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NOTES

WHO ARE THE REAL PARTIES IN INTEREST FOR PURPOSES OF DETERMINING DIVERSITY JURISDICTION FOR LIMITED PARTNERSHIPS?

The United States Constitution unequivocally vests the federal courts with jurisdiction over cases involving controversies between “citizens of different states.”¹ Section 1332(a) of Title 28 of the United States Code² codifies federal court diversity jurisdiction.³ While Congress specifically included corporations within the statutory definition of citizens,⁴ no similar uniform rule exists for dealing with unincorporated associations.⁵ As a result of this omission, courts have treated

1. “The judicial Power shall extend to . . . Controversies . . . between Citizens of different States.” U.S. CONST. art. III, § 2.

2. Section 1332(a) provides in pertinent part:

The district court shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and is between . . . citizens of different States.

28 U.S.C. § 1332(a) (1976).

3. The term “diversity jurisdiction,” as used in this Note, refers to federal jurisdiction based on complete diversity of citizenship between the plaintiff and defendant. The phrase actually embraces cases in which jurisdiction is predicated upon either diversity or alienage. For a discussion of the history and purposes behind the grant of diversity jurisdiction to the federal courts see 13 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3601 (1972) [hereinafter cited as WRIGHT & MILLER].

4. “[A] corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business.” 28 U.S.C. § 1332(c) (1976).

5. The term “unincorporated association” includes partnerships, limited partnerships, joint stock associations, business trusts, labor unions, and fraternal organizations. 13 WRIGHT & MILLER, *supra* note 3, § 3630. Since 1900, the Supreme Court has treated unincorporated associations as aggregates of individuals. See *Great So. Fire Proof Hotel Co. v. Jones*, 177 U.S. 449 (1900). For purposes of diversity jurisdiction, the Court considers the citizenship of each of the “persons composing” the association relevant. *Id.* at 456. See *infra* text accompanying notes 33-38.

In *United Steelworkers of Am. v. R.H. Bouligny Inc.*, 382 U.S. 145, 147 (1965), the Supreme Court held that the citizenship of an unincorporated labor union is determined by the citizenship of each of its members. In response to the Court’s holding, the American Law Institute proposed that Congress give unincorporated associations the same “fictional treatment long accorded to corporations with respect to citizenship and . . . locate them for diversity purposes in the state of their principal place of business.” AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURIS-

associations,⁶ particularly limited partnerships,⁷ with uncertainty when

DICTION BETWEEN STATE AND FEDERAL COURTS (Official Draft 1965) [hereinafter cited as ALI STUDY].

State statutes governing unincorporated business associations confer varying legal rights on the members of these associations. *See, e.g.*, UNIFORM LIMITED PARTNERSHIP ACT (ULPA) § 7, 6 U.L.A. 582 (1969) (limited partner not liable to creditors); ULPA § 9, 6 U.L.A. 586 (rights, powers, and liabilities of a general partner); ULPA § 10, 6 U.L.A. 590 (rights of a limited partner); ULPA § 26, 6 U.L.A. 614 (parties to an action). Some state statutes accord unincorporated associations the capacity to sue and be sued in the association name. *See, e.g.*, CONN. GEN. STAT. ANN. § 52-112 (West 1975); MICH. COMP. LAWS ANN. § 600.2051(2) (1968); N.Y. CIV. PRAC. LAW § 1025 (McKinney 1976).

Federal courts disagree about the roles these varying statutes should play in determining citizenship of unincorporated associations. In recent years, federal courts have employed three alternative methods to gain jurisdiction over unincorporated associations. The association may sue or be sued: (1) as an entity under an applicable state common name statute; (2) as an aggregate of individuals, either by joinder of all members, when they are jointly liable, or individually, when the members are severally liable; and (3) as a class, by designating one or more members of the association as representative of the class composed of all the members. 7A WRIGHT & MILLER, *supra* note 3, § 1861, at 451-53. This Note is limited to a discussion and analysis of the second method.

6. As distinguished from a corporation, an "association" is a group of persons organized without a charter, but acting together in the methods and forms used by incorporated bodies for the pursuit of some common enterprise. *Hecht v. Malley*, 265 U.S. 144, 157 (1924). Unlike a corporation, an association is not ordinarily a legal entity distinct from its individual members. *See, e.g.*, *Brocki v. American Express Co.*, 279 F.2d 785, 787 (6th Cir. 1960); *Sperry Prods. v. Association of Am. R.Rs.*, 44 F. Supp. 660, 662-63 (S.D.N.Y.), *rev'd on other grounds*, 132 F.2d 408 (2d Cir.), *cert. denied*, 319 U.S. 744 (1942). Moreover, unincorporated associations are not accorded the status of jural persons. *E.g.*, *Calagoz v. Calhoon*, 309 F.2d 248, 251 (5th Cir. 1962); *Lowry v. International Bhd. of Boilermakers*, 259 F.2d 568, 570 (5th Cir. 1958). *See generally* H. HART & H. WECHSLER, *FEDERAL COURTS & THE FEDERAL SYSTEM* 917 (1st ed. 1953); 3A J. MOORE & J. LUCAS, *J. MOORE'S FEDERAL PRACTICE* ¶ 17.25 (1982). For a discussion of unincorporated associations, see *supra* note 5.

7. Originally the limited partnership was used by small groups of investors to conduct intra-state transactions. More recently, it has grown in popularity and is used as a method for securing capital for all forms of business ventures. Often a limited partnership will involve hundreds of investors, and will engage in multistate business transactions. Comment, *Limited Partnerships and Federal Diversity Jurisdiction*, 45 U. CHI. L. REV. 384, 394-95 (1975). According to the ULPA, limited partnerships are composed of general and limited partners. ULPA §§ 1, 9-10, 6 U.L.A. 562, 590. The rights, powers, and liabilities of the two types of partners vary greatly. *See infra* note 22 and accompanying text. Professor Bromberg describes the limited partnership as follows:

A limited partnership is formed by compliance with statutory requirements. It consists of (a) general partners, who manage the business and have the same liability as in an ordinary partnership, and (b) limited partners, who take no part in management, share profits, and do not share losses beyond their capital contributions to the firm. A limited partner may forfeit his limited liability by taking part in control of the business. In most other respects, limited partnerships are like general partnerships.

