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FIRST THINGS FIRST: FEDERAL COURTS SHOULD DETERMINE THE LEGAL STATUS OF A LLOYD'S OF LONDON SYNDICATE BEFORE DECIDING THE SYNDICATE'S CITIZENSHIP FOR DIVERSITY PURPOSES

John M. Brust

Abstract: Lloyd's of London provides a marketplace where groups of underwriters form syndicates to insure risk. The United States Circuit Courts of Appeals have split on the question of how to determine whether a federal court has diversity jurisdiction over a controversy involving Lloyd's syndicates. In a diversity action, each party must have diverse citizenship from all opposing parties. Circuit courts disagree about which diversity of citizenship test applies to suits involving Lloyd's syndicates. The Second, Third, and Sixth Circuits have applied the real party in interest test. This test looks only to the citizenship of the parties that have a real interest in the litigation and ignores the citizenship of nominal or formal parties. In contrast, the Seventh Circuit has applied the unincorporated association test to assess the citizenship of a syndicate. This test requires a court to look to the citizenship of each of the underwriters in a syndicate. This Comment argues that the circuit courts have failed to consider whether a syndicate is a formal legal entity, which is a determination that will control the test that the court must apply. To answer this question, courts should first decide which law to apply to the case. Second, they should determine the syndicate's legal status under that law. Courts should then apply the appropriate test to determine the citizenship of the underwriters. If the applicable law does not recognize a syndicate as a legal entity, then the real party in interest test applies. However, if the applicable law recognizes a syndicate as a legal entity, then the unincorporated association test applies.

Lloyd's of London began in Edward Lloyd's coffee house in the 1680s.¹ Since that time, Lloyd's has provided a market where buyers and sellers of insurance come together to negotiate insurance policies.² Lloyd's operates its market by placing underwriters into groups known as syndicates.³ Lloyd's assigns an agent who is an expert in the insurance business to manage each syndicate on behalf of all its members.⁴

Suits involving a Lloyd's syndicate frequently give rise to the challenge that a federal court lacks diversity jurisdiction because

1. ANTONY BROWN, HAZARD UNLIMITED 16 (2d ed. 1978).

2. Roby v. Corp. of Lloyd's, 796 F. Supp. 103, 104-05 (S.D.N.Y. 1992).

3. *Id.*

4. *Id.*

diversity of citizenship is not complete.⁵ Diversity jurisdiction requires that all parties on one side of a dispute be of different citizenship from all parties on the other side of the dispute.⁶ Because syndicates usually consist of numerous underwriters with different citizenships,⁷ it is common to have parties of non-diverse citizenship on opposite sides of the litigation.

The United States Circuit Courts of Appeals disagree about which test to apply to determine the citizenship of the underwriters on a Lloyd's of London insurance policy.⁸ Under one approach, several circuit courts consider the underwriters of a syndicate to be various parties before the court and apply the "real party in interest" test to determine citizenship.⁹ A court applying the real party in interest test ignores the citizenship of a group's representative, and instead looks at the citizenship of the parties who have a real interest in the action.¹⁰ Courts that have applied the real party in interest test to Lloyd's underwriters have reached different conclusions as to which parties are the real parties in interest.¹¹ Under a second approach, one circuit court has applied the "unincorporated association test,"¹² provided by the U.S. Supreme Court in *Carden v. Arkoma Associates*.¹³ Under this test, courts attribute to the syndicate the

5. See, e.g., *Corfield v. Dallas Glen Hills L.P.*, 355 F.3d 853, 855 (5th Cir. 2003), *cert. denied*, 124 S.Ct. 2421 (2004) (addressing an insured party's challenge to diversity jurisdiction); *E.R. Squibb & Sons, Inc. v. Accident & Cas. Ins. Co.*, 160 F.3d 925, 928 (2d Cir. 1998) (raising the diversity issue sua sponte); *Ind. Gas Co. v. Home Ins. Co.*, 141 F.3d 314, 320 (7th Cir. 1998) (raising the diversity issue sua sponte); *Certain Interested Underwriters at Lloyd's v. Layne*, 26 F.3d 39, 41 (6th Cir. 1994) (addressing an insured party's challenge to diversity jurisdiction).

6. *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 267 (1806).

7. See *Layne*, 26 F.3d at 42.

8. See *Corfield*, 355 F.3d at 863 (applying the real party in interest test); *E.R. Squibb & Sons, Inc.*, 160 F.3d at 930-31 (applying the real party in interest test); *Ind. Gas Co.*, 141 F.3d at 317 (applying the unincorporated association test); *Layne*, 26 F.3d at 42 (applying the real party in interest test).

9. See, e.g., *Corfield*, 355 F.3d at 863 (applying the real party in interest test); *E.R. Squibb & Sons, Inc.*, 160 F.3d at 930-31 (applying the real party in interest test); *Layne*, 26 F.3d at 42 (applying the real party in interest test).

10. See *N. Trust Co. v. Bunge Corp.*, 899 F.2d 591, 594 (7th Cir. 1990).

11. Compare *Layne*, 26 F.3d at 43 (holding that only the lead underwriter is the real party in interest under Tennessee law), with *E.R. Squibb & Sons, Inc.*, 160 F.3d at 930-31 (holding that all underwriters are real parties in interest when the lead underwriter is a party to the action as a representative of all names).

12. *Ind. Gas Co.*, 141 F.3d at 317.

13. 494 U.S. 185, 187-88 (1990). The U.S. Supreme Court has applied the unincorporated association test to unincorporated entities such as joint stock companies, see *Chapman v. Barney*, 129 U.S. 677, 682 (1889); labor unions, see *United Steelworkers of Am. v. R.H. Bouligny, Inc.*, 382

citizenship of each of its member underwriters.¹⁴

However, before a court can decide which test to apply to Lloyd's underwriters, it must determine whether a syndicate is a legal entity under the applicable law.¹⁵ If the applicable law does not provide a syndicate with legal entity status, then the underwriters appear before the court as various parties, and the court must apply the real party in interest test.¹⁶ On the other hand, if the applicable law does provide the syndicate with legal entity status to sue or be sued as an unincorporated association, then the unincorporated association test applies.¹⁷ In this case, each syndicate will possess the citizenship of all its members.¹⁸ Before a court can address the legal status question, it must decide which law controls the determination of the legal status of a Lloyd's syndicate.¹⁹ However, none of the circuit courts that have considered the citizenship of a Lloyd's syndicate have considered what law should determine the syndicate's legal status.²⁰ Although the circuit courts have applied English law,²¹ state law,²² or have not specified which law they are applying,²³ the courts have not shown how they determine which law controls a syndicate's legal status.²⁴

This Comment provides a new approach to assist courts in determining the citizenship of Lloyd's syndicates. Part I describes the structure of Lloyd's. Part II discusses available choice-of-law rules and provides an analysis of a syndicate's legal status under English law and state law. Part II also describes the bifurcated approach taken by one

U.S. 145, 152–53 (1965); and limited partnerships, see *Carden*, 494 U.S. at 187.

14. *Carden*, 494 U.S. at 187–88. Congress has provided an exception to the legal entity test for corporations. See 28 U.S.C. § 1332(c) (2000). A corporation is deemed to be a citizen of the state in which it is incorporated and the state in which it has its principal place of business. *Id.* The U.S. Supreme Court expressly declined to extend this exception to other legal entities in the absence of the expressed intent of Congress. *R.H. Bouligny, Inc.*, 382 U.S. at 153.

15. *Carden*, 494 U.S. at 187 n.1.

