar entities to be treated similarly. This rationalization should outweigh the fact that although the 1958 amendment reduced corporate access to federal courts, its application to unincorporated associations would increase their access. Moreover, the functions Congress intended the 1958 legislation to serve would be served also by treating unincorporated associations as citizens of their principal place of business.[51]

Treating unincorporated associations like corporations would present some administrative difficulties, for example in pleading jurisdictional facts. It is a settled rule that a plaintiff must allege positively the facts upon which the court's jurisdiction depends.[52] If this rule forced the plaintiff to locate the association's principal place of business, it would impose a burden upon the plaintiff that he would often be unable to meet. The difficulty of showing the precise location of a principal place of business has been avoided in suits against corporations under the 1958 amendment by allowing plaintiff to plead that the corporation

50. The *Bouligny* court argued from a different direction, suggesting that prior to the 1958 amendment the courts could "substantially equate unincorporated associations with corporations by a minor feat of interpretation." United Steelworkers of America v. Bouligny, Inc., 336 F.2d 160, 164 (4th Cir. 1964). But in making this argument, the court did not face the difficulty confronting a judge in the face of the rationale for corporations based on the existence of a charter.

It might also be suggested that it would be improper for the courts to adopt the principal place of business test for association citizenship, since Congress failed to include unincorporated associations in 28 U.S.C. § 1332(c) (1958); *but see* 28 U.S.C. § 1332(d) (1964) dealing with a specific form of unincorporated association. There is no indication that Congress even considered the status of unincorporated associations in 1958, and the failure of Congress to enact a rule governing the citizenship of associations in 1958 is not equivalent to congressional action denying them citizenship for jurisdictional purposes.

> True it is that when a rule has been established by legislation, however undesirable it may be, it is for the legislature alone to remedy the situation. . . . But when the rule is one of common law established by the courts the remedy lies with either the Legislature or the courts, and inaction by the one does not preclude action by the other.

Reimann v. Monmouth Consolidated Water Co., 9 N.J. 134, 150, 87 A.2d 325, 333 (1952) (Vanderbilt, C. J. dissenting).

51. Congress did intend by the 1958 amendment to relate the citizenship of corporations for diversity purposes to the likelihood that they would experience local prejudice in the states in which they did business. See Browne v. Hartford Fire Ins. Co., 168 F. Supp. 796, 798 (N.D. Ill. 1959). See also legislative material cited *supra* note 33.

52. 2 MOORE, FEDERAL PRACTICE, ¶ 8.07 [1], 1639 (2d ed. 1964).

"does not have its principal place of business in the state . . . of which the plaintiff is a citizen," and is incorporated in a particular state different from the plaintiff's.[53] However, perhaps the pleadings allowed for suits against corporations are not relevant in suits against associations, since the corporate pleading at least establishes the corporation as citizen in the incorporating state.[54] But it is not necessary to rely solely upon the corporate pleading analogy since there is other authority that plaintiff may allege merely that the association's citizenship is different from his own, without locating its precise citizenship.[55] This pleading would meet the requirement of the positive averment of jurisdiction, since the pleading establishes that plaintiff and defendant are citizens of different states. Defendant should not be allowed merely to deny that its principal place of business is in a state other than the plaintiff's; in order to defeat diversity jurisdiction it should be required to allege either that its principal place of business is in the plaintiff's state or that it has no principal place of business and is therefore not a citizen of any state. The burden of proving the former allegation should be on the defendant, because the information to locate the association's principal place of business would be peculiarly in its possession, and because it would be extremely difficult for the plaintiff to disprove defendant's allegation. An allegation of statelessness should probably place upon the plaintiff the burden of showing that the defendant association did have a principal place of business in some state.[56] When an

53. 2 MOORE, FEDERAL PRACTICE, ¶ 8.10, 1658 n.24 (2d ed. 1964).