A. BROMBERG, *CRANE AND BROMBERG ON PARTNERSHIPS* § 26, at 143 (1968). The main purpose of such a relationship is to persuade people who have capital to become partners with those who possess skill. Because limited liability follows the limited partner, he is not responsible for the general obligations of the partnership. Only the capital contribution is imperiled. *Id.*

determining diversity jurisdiction.

In *Colonial Realty Corp. v. Bache Co.*,⁸ the Second Circuit, recognizing that under applicable state law a limited partner lacked capacity to sue on behalf of the partnership in the situation which gave rise to the litigation, concluded that only the citizenship of general partners was relevant to the diversity determination.⁹ More than a decade later the Third Circuit, in *Carlsberg Resources Corp. v. Cambria Savings & Loan Association*,¹⁰ expressly rejected the rule laid down in *Colonial Realty* and held that the citizenship of both limited and general partners was relevant to the diversity determination.¹¹ The Supreme Court has not considered this precise issue and the split of opinion continues to grow. The Fifth Circuit and at least one federal district court in the Fourth Circuit¹² follow *Colonial Realty* while the Third Circuit steadfastly continues to follow its decision in *Carlsberg Resources*.¹³

In *Navarro Savings Association v. Lee*,¹⁴ the Supreme Court addressed a related question when it clarified the application of federal diversity jurisdiction to cases involving a different form of unincorporated association—the business trust.¹⁵ The Court applied its long-standing rule that only the citizenship of those who are “real and substantial parties to the controversy” determines diversity jurisdiction.¹⁶ Thus, the citizenship of the beneficial shareholders, who retained se-

8. 358 F.2d 178 (2d Cir.), cert. denied, 385 U.S. 817 (1966).

9. *Id.* at 183.

10. 554 F.2d 1254 (3d Cir. 1977).

11. *Id.* at 1260-61.

12. See *Lee v. Navarro Sav. Ass'n*, 597 F.2d 421 (5th Cir.), *aff'd*, 446 U.S. 458 (1980); *C.P. Robinson Co. v. National Corp. for Hous. Partnerships*, 375 F. Supp. 446 (M.D.N.C. 1974).

13. See *Trent Realty Ass'n v. First Fed. Sav. & Loan Ass'n*, 657 F.2d 29 (3d Cir. 1981).

14. 446 U.S. 458 (1980), *aff'g* 597 F.2d 421 (5th Cir. 1979).

15. A business trust is a voluntary association which possesses many of the attributes of a corporation without formal incorporation and its attendant statutory regulation. The Supreme Court has defined the business trust as:

[A] form of business organization . . . consisting essentially of an arrangement whereby property is conveyed to trustees, in accordance with the terms of an instrument of trust, to be held and managed for the benefit of such persons as may from time to time be the holders of transferable certificates issued by the trustees showing the shares into which the beneficial interest in the property is divided.

Hecht v. Malley, 265 U.S. 144, 146-47 (1924). *Accord* *Goldwater v. Olman*, 210 Cal. 408, 416, 292 P. 624, 627 (1930) (per curiam) (trust created when legal title to property transferred to trustees with accompanying managerial and discretionary powers over principal and profits of the enterprise); *Enochs & Flowers, Ltd. v. Roell*, 170 Miss. 44, 51, 154 So. 299, 300-01 (1934) (defining “trust” as a business organization in which property is conveyed to trustees who hold and manage it for the beneficiaries).

16. The real party in interest terminology first appeared in *Wormley v. Wormley*, 21 U.S. (8

verely restricted powers of intervention and control, was irrelevant and the trustees possessed the right to invoke the diversity jurisdiction of the federal court on the basis of their own citizenship.¹⁷ By rejecting both the incorporated and unincorporated association analogies, the Court impliedly refused to extend its decision beyond this particular form of unincorporated association.¹⁸ Despite this tacit limitation to business trusts, however, the majority's interpretation of the real party in interest doctrine is potentially applicable to determinations of diversity jurisdiction involving other unincorporated associations.¹⁹

A year after the Supreme Court's decision in *Navarro*, the Third Circuit refused to apply the *Navarro* real party in interest reasoning to limited partnerships.²⁰ In *Trent Realty Association v. First Federal Savings & Loan Association*,²¹ the court held that the citizenship of limited partners,²² as well as general partners,²³ must be considered for pur-

Wheat.) 421 (1823). Addressing the issue of joinder of parties in a suit involving actions by a trustee allegedly constituting a breach of trust, the Court stated:

This Court will not suffer its jurisdiction to be ousted by the mere joinder or non-joinder of formal parties; but will rather proceed without them, and decide upon the merits of the case between the parties, who have the real interests before it, whenever it can be done without prejudice to the rights of others.

Id. at 451 (citation omitted).

17. 446 U.S. at 458, 465-66.

18. Justice Blackmun, the only dissenter in *Navarro*, stated that he was "troubled by the Court's intimation that business trusts are to be treated differently from other functionally analogous business associations—partnerships, limited partnerships, joint stock companies, and the like." *Id.* at 475 (Blackmun, J., dissenting). Additionally, Justice Blackmun stated that the majority opinion expressed no view on the appropriate method for determining the citizenship of limited partnerships. *Id.* at 475 n.6.