16. *Id.*

17. *Id.*

18. *Id.*

19. See *infra* Part II.

20. See *infra* Part IV.B.

21. See *E.R. Squibb & Sons, Inc. v. Accident & Cas. Ins. Co.*, 160 F.3d 925, 936 (2d Cir. 1998).

22. See *Certain Interested Underwriters at Lloyd's v. Layne*, 26 F.3d 39, 43 (6th Cir. 1994).

23. See *Ind. Gas Co. v. Home Ins. Co.*, 141 F.3d 314, 317 (7th Cir. 1998).

24. See *infra* Part IV.B.

district court in determining the legal status of unincorporated associations. Part III details the complete diversity requirement and the two tests that circuit courts have used to determine whether complete diversity exists in suits involving Lloyd's syndicates. Finally, Part IV argues that courts should adopt a three-step approach to determine the citizenship of Lloyd's underwriters. Under this approach, courts should (1) determine which law controls a syndicate's legal status; (2) determine the syndicate's legal status under that law; and (3) apply the appropriate citizenship test based on the syndicate's legal status.

I. LLOYD'S OF LONDON PROVIDES A MARKET WHERE UNDERWRITERS FORM SYNDICATES TO SELL INSURANCE

Contrary to popular belief, Lloyd's of London is not an insurance company.²⁵ Rather, Lloyd's provides a marketplace for its members to sell insurance.²⁶ Lloyd's refers to its underwriting members as "names" and places stringent requirements on who can become a name.²⁷ Names must prove that they have a minimum amount of net worth, have the sponsorship of two current names, take part in a formal interview process, and have approval by a Lloyd's committee.²⁸ In addition, each name must travel to England to execute a number of investment related contracts, which specifically provide that they shall be governed by the laws of England.²⁹ Once approved for membership, names join one of the several available underwriting groups, known as "syndicates."³⁰ A syndicate is a group of one or more names who have come together to insure risk.³¹ Individual names do not have the authority to underwrite insurance policies on their own. Instead, they rely on the syndicate's underwriting agent to subscribe to insurance policies on behalf of all names in the syndicate.³² The underwriting agent has the authority to

25. See *Layne*, 26 F.3d at 41.

26. *Id.*

27. Melissa Coulombe Beauchesne, *Lloyd's of London and Diversity Jurisdiction: Analyzing the Citizenship of a Unique Organization*, 5 ROGER WILLIAMS U. L. REV. 217, 227 (1999).

28. *Id.* at 227-28.

29. See *Roby v. Corp. of Lloyd's*, 796 F. Supp. 103, 106-07 (S.D.N.Y. 1992).

30. *Id.* at 229.

31. *Id.*

32. See *id.* at 229-30.

bind all names within the syndicate to the insurance policy and represent their interests in a judicial proceeding.³³

The Lloyd's market operates in a central room within the Lloyd's building.³⁴ In this room, underwriting agents represent their syndicates and wait for insurance brokers to stop by and pitch their insurance needs.³⁵ Insurance brokers, who represent outside parties seeking to insure against various types of risk, move from syndicate to syndicate until they find a syndicate that is willing to underwrite some or all of their clients' risk.³⁶ The first underwriting agent to commit his or her syndicate to a portion of the insurance policy is referred to as the "lead underwriter."³⁷ The lead underwriter may have a particular area of expertise and may negotiate the terms of the policy before committing to insure a portion of the risk.³⁸ If the lead underwriter has committed his or her syndicate to only a portion of the risk, then the broker will continue to pitch the policy to other underwriting agents until he or she has covered one hundred percent of the risk.³⁹ Underwriting agents for other syndicates may then subscribe to any remaining percentage of the policy, as negotiated by the lead underwriter.⁴⁰ The lead underwriter manages the insured's claims and has the authority to represent the interests of all the syndicates that have subscribed to the policy in any judicial proceeding.⁴¹

Parties who participate in the Lloyd's of London market must comply with a series of complex rules and regulations. When a party joins Lloyd's of London as a name, he or she agrees to specific rules for the allocation of risk, liability, and profits.⁴² In addition, Lloyd's of London strictly regulates the interaction between each party within the market and imposes fiduciary responsibilities on all parties involved by

33. See *Certain Interested Underwriters at Lloyd's v. Layne*, 26 F.3d 39, 42 (6th Cir. 1994).

34. See *BROWN*, *supra* note 1, at 3-4.

35. *Id.* at 4.

36. *Edinburgh Assurance Co. v. R.L. Burns Corp.*, 479 F. Supp. 138, 144-45 (C.D. Cal. 1979).

37. *Id.* at 145.

38. *Id.*

39. *Id.*

40. *Id.*

41. *E.R. Squibb & Sons, Inc. v. Accident & Cas. Ins. Co.*, 160 F.3d 925, 929 (2d Cir. 1998).

42. *Beauchesne*, *supra* note 27, at 226-29.

requiring that all dealings be in the “utmost good faith.”⁴³ Lloyd’s has also established regulations detailing appointment and dismissal of underwriting agents; fiduciary duties such as accounting, disclosure, and avoidance of conflict of interests; and the regulation of brokers.⁴⁴

Additionally, each name is severally liable for his or her proportionate share of the insurance policy.⁴⁵ When becoming a member of Lloyd’s, names agree to be personally liable for their percentage of the risk.⁴⁶ Thus, if a particular name is liable for one percent of the risk subscribed to by his or her syndicate, and the corresponding syndicate subscribes to fifty percent of the risk on an insurance policy, then that name would be severally liable for one half of one percent of the total risk insured by the policy.

II. THE LEGAL STATUS OF A SYNDICATE DEPENDS ON WHICH LAW APPLIES

The unique structure of Lloyd’s has led courts to disagree as to the legal status of a Lloyd’s syndicate.⁴⁷ The U.S. Circuit Courts of Appeals have not addressed the question of which jurisdiction’s law controls a syndicate’s legal status.⁴⁸ However, the federal district courts have provided some guidance in answering this question.⁴⁹ A court must determine which jurisdiction’s law applies before it can determine the legal status of a group of people.⁵⁰ Depending on which jurisdiction’s law applies, courts have reached various conclusions as to the legal status of a Lloyd’s syndicate.⁵¹

43. *Id.* at 46.

44. *Id.* at 46–49.

45. Certain Interested Underwriters at Lloyd’s v. Layne, 26 F.3d 39, 42 (6th Cir. 1994).

46. *E.R. Squibb & Sons, Inc.*, 160 F.3d at 929.

47. *See, e.g., Corfield v. Dallas Glen Hills L.P.*, 355 F.3d 853, 864 (5th Cir. 2003), *cert. denied*, 124 S.Ct. 2421 (2004) (treating a syndicate as a group of individuals with separate and distinct rights); *E.R. Squibb & Sons, Inc.*, 160 F.3d at 937 (treating a syndicate as a group of individuals with separate and distinct rights); *Ind. Gas Co. v. Home Ins. Co.*, 141 F.3d 314, 317 (7th Cir. 1998) (treating a Lloyd’s syndicate as an entity); *Layne*, 26 F.3d at 42–43 (treating a Lloyd’s syndicate as a group of various individuals who are represented by a common agent).

48. *See infra* Part IV.B.

49. *See Roby v. Corp. of Lloyd’s*, 796 F. Supp. 103, 105–06 (S.D.N.Y. 1992) (analyzing several choice-of-law rationales to determine which jurisdiction’s law controls a syndicate’s legal status).

50. *Id.*

51. *Compare Bobe v. Lloyd’s*, 27 F.2d 340, 345 (S.D.N.Y. 1927) (holding that syndicates are not unincorporated associations under New York law), *aff’d per curiam*, 27 F.2d 347 (2d Cir. 1928),

A. *Courts Have Applied Various Choice-of-Law Rules to Determine Which Law Controls the Legal Status of a Lloyd's Syndicate*

A court must determine what law controls the legal status of a group before it can apply that law to determine the group's legal status.⁵² Courts have acknowledged at least four competing methods to determine which law controls the legal status of unincorporated groups that operate in multiple jurisdictions: contractual choice-of-law clauses, the law of creation, the significant relationship test or similar analysis, and Federal Rule of Civil Procedure 17(b).⁵³ Although U.S. Circuit Courts of Appeals have not explicitly considered the choice-of-law question in the context of a Lloyd's syndicate, at least one district court has analyzed which jurisdiction's law controls the syndicate's legal status.⁵⁴

Under the first method, courts defer to the choice-of-law clauses in contracts.⁵⁵ These clauses allow parties to specify which state's law controls their relationship, thereby avoiding the uncertain application of a foreign jurisdiction's laws.⁵⁶ However, several state legislatures have enacted statutes that specifically prevent use of choice-of-law clauses in certain insurance contracts.⁵⁷ These statutes are generally consumer protection statutes intended to protect citizens from out-of-state insurance companies.⁵⁸ Thus, a court will not honor choice-of-law

with Merchs.' & Mfrs.' Lloyd's Ins. Exch. v. S. Trading Co., 205 S.W.2d 352, 354-55 (Tex. Civ. App. 1918) (stating that a Lloyd's association of underwriters constitutes an unincorporated association under Texas law), *rev'd on other grounds*, 229 S.W.2d 312, 316 (Tex. Comm'n App. 1921) (adopting judgment).