54. For diversity jurisdiction to be established, it is not sufficient merely to allege that plaintiff and defendant are not citizens of the same state, for if one party is stateless, they will not be "citizens of different states" and there will be no federal jurisdiction. Blair Holdings Corp. v. Rubinstein, 122 F. Supp. 602 (S.D.N.Y. 1954).

55. In Douglas v. United Electrical Workers, 127 F. Supp. 795 (E.D. Mich. 1955), plaintiff sued an unincorporated labor union and certain individuals. Jurisdiction was not established with respect to the union, as there was no allegation of the citizenship of its individual members, but the court held that the union was not an indispensable party, and that the action could have been maintained against the individual defendants if jurisdiction had been properly alleged. Plaintiff had alleged that the individual defendants were "non-residents" of the State of Michigan, and the court held that if the plaintiff had alleged instead that they were "residents of a state other than Michigan," jurisdiction would have been established. The court's language suggests that an allegation of the particular states of which the individual defendants were citizens would not have been required. *Id.* at 796. In Blair Holdings Corp. v. Rubinstein, *supra* note 54, the plaintiff only alleged that Rubinstein was not a citizen of the United States, but it also presented affidavits that Rubinstein was a citizen of either the USSR or of Portugal. This indefinite averment of the defendant's citizenship would have been sufficient if he had not denied that he was a citizen of any nation, thus putting on the plaintiff the burden of proving that he was a citizen of some foreign state. *Id.* at 603.

56. If the facts necessary to establish jurisdiction are denied by the defendant, the plaintiff normally has the burden of proving them. 2 MOORE, FEDERAL PRACTICE, ¶ 8.07 [1], 1640 (2d ed. 1964); Blair Holdings Corp. v. Rubinstein, *supra* note 54.

association is plaintiff it should be required, as are corporations, to allege the specific location of its principal place of business.

Were the Supreme Court to adopt a principal place of business test, further action would be required to prevent the use of the class action device to avoid this rule, as it has avoided *Chapman* in the past.[57] Possibilities of circumvention could be eliminated if the courts looked beyond the citizenship of the named representatives and imputed the citizenship of the association to them. Since the rights and liabilities of the representatives would have been determined by the activities of the association,[58] the imputation would be justified. In other cases involving similar devices for the arbitrary creation of diversity, the courts have looked beyond the parties before them. For example, when a cause of action has been assigned, federal courts will determine whether the assignor would have been able to invoke diversity jurisdiction, and if not, the courts will not allow the assignee's action.[59] Therefore if the Supreme Court follows the 1958 amendments, and adopts a principal place of business test for unincorporated associations, the Court also can insure that the rule be effective by eliminating the class action abuses.

57. See text accompanying note 36 *supra*.

The class action abuse could be eliminated by a ruling by the Court that associations cannot sue or be sued in class actions under FED. R. CIV. P. 23(a), since the association as an entity is not within the definition applying the Rule to parties too numerous to be brought before the court. But such a ruling would make it impossible for associations to sue or be sued in Federal court in the few states where associations may not be sued as an entity. FED. R. CIV. P 17(b) requires that Federal courts follow state law to determine a litigant's capacity to sue or be sued.

58. The class action determines the rights and liabilities of the class as a whole. Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921). Those who sue or defend as representatives of a class are presumed to represent the rights of the class as a whole. STORY, EQUITY PLEADINGS § 107 (10th ed. 1892).

59. In Le Mieux Bros., Inc. v. Tremont Lumber Co., 140 F.2d 387 (5th Cir. 1944), the court, following 28 U.S.C. § 41(1) (1940), held that if an action was assigned, diversity jurisdiction could be invoked only if it would have been proper had the assignor brought the action. Congress revised this statute to read:

> A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has improperly or collusively been made or joined to invoke the jurisdiction of such court.

28 U.S.C. § 1359 (1958). The notes to this revision explain that its purpose was to prevent the arbitrary control of choice of forum which would otherwise be available to a plaintiff who could assign his cause of action to create diversity.