19. Courts and commentators have advocated that the application of the real party in interest test to diversity determinations is most consistent with the policy behind the jurisdictional statutes. See, e.g., *Carlsberg Resources Corp. v. Cambria Savs. & Loan Ass'n*, 554 F.2d 1254, 1262 (1977) (Hunter, J., dissenting); Comment, *Diversity Jurisdiction over Unincorporated Business Entities: The Real Party in Interest as a Jurisdictional Rule*, 56 TEX. L. REV. 243, 250-51 (1978); Comment, *supra* note 7, at 410-11, 417-18.

20. *Trent Realty Ass'n v. First Fed. Savs. & Loan Ass'n*, 657 F.2d 29, 32 (3d Cir. 1981).

21. 657 F.2d 29 (3d Cir. 1981).

22. The ULPA provides that limited partners are not "bound by the obligations of the partnership." ULPA § 1, 6 U.L.A. 586. Nor shall a limited partner "become liable as a general partner unless, in addition to the exercise of his rights and powers as a limited partner, he takes part in the control of the business." *Id.* § 7, 6 U.L.A. 38-39. Additionally a limited partner is "not a proper party to proceedings by or against a partnership, except where the object is to enforce . . . [his] right against or liability to the partnership." *Id.* § 26, 6 U.L.A. 349. For a discussion of the varied interpretations of the ULPA and the degree of reliance to be reasonably placed upon the Act's declaration of limited liability, see A. BROMBERG, *supra* note 7, § 26, at 147-50.

23. Like officers in a corporation, general partners assume the managerial responsibilities of the partnership. General partners, however, are personally liable in suits against the partnership.

poses of determining diversity jurisdiction.²⁴ The Third Circuit found nothing in *Navarro* that compelled application of the real party in interest test to limited partnerships.²⁵ Concluding that the Court's decision in *Navarro* had not overruled a previous circuit decision on the citizenship of limited partnerships,²⁶ the Third Circuit felt bound by precedent. As a result, it was unable to adopt a view that would look only to the citizenship of general partners in determining whether federal jurisdiction exists.²⁷

This Note analyzes the Supreme Court's decision in *Navarro* and examines the use of the real party in interest doctrine to resolve the current split of opinion surrounding determinations of diversity citizenship for limited partnerships. Section I traces the development of diversity jurisdiction determinations in suits involving unincorporated associations. Section II discusses the unresolved conflict among the federal courts over the determination of diversity jurisdiction for limited partnerships. Section III analyzes the *Navarro* decision its interpretation by the Third Circuit in *Trent Realty*. This Note concludes by suggesting that courts should apply the real party in interest reasoning employed by the Supreme Court in *Navarro* to cases involving limited partnerships, and thereby follow the approach first advocated by the Second Circuit in *Colonial Realty*.

I. DETERMINING DIVERSITY FOR UNINCORPORATED ASSOCIATIONS

The theory that a corporation is considered a citizen of the state of its incorporation, for purposes of diversity jurisdiction, is now well settled

ULPA § 9, 6 U.L.A. 586 (rights, powers, and liabilities of a general partner). *See also supra* note 7.

24. 657 F.2d at 32.

25. *Id.*

26. "We do not read *Navarro* to require us to depart from the precedent of *Carlsberg Resources*." *Id.* (construing *Carlsberg Resources Corp. v. Cambria Sav. & Loan Ass'n*, 554 F.2d 1254 (3d Cir. 1977)) (holding that citizenship of limited partners must be considered in determining if complete diversity exists). *See infra* notes 48-68 and accompanying text.

27. 657 F.2d at 32. For cases declaring that identity of citizenship between a limited partner and the opposing party does not destroy diversity, see *Colonial Realty Corp. v. Bache & Co.*, 358 F.2d 178, 183-84 (2d Cir.), *cert. denied*, 385 U.S. 817 (1966); *Robinson Constr. Co. v. National Corp. for Hous. Partnerships*, 375 F. Supp. 446, 449 (M.D.N.C. 1974). *Cf.* *Mason v. American Express Co.*, 334 F.2d 392, 401 (2d Cir. 1964) (joint stock association is citizen of the state where formed); *Van Sant v. American Express Co.*, 169 F.2d 355, 371 (3d Cir. 1948) (same); *Erving v. Virginia Squires Basketball Club*, 349 F. Supp. 709, 711 (E.D.N.Y. 1972) (limited partnership is citizen of state of its sole general partner); *Sands v. Galler*, 321 F. Supp. 558, 561 (S.D.N.Y. 1971) (*dictum*) (same).

doctrine.²⁸ Moreover, section 1332(c) of Title 28 of the United States Code provides that a corporation is a citizen of any state by which it has been incorporated and in which it maintains its principal place of business.²⁹ No statute similarly provides for the citizenship of unincorporated associations, however. As a result, two methods have evolved to assess the citizenship of unincorporated associations for purposes of diversity. Using one approach, the court examines the association's characteristics to determine if it is sufficiently corporate-like to be treated as an incorporated entity. If so, the court assigns citizenship on the basis of the state of association.³⁰ Using the other method, the court foregoes the corporate analogy and considers the unincorporated association as a mere collection of individuals.³¹ Diversity under this method therefore depends upon the citizenship of the "persons composing" the association.³²

28. In the 1958 amendment to § 1332(c), the Senate Judiciary Committee stated that "[i]t is now established doctrine that a corporation, for the purposes of jurisdiction, is deemed a citizen of the State in which it is incorporated." S. REP. NO. 1830, 85th Cong., 2d Sess., *reprinted in* 1958 U.S. CODE CONG. & AD. NEWS 3099, 3101.

29. 28 U.S.C. § 1332(c) (1976).

30. *See, e.g.*, *Puerto Rico v. Russell & Co.*, 288 U.S. 476 (1933); *Mason v. American Express Co.*, 334 F.2d 392 (2d Cir. 1964); *Baltimore & O. R.R. v. Adams Express Co.*, 22 F. 404 (C.C.D. Md. 1884); *Fargo v. Louisville, N.A. & C. Ry.*, 6 F. 787 (C.C.D. Ind. 1881); *Maltz v. American Express Co.*, 16 F. Cas. 566 (C.C.E.D. Mich. 1876).