52. *Four Way Plant Farm, Inc. v. Nat'l Council on Comp. Ins.*, 894 F. Supp. 1538, 1545 (M.D. Ala. 1995).

53. *See Roby*, 796 F. Supp. at 105-10.

54. *Id.*

55. *Id.*

56. *Id.*

57. 2 LEE R. RUSS & THOMAS F. SEGALLA, *COUCH ON INSURANCE* § 24:3 (3d ed. 1995) [hereinafter *COUCH*]. *See* ALA. CODE § 27-14-22 (1998); ALASKA STAT. § 21.51.300 (Michie 2002); ARIZ. REV. STAT. § 20-1115 (2002); CAL. INS. CODE § 41 (West 1993); COLO. REV. STAT. § 10-3-122 (1999); FLA. STAT. ch. 627.632 (2002); LA. REV. STAT. ANN. § 22.629 (West 2004); MD. CODE ANN., INS. § 12-209 (2003); MASS. GEN. LAWS ch. 175, § 22 (1997); MINN. STAT. § 60A.08 (1996); NEB. REV. STAT. § 44-357 (2000); N.C. GEN. STAT. § 58-3-1 (2003); OKLA. STAT. tit. 36, § 3617 (1999); S.C. CODE ANN. § 38-61-10 (Law. Co-op. 2002); TENN. CODE ANN. § 56-7-102 (2000); TEX. INS. CODE ANN. § 21.42 (Vernon 1981); UTAH CODE ANN. § 31A-21-314 (2003); VA. CODE ANN. § 38.2-312 (Michie 2002); WASH. REV. CODE § 48.18.200 (1999).

58. *COUCH*, *supra* note 57, § 24:3.

clauses in insurance contracts that fall within the purview of such a statute.⁵⁹

Under the second method, courts apply the common law rule that requires courts to look to the law of the state that created the foreign entity to determine its legal status to sue or be sued.⁶⁰ Courts have applied this rule to determine whether a foreign group is a legal entity.⁶¹ They have also used it to determine whether a foreign business group comprises an unincorporated association.⁶² One district court applied this rule to a Lloyd's syndicate and determined that English law governs the question of a syndicate's legal status.⁶³ The court reasoned that English law created the syndicate because English citizens comprise the majority of membership in most syndicates and because all membership documents are executed in England.⁶⁴

Under the third approach, courts engage in a choice-of-law analysis by applying the forum state's choice-of-law rules.⁶⁵ When choosing which law controls the contractual relationship between parties, the current trend is for states to adopt the Restatement of Conflict of Laws' "significant relationship" test.⁶⁶ However, some states continue to rely

59. *Id.*

60. See 7 C.J.S. *Associations* § 2 (1980); see, e.g., *Carl Zeiss Stiftung v. VEB Carl Zeiss Jena*, 433 F.2d 686, 698–99 (2d Cir. 1970) (looking to the laws of West Germany to classify a German private business foundation without stockholders as a legal entity); *Sanchez v. Bowers*, 70 F.2d 715, 717 (2d Cir. 1934) (looking to Cuban law to classify a "sociedad de gananciales," a profit-seeking association between husband and wife, as a separate juristic person); *Four Way Plant Farm, Inc. v. Nat'l Council on Comp. Ins.*, 894 F. Supp. 1538, 1545–46 (M.D. Ala. 1995) (applying Florida law to conclude that a Florida-based insurance association is an unincorporated association); *Cal. Clippers, Inc. v. United States Soccer Football Ass'n*, 314 F. Supp. 1057, 1068 (N.D. Cal. 1970) (applying New York law to conclude that a gaming committee organized and operated in New York is an unincorporated association); *Perkins v. First Nat'l Bank of Cincinnati*, 79 N.E.2d 159, 163 (Ohio Ct. Com. Pl. 1948) (looking to the law of the Philippine Islands to classify a "sociedad anonima," a business association organized under Philippine law, as a legal entity).

61. See, e.g., *Carl Zeiss Stiftung*, 433 F.2d at 698–99 (looking to the laws of West Germany to classify a German private business foundation without stockholders as a legal entity); *Sanchez*, 70 F.2d at 717 (looking to Cuban law to classify a "sociedad de gananciales," a profit-seeking association between husband and wife, as a separate juristic person); *Perkins*, 79 N.E.2d at 163 (looking to the law of the Philippine Islands to classify a "sociedad anonima," a business association organized under Philippine law, as a legal entity).

62. *Four Way Plant Farm, Inc.*, 894 F. Supp. at 1545–46; *Cal. Clippers, Inc.*, 314 F. Supp. at 1068.

63. *Roby v. Corp. of Lloyd's*, 796 F. Supp. 103, 106–07 (S.D.N.Y. 1992).

64. *Id.*

65. *Id.* at 107.

66. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (1988); 16 AM. JUR. 2D *Conflict*

on traditional choice of law rules such as the place of the contract's formation,⁶⁷ the place of performance,⁶⁸ or the intention of the parties.⁶⁹ Under the significant relationship test, courts consider a list of factors to determine which state has the most significant relationship to the contract.⁷⁰ The test also provides that if the parties negotiate and perform the contract in the same state, then courts should apply that state's law to the contract.⁷¹

Under the final method, courts look to Federal Rule of Civil Procedure 17(b) to determine which law controls a party's capacity to sue or be sued in federal court.⁷² Rule 17(b) instructs courts to look to the law of the forum state to determine the capacity of an unincorporated association to sue in federal court under diversity jurisdiction.⁷³ However, one district court distinguished capacity from legal status and held that Rule 17(b) does not confer legal status on an unincorporated group of persons.⁷⁴

One district court has explicitly applied a choice-of-law analysis to determine the legal status of a Lloyd's syndicate.⁷⁵ In *Roby v. Corp. of Lloyd's*,⁷⁶ the U.S. District Court for the Southern District of New York concluded that English law governs the legal status of a Lloyd's syndicate.⁷⁷ In that case, several New York citizens who were names in Lloyd's of London syndicates sued their respective syndicates for

of Laws § 86 (2003) (recognizing a movement to adopt the Restatement's significant relationship rule). Some courts have referred to the significant relationship rule as the center-of-gravity theory, the interest-weighting or choice-influencing theory, the grouping of contacts theory, the governmental interest analysis, or the interest analysis. 16 AM. JUR. 2D *Conflict of Laws* § 86 (2003).

67. 16 AM. JUR. 2D *Conflict of Laws* § 94 (2003).

68. *Id.* § 100.

69. *Id.* § 102.

70. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188(2) (1988). The factors include "(a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicile, residence, nationality, place of incorporation and place of business of the parties." *Id.*

71. *Id.* § 188(3).

72. FED. R. CIV. P. 17(b).

73. *Id.*

74. *Roby v. Corp. of Lloyd's*, 796 F. Supp. 103, 110 (S.D.N.Y. 1992).

75. *Id.*

76. 796 F. Supp. 103 (S.D.N.Y. 1992).