Puerto Rico v. Russell & Co., 288 U.S. 476 (1933) involved the question of whether a *sociedad en comandita*, an unincorporated association organized under Puerto Rican law, could be treated as a citizen for purposes of diversity. Departing from prior decisions which focused upon whether or not a state had granted an organization a corporate label, the Court examined the *sociedad's* essential characteristics in light of the law under which the association was created. The Court then determined whether these features entitled it to corporate diversity treatment. Among the important characteristics upon which the Court focused were its creation pursuant to publicly filed articles of association and its capacity to contract, own property, transact business and litigate in its own name. The Court also considered the *sociedad's* powers of management vested in the hands of managers who alone could act to legally bind the group. *Id.* at 481.

In *Mason v. American Express Co.*, 334 F.2d 392 (2d Cir. 1964), the Second Circuit followed the Supreme Court's lead and examined the essential characteristics of the organization before it determined whether the organization was complete enough to warrant treatment as a separate entity for diversity purposes. The court found that the New York joint stock association exhibited virtually all of the corporate-like characteristics identified by the Supreme Court in the *sociedad*. Thus, the court reasoned, these essential characteristics were sufficient to invest the joint stock association with a legal personality separate from that of its individual members. *Id.* at 399-400.

31. *See, e.g.*, *United Steelworkers of Am. v. R.H. Bouligny*, 382 U.S. 145 (1965) (unincorporated labor union); *Great So. Fire Proof Hotel Co. v. Jones*, 177 U.S. 449 (1900) (limited partnership); *Chapman v. Barney*, 129 U.S. 677 (1889) (unincorporated joint stock company); *Carlsberg Resources Corp. v. Cambria Sav. & Loan Ass'n*, 554 F.2d 1254 (3d Cir. 1977); *Colonial Realty Corp. v. Bache Co.*, 358 F.2d 178 (2d Cir.), *cert. denied*, 385 U.S. 817 (1966).

32. *Great So. Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 456 (1900).

The Supreme Court has applied the “persons composing” test to all forms of unincorporated associations. In *Chapman v. Barney*,³³ the Court held that a joint stock company³⁴ organized under New York law was not a corporation.³⁵ As a result, the company could not invoke federal jurisdiction unless it alleged that all of the members were shown to be of citizenship diverse from that of the opposing party.³⁶ Relying on *Chapman*, the Court, in *Great Southern Fire Proof Hotel Co. v. Jones*³⁷ extended its reasoning to limited partnerships and held that diversity jurisdiction must be determined by looking to the citizenship of both the limited and general partners.³⁸

Some lower courts have further refined this “persons composing” approach by distinguishing between those partners who should and should not be considered relevant to diversity jurisdiction determinations.³⁹ Underlying this refinement is a deference to the Supreme Court mandate that jurisdiction should turn upon the citizenship of only those persons with real and substantial interests in the controversy.⁴⁰ Courts employing this reasoning determine the real parties in

33. 129 U.S. 677 (1889). *Chapman* was the Supreme Court’s first opportunity to address the issue of citizenship of unincorporated associations.

34. A joint stock company is a form of unincorporated association. *See supra* note 5. It is a non-statutory business organization created by agreement of the parties. Like a corporation, a joint stock company has centralized management and transferable shares, although the members maintain property rights and liabilities similar to partners in a general partnership. A. BROMBERG, *supra* note 7, § 34. *See generally* R. ROWLEY & D. SIVE, *ROWLEY ON PARTNERSHIP* 610-12 (2d ed. 1960).

35. 129 U.S. at 682. The Court reasoned that “although it may be authorized by the laws of the State of New York to bring suit in the name of its president, that fact cannot give the company power, by that name, to sue in federal court.” *Id.*

36. *Id.*

37. 177 U.S. 449 (1900).

38. *Id.* at 456. Over forty years later, the Supreme Court returned to consideration of the citizenship of an unincorporated association. In *United Steelworkers of Am. v. R.H. Bouligny*, 382 U.S. 145 (1965), the Court addressed the question of whether a labor union could be considered a citizen of the state of its principal place of business for diversity purposes without regard to the citizenship of its members. Writing for a unanimous court, Justice Fortas relied on *Chapman* in concluding that the union could not be treated as an entity and, therefore, the citizenship of its members controlled the diversity determination. *Id.* at 151. Justice Fortas discussed the practical difficulties in treating a union as an entity for diversity purposes. Unlike corporations, all of which have a chartering state and a principal place of business, labor unions may have local, district, and international organizations but no state of formal organization. *Id.* at 152. Therefore, the Court refused to extend diversity jurisdiction, concluding that only Congress could extend entity citizenship to unincorporated labor unions. *Id.* at 150-51.

39. *See supra* text accompanying notes 8-13.

40. *See supra* note 16.

interest by looking to those members of the limited partnership who are vested with the capacity to sue.⁴¹ Federal courts disagree, however, whether to adopt this modification of the *Chapman-Great Southern* rule. An examination of the opinions of the Second and Third Circuits clearly illustrates the controversy which exists among lower courts.

II. THE *COLONIAL REALTY*—*CARLSBERG RESOURCES* CONFLICT

The Court of Appeals for the Second Circuit was the first federal appellate court to address the question of which members of a limited partnership—general partners or general partners and limited partners—were relevant to a determination of diversity jurisdiction. In *Colonial Realty Corp. v. Bache Co.*,⁴² the court acknowledged the rule established in *Great Southern*,⁴³ but concluded that only the citizenship of general partners was relevant for purposes of diversity jurisdiction.⁴⁴ Judge Friendly, writing for the court, based this conclusion upon a provision of the New York Partnership Law, which provides that a limited partner is not a proper party to proceedings by or against a partnership, unless the suit is one to enforce his rights against or liability to the partnership.⁴⁵ Reasoning that a limited partner lacked capacity to sue in the situation before the court, the court held that identity of citizenship between the plaintiff and a limited partner did not destroy jurisdiction properly founded upon complete diversity between the plaintiff and each general partner.⁴⁶ Courts in the Fourth and Fifth Circuits⁴⁷ follow the rule announced by the Second Circuit in *Colonial Realty*.

In *Carlsberg Resources Corp. v. Cambria Savings & Loan Associa-*

41. See *supra* notes 7, 19 & 22.

42. 358 F.2d 178 (2d Cir.), *cert. denied*, 385 U.S. 817 (1966).

43. 177 U.S. 449 (1900). See *supra* notes 38 & 39 and accompanying text.

44. 358 F.2d at 183.

45. N.Y. PARTNERSHIP LAW § 115 (McKinney 1948). This law is virtually identical to ULPA § 26. See *supra* note 22.

46. 358 F.2d at 184.

47. See *Lee v. Navarro Sav. Ass'n*, 597 F.2d 421, 425 (5th Cir.), *aff'd*, 446 U.S. 458 (1980); *C.P. Robinson Co. v. National Corp. for Hous. Partnerships*, 375 F. Supp. 446, 449 (M.D.N.C. 1974). See generally Note, *Diversity Jurisdiction and Limited Partnerships*, 1977 B.Y.U.L. REV. 661, 671-72 (real party approach of *Colonial Realty* is consistent with the underlying statutory policy of diversity jurisdiction); Note, *Diversity Jurisdiction—Identity of Citizenship Between Defendants and Some Limited Partners in Plaintiff Partnership Precludes Federal Jurisdiction Based on Diversity Citizenship*, 27 EMORY L.J. 165, 183-85 (1978) (*Colonial Realty* the most reasonable result of an application of FED. R. CIV. P. 17(b) to unincorporated associations).

tion,⁴⁸ the Court of Appeals for the Third Circuit explicitly rejected the *Colonial Realty* holding. In *Carlsberg Resources*, the sole general partner of a limited partnership brought suit against a Pennsylvania corporation. The plaintiff-general partner was a California corporation but some of the limited partners were Pennsylvania citizens. The Third Circuit affirmed the district court's dismissal for want of diversity jurisdiction,⁴⁹ noting that although *Chapman* and *Great Southern* were both pertinent to resolving this diversity question, no Supreme Court decision was precisely on point.⁵⁰ The partnership was seeking diversity jurisdiction on the theory that partners of different status may be treated differently for determining diversity of citizenship.⁵¹ The court acknowledged that *Great Southern* involved an association in which all members were of a single class and therefore possibly of little precedential value in resolving the issue at bar.⁵² The court interpreted *Chapman* as having involved an association with two classes—the president, who possessed the power to litigate on behalf of the association, and all the other members of the joint stock association.⁵³ Despite this distinction, the Supreme Court in *Chapman* held that all members must be considered in determining diversity jurisdiction. The Third Circuit regarded *Chapman*, therefore, as a refusal by the Supreme Court to differentiate between classes of members when determining whether complete diversity exists.⁵⁴ Based on this interpretation, the court concluded that finding diversity jurisdiction in the case would constitute a broad extension of federal jurisdiction, detrimentally affecting judicial economy and the principles of federalism.⁵⁵

Because the *Carlsberg Resources* court considered the determination of jurisdiction fundamental to the federal courts, it was troubled by the Second Circuit's consideration in *Colonial Realty* of capacity-to-sue

48. 554 F.2d 1254 (3d Cir. 1977).

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

50. 554 F.2d at 1259.

51. *Id.*

52. *Id.* at 1258.

53. *Id.* Similarly, by definition limited partnerships have two classes of members: "A limited partnership is a partnership formed by two or more persons . . . having as members one or more general partners and one or more limited partners." ULPA § 1, 6 U.L.A. 562. The distinction between the liability of its members is what distinguishes limited partnerships from general partnerships and joint stock companies.

54. 554 F.2d at 1259.

55. *Id.* at 1262.

before settlement of the jurisdictional issue.⁵⁶ The possible ramifications of reference to state law in determining diversity jurisdiction also disturbed the Third Circuit. Such reliance, the court reasoned, would invest state legislators or state courts with the power to determine the perimeters of federal jurisdiction and thereby make diversity jurisdiction dependent upon frequently inconsistent state laws.⁵⁷ Additionally, the majority argued that if the Second Circuit were relying upon rule 17(b) of the Federal Rules of Civil Procedure⁵⁸ as authority for applying the New York state rules on capacity-to-sue, the court violated the command of rule 82⁵⁹ not to construe any of the Federal Rules of Civil Procedure to expand the jurisdiction of the federal courts.

Judge Hunter, the lone dissenter in *Carlsberg Resources*, was particularly concerned with the far-reaching impact this decision could have in effectively foreclosing limited partnerships from obtaining complete diversity and, thus, access to the federal courts.⁶⁰ Judge Hunter, agreeing with the approach taken by Judge Friendly in *Colonial Realty*,⁶¹ considered the majority's examination of citizenship before determination of capacity-to-sue to be misordered.⁶² While mindful that capacity-to-sue is a separate issue from diversity, the dissent noted that such a determination would, nevertheless, properly reflect the real parties to the controversy.⁶³ Because state law indicated that each member in a general partnership should be counted for purposes of diversity, Judge Hunter felt that state law indicated that limited partners should not be considered.⁶⁴ Moreover, he found the majority's reliance on *Chapman*

56. *Id.* at 1260.

As we view it, jurisdiction is the *most* elemental concern of the federal courts in evaluating the cases which come before them. By contrast, issues pertaining to the capacity to sue, while hardly lacking in significance, are deserving of consideration only after the jurisdiction of the federal court has been firmly established.

Id. (emphasis in original).

57. *Id.* at 1261.