77. *Id.* at 105.

violations of various securities laws and the Racketeer Influenced and Corrupt Organizations Act.⁷⁸ The syndicates moved to dismiss the actions on the grounds that syndicates are not legal entities and cannot be sued.⁷⁹ The district court first analyzed whether English or New York law should apply to determine legal status.⁸⁰ It concluded that English law should control this determination.⁸¹ The court applied three alternative rules to determine the controlling law: the choice-of-law clause in Lloyd's investment contracts providing for the application of English law to resolve disputes between names,⁸² the general rule that the law that created the association shall control its legal status,⁸³ and New York's choice-of-law "interest analysis."⁸⁴ Applying English law, the court dismissed the claim because it concluded that syndicates are not legal entities under English law.⁸⁵ As an alternative rationale, the court concluded that syndicates are not legal entities under New York law.⁸⁶ In addition, the court distinguished an entity's legal status from its capacity to sue or be sued.⁸⁷ The court found Federal Rule of Civil Procedure 17(b) did not control because a party must have both legal status, under the applicable state law, and capacity, under Rule 17(b), to appear in federal court.⁸⁸

B. Courts Have Applied the Laws of Various Jurisdictions and Reached Conflicting Results as to the Legal Status of a Syndicate

Once a court determines which law controls a group's legal status, it must look to the applicable law to determine whether a syndicate is an unincorporated association and whether an unincorporated association is a legal entity under the laws of that jurisdiction.⁸⁹ Under English law,

78. *Id.* at 103–04.

79. *Id.* at 104.

80. *Id.* at 106–07.

81. *Id.* at 107.

82. *Id.* at 106.

83. *Id.* at 106–07.

84. *Id.* at 107. The court weighed such evidence as the contract's execution in England and the fact that over eighty percent of the investors are citizens of England. *Id.*

85. *Id.* at 111.

86. *Id.*

87. *Id.* at 110.

88. *Id.* at 110–11.

89. *See id.* at 106.

syndicates are unincorporated associations.⁹⁰ However, English law does not provide Lloyd's syndicates with a separate legal personality apart from the individual underwriters.⁹¹ United States courts have widely recognized that English law does not provide a Lloyd's syndicate with the legal status to sue or be sued in its own name.⁹²

When applying the laws of different states, courts have reached differing conclusions about the legal status of a Lloyd's syndicate.⁹³ The general common law definition of an unincorporated association is "a body of persons acting together, without a charter, but upon the methods and forms used by corporations, for the prosecution of some common enterprise."⁹⁴ Some courts have applied state law to conclude that Lloyd's syndicates are unincorporated associations,⁹⁵ while other courts have applied a different state's law and reached the opposite conclusion.⁹⁶

Even if a court classifies a Lloyd's syndicate as an unincorporated

90. See, e.g., *Davenport v. Corinthian Motor Policies*, 1991 S.L.T. 774, 776 (Scot.) (referring to a syndicate as an unincorporated association). Under English law, an unincorporated association is defined as "an association of persons bound together by identifiable rules and having an identifiable membership." Jean Warburton, *Charities, Members, Accountability and Control*, 1997 CONV. & PROP. LAW (n.s.) 106, 109 (quoting *Re Koeppler's Will Trust*, [1985] 3 W.L.R. 765, 771 (Eng.) (per Slade L.J.)).

91. See *Society of Lloyd's v. Clementson*, [1996] 5 Re L.R. 215, 227 (Q.B. Com. Ct.).

92. See *Chem. Leaman Tank Lines, Inc. v. Aetna Cas. & Sur. Co.*, 177 F.3d 210, 221 (3d Cir. 1999) ("[Lloyd's] syndicates are not legal entities."); *E.R. Squibb & Sons, Inc. v. Accident & Cas. Ins. Co.*, 160 F.3d 925, 929 (2d Cir. 1998) ("[The Lloyd's] syndicates themselves have been said to have no independent legal identity"); *Youell v. Grimes*, 203 F.R.D. 503, 508 (D. Kan. 2001) ("It is well settled under [English] law that Lloyd's Syndicates do not constitute legal entities."); *Humm v. Lombard World Trade, Inc.*, 916 F. Supp. 291, 299 (S.D.N.Y. 1996) ("Lloyd's syndicates are not recognized as legal entities under British law."); *Roby*, 796 F. Supp. at 105 ("It is undisputed that under the law of England, the syndicates do not constitute legal entities.").

93. Compare *Bobe v. Lloyd's*, 27 F.2d 340, 345 (S.D.N.Y. 1927) (holding that syndicates are not unincorporated associations under New York law), *aff'd per curiam*, 27 F.2d 347 (2d Cir. 1928), *with Merchs.' & Mfrs.' Lloyd's Ins. Exch. v. S. Trading Co.*, 205 S.W.2d 352, 354-55 (Tex. Civ. App. 1918) (stating that a Lloyd's association of underwriters constitutes an unincorporated association under Texas law), *rev'd on other grounds*, 229 S.W.2d 312, 316 (Tex. Comm'n App. 1921) (adopting judgment), *and Youell*, 203 F.R.D. at 509 n.6 (finding that a Lloyd's syndicate meets the common law definition of an unincorporated association).

94. 7 C.J.S. *Associations* § 2 (1980).

95. See, e.g., *Youell*, 203 F.R.D. at 509 n.6 (applying Kansas law to conclude that syndicates are unincorporated associations).

96. See, e.g., *Bobe*, 27 F.2d at 345 (applying New York law to conclude that syndicates are not unincorporated associations).

association, it does not necessarily follow that the applicable state law will treat the syndicate as a legal entity.⁹⁷ The traditional common law rule is that an unincorporated association is not a separate legal entity.⁹⁸ The jurisdictions that follow this common law rule will deny an unincorporated association the right to represent the collective interests of its members in a judicial proceeding.⁹⁹ In such a case, parties could either bring an action on behalf of all individual members, no matter how many there may be,¹⁰⁰ or bring an action in the name of a few members as representatives of all the members.¹⁰¹

Many states have enacted statutes to opt out of the common law rule and provide unincorporated associations with legal entity status.¹⁰² These statutes will generally allow an unincorporated association to bring or defend a suit as an entity representing the collective interests of all its members.¹⁰³ These statutes apply to both foreign and domestic unincorporated associations, as foreign unincorporated associations doing business in the forum state may be sued under the forum state's statute.¹⁰⁴ However, statutes that grant unincorporated associations legal entity status are "purely local in their operation and are not binding in other states."¹⁰⁵ Thus, the legal status of a foreign unincorporated association can vary depending on whether the legislature in the forum state has enacted such a statute.¹⁰⁶

97. *Youell*, 203 F.R.D. at 508–09 (finding that a Lloyd's syndicate meets the common law definition of an unincorporated association but that Kansas does not recognize unincorporated associations as legal entities).

98. 7 C.J.S. *Associations* § 2 (1980); 6 AM. JUR. 2D *Associations and Clubs* § 51 (1999).

99. 6 AM. JUR. 2D *Associations and Clubs* § 51 (1999).

100. 7 C.J.S. *Associations* § 41 (1980).

101. *Id.* § 43. The representative option is known as the doctrine of "virtual representation," and it is generally available where the members of the association have "a common or general interest in the subject matter of the suit, or where the members are numerous and it is impracticable to bring them all before the court." *Id.* The selected representative should be a member of the association because there is a presumption that a member will fairly represent the rights and interests of all members. *Id.*

102. See ALA. CODE § 6-7-81 (1993); CAL. CIV. PROC. CODE § 369.5 (West 2004); OKLA. STAT. tit. 12, § 2017 (Supp. 2004).

103. 7 C.J.S. *Associations* § 47 (1980).

104. *Id.*; see, e.g., *Four Way Plant Farm, Inc. v. Nat'l Council on Comp. Ins.*, 894 F. Supp. 1538, 1548 (M.D. Ala. 1995) ("To determine whether an unincorporated association is subject to suit, the court examines the law of the forum state.").

105. 7 C.J.S. *Associations* § 47 (1980).