58. FED. R. CIV. P. 17(b) provides in pertinent part:

The capacity of an individual other than one acting in a representative capacity to sue or be sued shall be determined by the law of his domicile.

59. FED. R. CIV. P. 82 provides that the Federal Rules:

[S]hall not be construed to extend or limit the jurisdiction of the United States district courts. . . .

60. 554 F.2d at 1263 (Hunter, J., dissenting).

61. 358 F.2d 178 (2d Cir.), *cert. denied*, 385 U.S. 817 (1966). *See supra* notes 43-47.

62. 554 F.2d at 1263 (Hunter, J., dissenting). Judge Hunter thought it impossible to properly determine diversity, as the majority did, before first determining the proper parties to the suit.

63. *Id.* at 1263 n.6.

64. *Id.* at 1264-65.

and *Great Southern* inapposite because of the unique nature of limited partnerships,⁶⁵ epitomized by the purpose of limited partnerships and the provisions in the Uniform Limited Partnership Act, which restrict the powers and the liability of limited partners.⁶⁶ In noting the clear statutory prohibition against limited partners taking part in suits involving the partnership, Judge Hunter considered the majority's inclusion of these parties in a diversity determination illogical.⁶⁷ In conclusion, the dissent found the policies behind diversity jurisdiction well served by allowing limited partnerships access to federal courts on a finding of complete diversity between all the general partners and the opposing parties.⁶⁸

The Supreme Court has not addressed the specific issue of whether the citizenship of limited partners should be considered for purposes of determining diversity jurisdiction. Nonetheless, the recognition of a strong analogy between limited partnerships and business trusts⁶⁹ warrants an examination of the Court's decision in *Navarro Savings Association v. Lee*.⁷⁰

III. INTERPRETING *NAVARRO SAVINGS ASSOCIATION V. LEE*

The United States Supreme Court first addressed the question of whether, for purposes of establishing diversity jurisdiction, the citizen-

65. *Id.*

66. *Id.* at 1265. See *supra* notes 5 & 7 (discussing provisions of the ULPA).

67. *Id.* Accord 16 DUQ. L. REV. 221, 236 (1978)(criticizing the adverse impact of the *Carlsberg Resources* holding); 46 GEO. WASH. L. REV. 657, 669 (1978) (criticizing the practical effect of the *Carlsberg Resources* decision in barring limited partnerships from federal courts).

68. 554 F.2d at 1266 (Hunter, J., dissenting).

69. Business trusts are hybrids of traditional common law trusts, developed in Massachusetts between 1910 and 1925 in response to statutory prohibitions against corporations dealing in real estate. H. HENN, CORPORATIONS § 58, at 86 (1970). See *generally supra* note 15 (definition of business trust); R. ROWLEY & D. SIVE, *supra* note 34, § 55.1. These "trusts" are unincorporated associations organized as a means of carrying on a business enterprise and sharing its profits. Unlike the common law trust, the business trust is not concerned with holding and conserving particular property through trustees who have incidental powers, but with providing a medium for the conduct of business and the sharing of profits. *Morrissey v. Commissioner*, 296 U.S. 344, 357 (1935). Accord *Carey v. United States Indus., Inc.*, 414 F. Supp. 794, 795 (N. D. Ill. 1976); *Plymouth Sec. Co. v. Johnson*, 335 S.W.2d 142, 149 (Mo. 1960). Business trusts, like partnerships, "carry on business in a fictitious or collective name." *Kempner v. Welker*, 36 Ariz. 128, 131, 283 P. 284, 285 (1929). Like limited partners, the beneficial shareholders are not generally liable for trust debts. In contrast, trustees, like general partners, are normally personally liable for trust debts. *E.g.*, *Schumann-Heink v. Folsom*, 328 Ill. 321, 327, 159 N.E. 250, 253 (1927); *Ing v. Liberty Nat'l Bank*, 216 Ky. 467, 469, 287 S.W. 960, 961 (1926).

70. 446 U.S. 458 (1980).

ship of a business trust is determined by looking to the citizenship of its trustees or to that of its beneficial shareholders in *Navarro Savings Association v. Lee*.⁷¹ The suit was brought by eight trustees of a Massachusetts organized business, Fidelity Mortgage Investors, to recover damages from Navarro Savings Association, a Texas corporation, for breach of a loan commitment agreement.⁷² All eight trustees were citizens of states other than Texas and asserted jurisdiction based on diversity of citizenship.⁷³ The district court dismissed the case for lack of jurisdiction holding that the citizenship of each of the shareholders was to be considered in determining diversity.⁷⁴ The Fifth Circuit reversed,⁷⁵ finding that the Declaration of Trust granted the trustees all powers to control and manage the trust and to litigate on its behalf, free from any powers or control of the beneficiaries.⁷⁶ The court analogized to the limited partnership reasoning of the Second Circuit in *Colonial Realty* and concluded that the trustees were the real parties to the controversy.⁷⁷ Because complete diversity existed between the plaintiff-trustees and the defendant-corporation, the Fifth Circuit concluded that federal diversity jurisdiction existed.⁷⁸ The Supreme Court affirmed the court of appeals in an 8-1 decision,⁷⁹ holding that the trustees of a business trust may invoke the diversity jurisdiction of the federal courts on the basis of their own citizenship without regard to

71. *Id.*

72. *Id.* at 459. In 1971, respondents Fidelity lent \$850,000 to a Texas firm. The loan was partially secured by Navarro Savings and Loan Association. When Navarro refused, in 1973, to cover its obligation to Fidelity, respondents brought suit seeking \$1,174,525.17 plus interest and attorney's fees. *Lee v. Navarro Sav. Ass'n*, 597 F.2d 421 (5th Cir. 1979), *aff'd*, 446 U.S. 458 (1980).

73. 446 U.S. at 459-60. Navarro's complaint asserted federal jurisdiction under 28 U.S.C. § 1332 based on diversity of citizenship. The complaint stated that Navarro was a Texas citizen and that each respondent was a citizen of a state other than Texas. Thereafter the parties stipulated that some of Fidelity's beneficial shareholders were Texas citizens. *Id.*

74. 416 F. Supp. 1186, 1189 (N.D. Tex. 1976), *rev'd*, 597 F.2d 421 (5th Cir. 1979), *aff'd*, 446 U.S. 458 (1980).

75. 597 F.2d 428 (5th Cir. 1979), *rev'g* 416 F. Supp. 1186 (N.D. Tex. 1976), *aff'd*, 446 U.S. 458 (1980).

76. *Id.* at 424. Article III of the Declaration of Trust, entitled "Trustees Power," provided: The Trustees shall have, without other or further authorization, full absolute and exclusive power, control and authority over the Trust Estate and of the business and affairs of the Trust, free from any power and control of the Shareholders, to the same extent as if the Trustees were the sole owners of the Trust Estate in their own right. . . .

Id.

77. *Id.* at 424-25.

78. *Id.* at 428.

79. 446 U.S. 458 (1980), *aff'g* 597 F.2d 421 (5th Cir. 1979). Justice Blackmun filed a separate opinion dissenting.

the citizenship of the trust's beneficial owners.⁸⁰

The majority found merit in the Fifth Circuit's approach to the real party in interest determination. Rejecting Navarro's assertion that Fidelity's beneficial shareholders were the real parties to the controversy, the Court focused on the powers the trust agreement granted to the trustees and beneficiaries.⁸¹ Although Fidelity's Declaration of Trust provided that the shareholders could elect and remove trustees, amend the terms of the trust, vote on any disposition of more than half the trust estate, and terminate the trust agreement,⁸² the majority found that the shareholders had no power of control or intervention except under extraordinary circumstances.⁸³ Relying upon established principles of trust law,⁸⁴ the Court stated that the powers of a trustee to hold, manage, and dispose of trust assets for the benefit of the shareholders are the standards by which to determine whether a trustee possesses the "customary" powers which make him the real party to the controversy.⁸⁵ Fidelity's trustees held the requisite rights and duties to qualify as trustees and had filed suit in their capacity as trustees, seeking to recover on promissory notes executed in their names as trustees. Therefore, the Court concluded, resemblance to other forms of business enterprises did not alter Fidelity's trust character nor change the status of the trustees as the real parties in interest.⁸⁶

Justice Blackmun dissented, finding the majority's opinion conclusory, its approach simplistic, and its result contrary to the Massachusetts law of business trusts.⁸⁷ Unlike the majority, Justice Blackmun

80. 446 U.S. at 465-66.

81. *Id.* at 462, 465.

82. *Id.* at 465 n.14 (citing Fidelity Declaration of Trust, Arts. 2.2., 6.7, 8.2, 8.3, app. A47, A67, A79-A80).

83. *Id.* at 464-65. The Court focused on the fact that Fidelity's 9,500 beneficial shareholders had no voice in the initial investment decision and had no control over the case at bar. The Court concluded that Fidelity was an express trust and the trustees held legal title to the trust property. *Id.*

84. *See* *Bullard v. Cisco*, 290 U.S. 179 (1933). The *Bullard* Court followed the rule that a trustee is the real party to a controversy for purposes of determining diversity jurisdiction. *Id.* at 190.

85. 446 U.S. at 464.

86. *Id.* at 465. The majority reasoned that because no allegation was made of sham or collusion and the trustees were clearly active trustees and not "naked trustees" acting as "mere conduits," the fact that the trust departed in some respects from conventional forms had no bearing on the determination of diversity. *Id.*

87. *Id.* at 466-67 (Blackmun, J., dissenting). Justice Blackmun noted the substantial body of recent district court decisions which conflicted with the majority's position. Those cases held that

employed the control test,⁸⁸ which identifies the real parties in interest by evaluating the amount of control the trust indenture vests in particular members of the trust. Justice Blackmun found the powers vested in the shareholders by the trust indenture were substantial enough for this agreement to be considered a partnership.⁸⁹ While he agreed with the approach taken by the court of appeals, he could not agree with the holding in light of the large measure of control the shareholders possessed.⁹⁰ In Justice Blackmun's opinion, the Court's prior decisions concerning unincorporated associations and real parties in interest⁹¹ should have led to the conclusion that the beneficial shareholders of this business trust were the real parties in interest and their citizenship was determinative of the diversity issue.⁹²

In *Trent Realty Associates v. First Federal Savings & Loan Association*,⁹³ the Third Circuit found nothing in *Navarro* which dictated the use of the Court's real party in interest reasoning in determinations of diversity citizenship of limited partnerships.⁹⁴ The Third Circuit fo-

the citizenship of the beneficial owners of a business trust was dispositive in determining diversity jurisdiction. *Id.* at 466 n.1.

88. *Id.* at 468-71.

89. *Id.* at 472.

90. *Id.* at 475-76. The dissent noted that factors which are relevant to determining which members of a business trust are the controlling parties include: "(1) the right to remove the trustees, (2) the right to terminate the trust, (3) the right to modify the terms of the trust, (4) the right to elect trustees, and (5) the right to direct management decisions of the trustees." *Id.* at 476 n.8 (quoting Comment, *supra* note 7, at 416). Justice Blackmun found the first four factors present. *Id.* Justice Blackmun also stated that the shareholders "have the power to condition major dispositions of the trust assets on their affirmative approval." *Id.*

91. See *United Steelworkers of Am. v. R.H. Bouligny*, 382 U.S. 145 (1965); *Great So. Fire Proof Hotel Co. v. Jones*, 177 U.S. 449 (1900); *Chapman v. Barney*, 129 U.S. 677 (1889). See also *supra* note 5; text accompanying notes 33-38.

92. 446 U.S. at 476 (Blackmun, J., dissenting).

93. 657 F.2d 29 (3d Cir. 1981).