106. See *Four Way Plant Farm, Inc.*, 894 F. Supp. at 1548–49 (applying the statute of the forum

C. *One District Court Adopted a Bifurcated Approach to Determine the Legal Status of a Foreign Unincorporated Association Under State Law*

In *Four Way Plant Farm, Inc. v. National Council on Compensation Insurance*,¹⁰⁷ the U.S. District Court for the Middle District of Alabama analyzed the legal status of a foreign unincorporated association through a bifurcated choice-of-law approach.¹⁰⁸ Under this approach, the court denied diversity jurisdiction to a Florida unincorporated association.¹⁰⁹ The court applied Florida law to classify an association of insurers as an unincorporated association and Alabama law to determine whether the association was a legal entity.¹¹⁰ In applying Florida law, the court reasoned that it must look to where the association was created to determine whether it was an unincorporated association.¹¹¹ Florida has utilized the common law definition of an unincorporated association, and the court found that the association fit within that definition.¹¹² Next, the court reasoned that it must look to the laws of the forum state to determine whether an unincorporated association is subject to suit under its laws.¹¹³ Under Alabama law, unincorporated associations have legal entity status, and the court therefore determined that the association of insurers was a legal entity.¹¹⁴

Although the U.S. Courts of Appeals have not considered the question of how to determine the legal status of a Lloyd's syndicate,¹¹⁵ the district courts have provided some insight.¹¹⁶ District courts have looked to various choice-of-law methodologies to determine which law controls the question of legal status.¹¹⁷ Depending on which jurisdiction's law

state, Alabama, to grant legal entity status to a Florida unincorporated association).

107. 894 F. Supp. 1538 (M.D. Ala. 1995).

108. *Id.* at 1545–46, 1549.

109. *Id.*

110. *Id.* at 1545.

111. *Id.*

112. *Id.* at 1545–48.

113. *Id.* at 1548.

114. *Id.*

115. *See infra* Part IV.B.

116. *See, e.g., Four Way Plant Farm, Inc.*, 894 F. Supp. at 1547–48; *Roby v. Corp. of Lloyd's*, 796 F. Supp. 103, 105–06 (S.D.N.Y. 1992).

117. *See Four Way Plant Farm, Inc.*, 894 F. Supp. at 1547–48; *Roby*, 796 F. Supp. at 105–06.

controls the question, courts have reached different conclusions as to a syndicate's legal status.¹¹⁸ Courts have adopted either a single law analysis¹¹⁹ or have used a bifurcated analysis to classify a Lloyd's syndicate and determine its legal status.¹²⁰

III. A SYNDICATE'S LEGAL STATUS DETERMINES WHICH DIVERSITY JURISDICTION TEST FEDERAL COURTS WILL USE IN A SUIT INVOLVING THE SYNDICATE

Diversity jurisdiction requires that all parties on one side of a dispute be of diverse citizenship from all parties on the other side of the dispute.¹²¹ Courts may have difficulty determining the citizenship of the legal persons that can appear as parties. To resolve this problem, the U.S. Supreme Court has developed two different tests: the real party in interest test and the unincorporated association test.¹²² The real party in interest test applies unless state law provides a group of persons with legal entity status, in which case the unincorporated association test applies.¹²³

A. *Federal Subject Matter Jurisdiction Extends to Disputes Between Parties of Completely Diverse Citizenship*

Congress has extended subject matter jurisdiction to allow federal courts to resolve disputes between "citizens of different States."¹²⁴ Diversity jurisdiction, as this provision is commonly known, has two requirements: the amount in controversy requirement and the diversity of citizenship requirement.¹²⁵ The diversity of citizenship requirement

118. Compare *Bobe v. Lloyd's*, 27 F.2d 340, 345 (S.D.N.Y. 1927) (holding that syndicates are not unincorporated associations under New York law), *aff'd per curiam*, 27 F.2d 347 (2d Cir. 1928), with *Lloyd's Ins. Exch. v. S. Trading Co.*, 205 S.W.2d 352, 354-55 (Tex. Civ. App. 1918) (stating that a Lloyd's association of underwriters constitutes an unincorporated association under Texas law), *rev'd on other grounds*, 229 S.W.2d 312, 316 (Tex. Comm'n App. 1921) (adopting judgment).

119. See *Roby*, 796 F. Supp. at 107.

120. See *Four Way Plant Farm, Inc.*, 894 F. Supp. at 1548.

121. *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 267 (1806).

122. *Carden v. Arkoma Assocs.*, 494 U.S. 185, 187 n.1 (1990) (noting that the Court applies two different tests depending on the factual circumstances).

123. *Id.*

124. 28 U.S.C. § 1332(a) (2000).

125. *Id.* The amount in controversy requirement places the burden on the plaintiff to plead an amount greater than \$75,000. See JACK H. FRIEDENTHAL ET AL., *CIVIL PROCEDURE* § 2.8 (3d ed.

provides that a federal court may not exercise diversity jurisdiction over a case or controversy unless the plaintiff and the defendant are citizens of different states.¹²⁶ When determining the citizenship of the parties, courts look to citizenship at the time the plaintiff filed the complaint.¹²⁷ In cases where there are multiple plaintiffs or multiple defendants, a court applies the "complete diversity" rule.¹²⁸ The complete diversity rule provides that each plaintiff must be a citizen of a different state than each defendant.¹²⁹ Thus, diversity jurisdiction will not exist if one plaintiff is a citizen of the same state as one defendant.¹³⁰

B. Diversity Questions Commonly Arise in Suits by or Against Lloyd's Syndicates

In lawsuits filed against Lloyd's underwriters in federal court, the basis for federal jurisdiction over the case is often diversity of citizenship between the plaintiff and the names.¹³¹ A syndicate's legal status determines the test that a court must apply to determine its citizenship for diversity purposes.¹³² On one hand, if a syndicate is not a legal entity, then courts apply the real party in interest test.¹³³ To determine whether complete diversity exists under that test, courts examine the citizenship of only the real party in interest.¹³⁴ Sometimes, courts have found that the real party in interest is the lead underwriter.¹³⁵

1999). A plaintiff may not aggregate claims against multiple defendants to reach this amount unless the defendants are jointly liable, even if the claims arise out of the same set of facts. *Id.* at 49.

126. 28 U.S.C. § 1332.

127. *Mollan v. Torrance*, 22 U.S. (9 Wheat.) 537, 539 (1824).

128. *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch.) 267, 267 (1806).

129. 13B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 2D § 3605 (2d ed. 1984).

130. *Id.*

131. *See, e.g., Corfield v. Dallas Glen Hills L.P.*, 355 F.3d 853, 855 (5th Cir. 2003), *cert. denied*, 124 S.Ct. 2421 (2004) (addressing an insured party challenge to diversity jurisdiction); *E.R. Squibb & Sons, Inc. v. Accident & Cas. Ins. Co.*, 160 F.3d 925, 928 (2d Cir. 1998) (raising the diversity issue sua sponte); *Ind. Gas Co. v. Home Ins. Co.*, 141 F.3d 314, 320 (7th Cir. 1998) (raising the diversity issue sua sponte); *Certain Interested Underwriters at Lloyd's v. Layne*, 26 F.3d 39, 41 (6th Cir. 1994) (addressing an insured party challenge to diversity jurisdiction).

132. *Carden v. Arkoma Assocs.*, 494 U.S. 185, 187 n.1 (1990).

133. *Id.*

134. *Id.*

135. *See, e.g., Layne*, 26 F.3d at 43 (determining that lead underwriters are the real parties in

Other times, courts have concluded that all the names are real parties in interest.¹³⁶ On the other hand, if a syndicate is an unincorporated association with legal entity status, courts apply the unincorporated association test and look to the citizenship of all the names in a syndicate.¹³⁷

1. The Real Party in Interest Test Applies if a Syndicate Is Not Considered a Legal Entity

Federal courts apply the real party in interest test when “various parties” appear before them.¹³⁸ Under that test, courts determine which parties are simply representing the other parties, and which parties have a real interest in the action.¹³⁹ To be a real party in interest, a party must have a personal stake in the outcome the litigation.¹⁴⁰ Under this test, courts ignore the citizenship of the representative parties when determining whether complete diversity exists.¹⁴¹ Instead, courts look to the citizenship of only the real parties in interest in the action.¹⁴²

The U.S. Courts of Appeals for the Second, Fifth, and Sixth Circuits have all applied the real party in interest test to determine whether they had diversity jurisdiction over suits involving underwriters on a Lloyd’s policy.¹⁴³ In *Certain Interested Underwriters at Lloyd’s v. Layne*,¹⁴⁴ the Sixth Circuit looked to Tennessee law for guidance to determine who the real party in interest was.¹⁴⁵ Under Tennessee law, the court concluded the lead underwriter was the agent of the syndicate, and its subscribing

interest under Tennessee law).