94. *Trent* involved the validity of a mortgage due-on-sale clause. Under threat of foreclosure the plaintiffs, Trent Realty Associates, a limited partnership and the current owner of the property, and Norstar Realty, a New Jersey corporation and current mortgagee of the property, filed suit in New Jersey state court seeking a declaratory judgment against enforcement of the penalty provision in the mortgage agreement. Defendant, First Federal, a Pennsylvania based savings and loan association and the former mortgagee of the property, removed the action to the Federal District Court for the District of New Jersey on the basis of diversity of citizenship. On appeal after summary judgment for the defendant, the Third Circuit raised the question of federal subject matter jurisdiction. An affidavit submitted by Trent showed that one of its limited partners was a Pennsylvania resident. Thereafter, Trent belatedly claimed that lack of complete diversity destroyed federal jurisdiction. *Id.* at 30-32.

cused upon the *Navarro* majority's statement⁹⁵ that business trusts are neither corporations nor unincorporated associations. The *Trent* court also noted Justice Blackmun's remark⁹⁶ in dissent that the majority expressed no view on the issue of determining diversity jurisdiction for limited partnerships. The Third Circuit concluded, therefore, that the *Navarro* holding was limited to determinations of diversity for business trusts, and did not overrule *Carlsberg Resources*.⁹⁷ As a result, the court of appeals was bound by circuit precedent and held that identity of citizenship between a limited partner and a member of the opposing party destroyed diversity jurisdiction.⁹⁸

The Third Circuit's interpretation of *Navarro* is overly narrow. While the *Navarro* majority made no explicit reference to the Fifth Circuit's analogy between a business trust and a limited partnership, it did not explicitly reject the position that Fidelity shared some attributes of such an association.⁹⁹ Moreover, affirmance of the reasoning used by the Fifth Circuit suggests that the Court did not intend its rationale to be limited to express trusts. Furthermore, application of the *Navarro* interpretation of the real party in interest test to various forms of unincorporated associations, such as limited partnerships, in which the relative rights and responsibilities of the members are statutorily defined, would be less complicated than application of that interpretation to strictly organized business trusts.

IV. CONCLUSION

To date the Supreme Court has done nothing to weaken its holdings in *Chapman*¹⁰⁰ and *Great Southern*.¹⁰¹ These two cases may be read, nonetheless, as holding only that courts will not grant unincorporated associations entity status analogous to corporate treatment for purposes of diversity jurisdiction. Thus, these decisions do not bar application of

95. We need not reject the argument that Fidelity shares some attributes of an association. In certain respects, a business trust always resembles a corporation. But this case involves neither an association nor a corporation. Fidelity is an express trust, and the question is whether its trustees are real parties to this controversy for purposes of a federal court's diversity jurisdiction.

Navarro Sav. Ass'n v. Lee, 446 U.S. 458, 462 (1980).

96. *See id.* at 475 n.6 (Blackmun, J., dissenting).

97. 657 F.2d at 32. *See supra* text accompanying notes 48-59.

98. 657 F.2d at 32.

99. 446 U.S. at 462.

100. *See supra* text accompanying notes 33-36.

101. *See supra* text accompanying notes 37-38.

the real party in interest approach which the Court employed in *Navarro* in the context of business trusts, to limited partnerships.¹⁰²

Additional support for applying the *Navarro* real party in interest test to limited partnerships can be gleaned from close scrutiny of the seemingly irreconcilable rationales advanced in early Supreme Court decisions on corporate entity citizenship and denial of that status to joint stock companies.¹⁰³ In *Marshall v. Baltimore & Ohio Railroad*,¹⁰⁴ which established corporate citizenship before the enactment of section 1332(a),¹⁰⁵ the Court concluded that the citizenship of the shareholders was irrelevant because they had no control over the corporate litigation and thus were not real parties to the controversy.¹⁰⁶ In *Chapman v. Barney*,¹⁰⁷ however, the Court declared that the citizenship of all the members of a joint stock association was relevant to determining diversity. By labeling the association a partnership,¹⁰⁸ the Court implicitly recognized that each member was liable for the company's debts.¹⁰⁹ Consequently, each member was a real party to the suit.

The Court's reasoning in these two cases is eminently applicable to limited partnerships. Individual financial liability and degree of control are the two most important differences between general and limited partners.¹¹⁰ They may reasonably be used as major determinants in establishing the real parties to a suit. Furthermore, the liability of limited partners is more closely analogous to that of corporate shareholders than to that of members in a joint stock association. Limited partnerships are created under statutes patterned after the Uniform Limited Partnership Act.¹¹¹ Section 1 of the Uniform Act expressly provides that limited partners are not personally liable for the obligations of the partnership.¹¹² The official comments to section 1 state that "a limited partner is not in any sense a partner" and is not a principal

102. See Comment, *supra* note 7, at 413-19.

103. See *Chapman v. Barney*, 129 U.S. 677 (1889); *Marshall v. Baltimore & O. R.R.*, 57 U.S. (16 How.) 314 (1853).

104. 57 U.S. (16 How.) 314 (1853).

105. 28 U.S.C. § 1332(a) (1976). See *supra* note 2.

106. *Id.* at 326.

107. 129 U.S. 677 (1889).

108. *Id.* at 681.

109. See Comment, *supra* note 7, at 389 (relying upon *Rowley*, *supra* note 34 at 610-12).

110. See *supra* note 7.

111. See ULPA § 1, 6 U.L.A. 562 comment.

112. *Id.*

in transactions of the partnership.¹¹³ Thus, as the responsibilities of the partnership do not bind the limited partner, those of a corporation do not bind the shareholder. These definitional restrictions and functional differences point to the conclusion that the *Navarro* real party in interest test, which looks to the varying control and liability assigned parties to a trust, is well suited to the determination of whether limited partners should be counted in determining diversity jurisdiction.

Rachel F. Best

113. *Id.*