136. See, e.g., *E.R. Squibb & Sons, Inc.*, 160 F.3d at 930–31 (determining that all names are real parties in interest).

137. *Carden*, 494 U.S. at 187 n.1.

138. *Id.*

139. *Id.*

140. 6A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE: CIVIL 2D § 1556 (1982).

141. *N. Trust Co. v. Bunge Corp.*, 899 F.2d 591, 594 (7th Cir. 1990).

142. *Id.*

143. See *Corfield v. Dallas Glen Hills L.P.*, 355 F.3d 853, 863 (5th Cir. 2003), *cert. denied*, 124 S.Ct. 2421 (2004); *E.R. Squibb & Sons, Inc. v. Accident & Cas. Ins. Co.*, 160 F.3d 925, 931 (2d Cir. 1998); *Certain Interested Underwriters at Lloyd’s v. Layne*, 26 F.3d 39, 43 (6th Cir. 1994).

144. 26 F.3d 39 (6th Cir. 1994).

145. *Id.* at 43.

underwriters were undisclosed principals on the insurance contract.¹⁴⁶ Because Tennessee law holds agents liable for contracts they enter into on behalf of undisclosed principals, the *Layne* court determined that the lead underwriter was the real party in interest.¹⁴⁷ Likewise, the court held that the other underwriters in the syndicate were not real parties in interest because Tennessee law releases undisclosed principals from liability when only the agent is sued.¹⁴⁸

In *E.R. Squibb & Sons, Inc. v. Accident & Casualty Insurance Co.*,¹⁴⁹ the Second Circuit also applied the real party in interest test, but did not look to any state's law to determine the party in interest.¹⁵⁰ The court held that all subscribing underwriters are real parties in interest when the lead underwriter is suing in a representative capacity.¹⁵¹ However, the court also analyzed whether the plaintiff could avoid having to account for the citizenship of all subscribing underwriters by suing the lead underwriter in his capacity as an individual underwriter, and not in his capacity as the underwriter representing the syndicate.¹⁵² The Second Circuit remanded the question of whether, under English law, the lead underwriter could be sued as an individual and not as a representative of the other underwriters.¹⁵³ On remand, the district court concluded that the lead underwriter could properly be sued in his or her individual capacity.¹⁵⁴

The most recent circuit court to employ the real party in interest test is

146. *Id.* at 43–44.

147. *Id.*

148. *Id.*

149. 160 F.3d 925 (2d Cir. 1998).

150. *Id.* at 931.

151. *Id.*

152. *Id.* at 935–36. The court reasoned that Lloyd's was neither an unincorporated association nor a "constructive entity," although the court did not specify which jurisdiction's law it applied to make that determination. *Id.* at 937. The court distinguished Lloyd's from other unincorporated associations because unincorporated associations have contractual provisions that run horizontally from member to member. *Id.* In contrast, the court concluded that a Lloyd's of London insurance policy is composed of vertical obligations that run only from the insured to each underwriter individually. *Id.*

153. *Id.* at 939. In addition, the Second Circuit asked the district court to consider whether the unjoined names would be indispensable parties to the action under Federal Rule of Civil Procedure 19(b). *Id.*

154. *E.R. Squibb & Sons, Inc. v. Accident & Cas. Ins. Co.*, No. 82 CIV. 7327JSM, 1999 WL 350857, at *5 (S.D.N.Y. June 2, 1999), *aff'd*, 241 F.3d 154, 162 (2d Cir. 2001).

the Fifth Circuit in *Corfield v. Dallas Glen Hills L.P.*¹⁵⁵ In *Corfield*, a syndicate filed a declaratory action in federal court against a Texas partnership seeking a determination of the parties' rights regarding an insurance contract.¹⁵⁶ The syndicate's lead underwriter filed suit on his own behalf and on behalf of the syndicate's other underwriters.¹⁵⁷ After the partnership challenged the court's diversity jurisdiction, the lead underwriter amended the complaint to sue only on his own behalf.¹⁵⁸ Like the *Squibb* court, the *Corfield* court did not consult state law to determine the syndicate's legal status.¹⁵⁹ The court concluded that the only citizenship that matters is the lead underwriter's when he sues in his capacity as an individual underwriter.¹⁶⁰

2. *The Unincorporated Association Test Applies if a Syndicate Is an Unincorporated Association*

The unincorporated association test applies when one or more of the parties to the litigation is a group of individuals or businesses that has formed, or is deemed by state law to have formed, an "unincorporated association" with legal entity status.¹⁶¹ Unincorporated associations include joint stock companies,¹⁶² labor unions,¹⁶³ and limited partnerships.¹⁶⁴ To determine the citizenship of a limited partnership for diversity purposes, for example, courts consider the citizenship of each of the partnership's general and limited partners.¹⁶⁵

The U.S. Supreme Court's decision in *Carden v. Arkoma Associates*¹⁶⁶ illustrates the role that state law plays in determining

155. 355 F.3d 853 (5th Cir. 2003), *cert. denied*, 124 S.Ct. 2421 (2004).

156. *Id.* at 855.

157. *Id.*

158. *Id.* at 856.

159. *Id.* at 863.

160. *Id.*

161. *Carden v. Arkoma Assocs.*, 494 U.S. 185, 187 n.1 (1990). Congress has created one exception to this rule to provide corporations with separate citizenship. 28 U.S.C. § 1332(c) (2000).

162. *Chapman v. Barney*, 129 U.S. 677, 682 (1889). A joint stock company, which is now a purely historical entity, was a hybrid resembling both a corporation and a general partnership. *Carden*, 494 U.S. at 202 (O'Connor, J., dissenting).

163. *See United Steelworkers of Am. v. R.H. Bouligny, Inc.*, 382 U.S. 145, 152-53 (1965).

164. *See Carden*, 494 U.S. at 195-96.

165. *Id.*

166. 494 U.S. 185 (1990).

whether the real party in interest test or the unincorporated association test applies to a group of persons.¹⁶⁷ The *Carden* Court addressed the question of how to determine the citizenship of a limited partnership for diversity purposes.¹⁶⁸ The majority and dissent disagreed about how many parties were before the Court and which citizenship test applied.¹⁶⁹ Whereas the dissent argued that there were many parties, the majority concluded that only one party appeared before the court—the limited partnership.¹⁷⁰ The majority reasoned that the limited partnership did not consist of individual real parties in interest because state law recognized it as a “single artificial entity.”¹⁷¹ The Court stated that it would apply the real party in interest test when “various parties [are] before the Court” and would apply the rule for unincorporated associations when a “single artificial entity” was before the Court.¹⁷² The Court concluded that the dissent incorrectly applied the real party in interest test because the dissent erred in determining the legal status of the parties.¹⁷³

In contrast to the Second, Fifth, and Sixth Circuits, which have applied the real party in interest test, the U.S. Court of Appeals for the Seventh Circuit has applied the unincorporated association test to determine the citizenship of a Lloyd's syndicate.¹⁷⁴ In *Indiana Gas Co. v. Home Insurance Co.*,¹⁷⁵ the court concluded that a syndicate should be treated as an unincorporated association and that the syndicate assumes the citizenship of each of its subscribing underwriters.¹⁷⁶ The court rejected the Sixth Circuit's reasoning and conclusion in *Layne*.¹⁷⁷ Instead, it relied on the U.S. Supreme Court's decision in *Carden* to articulate the general rule that “every association of a common-law jurisdiction other than a corporation is to be treated like a

167. *See id.* at 187 n.1.

168. *Id.* at 186.

169. *Id.* at 187 n.1.

170. *Id.*

171. *Id.* at 187–88.

172. *Id.*

173. *See id.*

174. *Ind. Gas Co. v. Home Ins. Co.*, 141 F.3d 314, 317–19 (7th Cir. 1998).

175. 141 F.3d 314 (7th Cir. 1998).

176. *Id.* at 317–19.

177. *Id.* at 319.

partnership.”¹⁷⁸ In reaching this conclusion, the court described the structure of a Lloyd’s syndicate as a cross between a general partnership and a limited partnership.¹⁷⁹ The court stated that the syndicate’s liability structure resembles that of a general partnership because every name faces unlimited liability for its share of the risk, but the syndicate’s management structure resembles that of a limited partnership because the lead underwriter is the active manager, while the subscribing underwriters have no management powers.¹⁸⁰

Thus, the U.S. Circuit Courts of Appeals disagree as to which test applies to a Lloyd’s syndicate.¹⁸¹ The appropriate test for citizenship often determines a court’s ability to assert diversity jurisdiction over the case because of the complete diversity requirement.¹⁸² Some courts have applied the real party in interest test to determine the citizenship of the Lloyd’s parties,¹⁸³ but these courts have reached different conclusions as to which parties are the real parties in interest.¹⁸⁴ Other courts have applied the unincorporated association test and have concluded that a syndicate inherits the citizenship of all its members.¹⁸⁵ The U.S. Supreme Court should resolve the disagreement among the courts by announcing a definitive methodology for determining the citizenship of a Lloyd’s syndicate.

178. *Id.* at 317.

179. *Id.* at 316.

180. *See id.*

181. *See Corfield v. Dallas Glen Hills L.P.*, 355 F.3d 853, 863 (5th Cir. 2003) (applying the real party in interest test), *cert. denied*, 124 S.Ct. 2421 (2004); *E.R. Squibb & Sons, Inc. v. Accident & Cas. Ins. Co.*, 160 F.3d 925, 930–31 (2d Cir. 1998) (applying the real party in interest test); *Ind. Gas Co.*, 141 F.3d at 317 (applying the unincorporated association test); *Certain Interested Underwriters at Lloyd’s v. Layne*, 26 F.3d 39, 42 (6th Cir. 1994) (applying the real party in interest test).

182. *See supra* Part III.A.

183. *See Corfield*, 355 F.3d at 863; *E.R. Squibb & Sons, Inc.*, 160 F.3d at 930–31; *Layne*, 26 F.3d at 42.

184. *Compare E.R. Squibb & Sons, Inc.*, 160 F.3d at 930–31 (holding that all underwriters are real parties in interest when the lead underwriter is a party to the action as a representative of all names), *with Layne*, 26 F.3d at 43 (holding that under Tennessee law only the lead underwriter is the real party in interest).

185. *Ind. Gas Co.*, 141 F.3d at 317–19.

IV. FEDERAL COURTS SHOULD DETERMINE THE LEGAL STATUS OF A SYNDICATE UNDER STATE LAW, THEN DETERMINE ITS CITIZENSHIP FOR DIVERSITY PURPOSES

Of the U.S. Courts of Appeals that have analyzed the citizenship of a Lloyd's of London syndicate, none has first decided which law should determine whether syndicates are legal entities.¹⁸⁶ Instead of beginning with a choice-of-law analysis or announcing a definitive rule, the courts have simply looked to English or state law without explaining why one or the other should apply.¹⁸⁷ Other courts have simply declared whether syndicates are legal entities, without relying on English or state law.¹⁸⁸ Because the U.S. Supreme Court's decision in *Carden* implies that courts look to state or English law to determine a syndicate's legal status,¹⁸⁹ courts should adopt a three-step process. First, courts must determine which state's law controls the syndicate relationship. Second, courts must apply that law to determine if a Lloyd's syndicate is a legal entity. Finally, courts must apply the appropriate test to determine the citizenship of the parties for diversity purposes.

A. *Carden Suggests a Three-Step Approach for Determining a Syndicate's Citizenship*

The three-part test evolves from the U.S. Supreme Court's language in *Carden*.¹⁹⁰ The *Carden* Court implicitly recognized a state's authority to create artificial entities, and the Court appeared willing to apply the legal entity test to any such state-created entity.¹⁹¹ When a group of people with similar interests are before a federal court, the court must determine which jurisdiction's law it should apply when deciding whether the group is a legal entity or various separate persons.¹⁹² The

186. See *Corfield*, 355 F.3d at 863; *E.R. Squibb & Sons, Inc.*, 160 F.3d at 930–31; *Ind. Gas Co.*, 141 F.3d at 317; *Layne*, 26 F.3d at 42.

187. Compare *E.R. Squibb & Sons, Inc.*, 160 F.3d at 936 (applying English law), with *Layne*, 26 F.3d at 43 (applying Tennessee law).

188. See, e.g., *Ind. Gas Co.*, 141 F.3d at 316–17 (concluding that a syndicate is a legal entity without specifying what law the court applied to reach that conclusion).

189. See *Carden v. Arkoma Assocs.*, 494 U.S. 185, 187 n.1 (1990).

190. See *id.*

191. See *id.* at 187.

192. *Four Way Plant Farm, Inc. v. Nat'l Council on Comp. Ins.*, 894 F. Supp. 1538, 1545 (M.D.

Carden Court stated that the real party in interest test applies when “various parties [are] before the Court” and that the unincorporated association test applies when the parties comprise a “single artificial entity.”¹⁹³ To provide a uniform analysis, courts should adopt a three-part test to apply to a Lloyd’s syndicate. Courts should first determine which state’s law controls the syndicate relationship; second, apply that law to determine if a Lloyd’s syndicate is a legal entity; and third, apply the appropriate test to determine the citizenship of the parties for diversity purposes.

1. *Step One: A Court Must Determine Which Law Controls the Legal Status of a Lloyd’s Syndicate*

First, a court must decide what law should control the determination of a syndicate’s legal classification and status. Given the disparate treatment under the alternative laws,¹⁹⁴ the answer to this question will often determine the appropriate test for citizenship. A court could choose to honor the Lloyd’s agreements that members must sign upon joining Lloyd’s, which contain a choice-of-law clause that provides that English law shall govern disputes between members.¹⁹⁵ However, a court could reason that these contracts only regulate the relationship among members of Lloyd’s and not the relationship between the insured party and the syndicate.¹⁹⁶ Many states have enacted statutes that would trump choice-of-law clauses in the insurance contracts,¹⁹⁷ and a court could interpret such statutes to provide that the local law shall govern the entire insurance contractual relationship, including the legal classification of an

Ala. 1995).

193. *Carden*, 494 U.S. at 187 n.1.

194. Compare *Youell v. Grimes*, 203 F.R.D. 503, 508 (D. Kan. 2001) (“It is well settled under [English] law that Lloyd’s Syndicates do not constitute legal entities.”), and *Bobe v. Lloyd’s*, 27 F.2d 340, 345 (S.D.N.Y. 1927) (holding that syndicates are not unincorporated associations under New York law), *aff’d per curiam*, 27 F.2d 347 (2d Cir. 1928), with *Merchs.’ & Mfrs.’ Lloyd’s Ins. Exch. v. S. Trading Co.*, 205 S.W.2d 352, 354–55 (Tex. Civ. App. 1918) (stating that a Lloyd’s association of underwriters constitutes an unincorporated association under Texas law), *rev’d on other grounds*, 229 S.W.2d 312, 316 (Tex. Comm’n App. 1921) (judgment adopted).

195. *Roby v. Corp. of Lloyd’s*, 796 F. Supp. 103, 106 (S.D.N.Y. 1992) (“Upon acceptance into the Society of Lloyd’s, the individual executes a number of documents, among which are the premium trust deed, a member’s agent agreement, and a managing agent agreement. Each of the documents provides that it is to be governed by the law of England.”).

196. *See id.*

197. COUCH, *supra* note 57, at § 24:3.

unincorporated group of insurers.¹⁹⁸

Alternatively, a court could adopt the common law rule that the applicable law is determined by looking to the jurisdiction in which the association was created.¹⁹⁹ This was the primary rationale behind the *Roby* court's holding that English law applied,²⁰⁰ and the rationale of the *Four Way Plant Farm* court when determining the legal classification of the group of insurers.²⁰¹ A court applying this test to a Lloyd's syndicate would likely conclude that syndicates are created and continue to operate under English law because the Lloyd's of London market is physically located in England, the majority of names are English citizens, and each name must travel to England to execute the investment contract.²⁰² However, courts may have difficulty determining which jurisdiction "created" the unincorporated association when members reside and conduct business in different locations.

As a third alternative, a court could apply the choice-of-law rules of the forum state to determine which state's law should govern the syndicate's legal status.²⁰³ The *Roby* court applied a choice-of-law analysis as an alternative holding and found that the New York choice-of-law "interests analysis" directed the court to apply English law.²⁰⁴ However, this outcome is dependant on the forum state's choice-of-law rules. In addition, *Roby* is distinguishable from cases involving a determination of legal status for diversity purposes because *Roby* involved a dispute regarding the investment relationship between the names and Lloyd's of London.²⁰⁵ In contrast, diversity cases result from the operations of a Lloyd's syndicate in the United States.

Finally, a court could look to Federal Rule of Civil Procedure 17(b) to

198. Even though a court may determine that local law applies, the court could apply the whole law of the jurisdiction in which it sits to conclude that English or some other jurisdiction's law controls the legal status of a syndicate.

199. *Roby*, 796 F. Supp. at 106-07.

200. *See id.*

201. *See Four Way Plant Farm, Inc. v. Nat'l Council on Comp. Ins.*, 894 F. Supp. 1538, 1545-46 (M.D. Ala. 1995).

202. *See Roby*, 796 F. Supp. at 106-07.

203. *See Klaxon v. Stentor Elec. Mfg., Co.*, 313 U.S. 487, 496 (1941).

204. *See Roby*, 796 F. Supp. at 106-07 (applying New York's choice-of-law rules to conclude that English law governs "because Lloyd's is based in London and approximately 80% of the Names are English citizens").

205. *See id.* at 104.

conclude that the forum state's law applies to determine a syndicate's legal status.²⁰⁶ However, Rule 17(b) explicitly states that it is a rule to determine the capacity of a party to appear in federal court.²⁰⁷ As the *Roby* court discussed, capacity and legal status are two distinct concepts, and a party must have both to appear in federal court under diversity jurisdiction.²⁰⁸ This rationale makes sense given that the language of Rule 17(b) directs federal courts to different law depending on the legal status of the party.²⁰⁹ If a court were to look to Rule 17(b) to determine legal status, its analysis would be circular.²¹⁰

2. *Step Two: A Court Must Apply the Applicable Law to Determine a Syndicate's Legal Status*

Once a court determines which state's law applies, it must apply that law to classify the syndicate relationship and determine a syndicate's legal status.²¹¹ To do so, a court must first classify a Lloyd's syndicate as either an unincorporated association or a mere grouping of individuals.²¹² Then, a court must determine the syndicate's legal status based on the applicable law.²¹³ A court could either adopt the bifurcated choice-of-law approach advocated by the *Four Way Plant Farm* court, or it could classify a syndicate and analyze its legal status under the same law.²¹⁴

States may choose to define an unincorporated association by statute,²¹⁵ but many of the statutes provide a definition similar to the common law definition.²¹⁶ Courts that have analyzed state law to classify

206. FED. R. CIV. P. 17(b).

207. *Id.*

208. *Roby*, 796 F. Supp. at 110.

209. FED. R. CIV. P. 17(b).

210. Rule 17(b) directs courts to the law of the forum state to determine the capacity of an unincorporated association. *Id.* However, a court cannot determine whether a group comprises an unincorporated association until it looks to the law of some jurisdiction.

211. *Roby*, 796 F. Supp. at 110.

212. *See supra* Part II.B.

213. *See supra* Part II.B.

214. *See supra* Part II.B-C.

215. *See Four Way Plant Farm, Inc. v. Nat'l Council on Comp. Ins.*, 894 F. Supp. 1538, 1545-46 (M.D. Ala. 1995) (noting that the Florida legislature has not defined an unincorporated association in its statutes and the Florida judiciary has adopted the common law definition).

216. 7 C.J.S. *Associations* § 2 (1980). An unincorporated association is defined as "a body of persons acting together, without a charter, but upon the methods and forms used by corporations, for

a Lloyd's syndicate have reached different conclusions as to whether a syndicate qualifies as an unincorporated association.²¹⁷ The majority of courts that have considered the question have concluded that a Lloyd's syndicate is an unincorporated association.²¹⁸ In addition, courts in the United Kingdom appear to recognize that a syndicate is an unincorporated association.²¹⁹

After a court has classified a syndicate as either an unincorporated association or a group of individuals, it must then consider whether the syndicate is a legal entity.²²⁰ Courts apply either the same law they used to determine whether a syndicate is an unincorporated association or, under the bifurcated approach in *Four Way Plant Farms*, the law of the local jurisdiction.²²¹ If a court determines that a Lloyd's syndicate is not an unincorporated association, then the members are merely individuals and do not comprise a legal entity.²²² However, if a court determines that a syndicate is an unincorporated association, it must then determine whether an unincorporated association is a legal entity under the applicable law.²²³ Although an unincorporated association is not a legal

the prosecution of some common enterprise." *Id. Four Way Plant Farm, Inc.*, 894 F. Supp. at 1546 (noting that courts in several states have adopted the common law definition of an unincorporated association).

217. *Compare* *Bobe v. Lloyd's*, 27 F.2d 340, 345 (S.D.N.Y. 1927) (holding that syndicates are not unincorporated associations under New York law), *aff'd per curiam*, 27 F.2d 347 (2d Cir. 1928), *with* *Merchs.' & Mfrs.' Lloyd's Ins. Exch. v. S. Trading Co.*, 205 S.W.2d 352, 354-55 (Tex. Civ. App. 1918) (stating that a Lloyd's association of underwriters constitutes an unincorporated association under Texas law), *rev'd on other grounds*, 229 S.W.2d 312, 316 (Tex. Comm'n App. 1921) (adopting judgment).

218. *See* *Youell v. Grimes*, 203 F.R.D. 503, 509 n.6 (D. Kan. 2001) ("[T]he majority of courts [have held that] Lloyd's Syndicates are unincorporated associations.").

219. *See* *Davenport v. Corinthian Motor Policies*, 1991 S.L.T. 774, 776 (Scot.) (referring to a syndicate as an unincorporated association). Under English law, an unincorporated association is defined as "an association of persons bound together by identifiable rules and having an identifiable membership." *See* Jean Warburton, *Charities, Members, Accountability and Control*, 1997 CONV. & PROP. LAW (n.s.) 106, 109 (quoting *Re Koeppler's Will Trust*, [1985] 3 W.L.R. 765, 771 (Eng.) (per Slade L.J.)).

220. *See, e.g.*, *Roby v. Corp. of Lloyd's*, 796 F. Supp. 103, 107 (S.D.N.Y. 1992) (applying New York law to conclude that a syndicate is not an unincorporated association under and therefore not a legal entity); *Four Way Plant Farm, Inc.*, 894 F. Supp. at 1548 (applying the forum state's statute to determine the legal entity status of a Florida unincorporated association).

221. *Four Way Plant Farm, Inc.*, 894 F. Supp. at 1548.

222. *Roby*, 796 F. Supp. at 107.

223. The court may choose the bifurcated approach and apply the forum state's law to determine legal entity status, or it may choose to apply the same law it used to determine the classification as

entity under common law,²²⁴ many states have enacted statutes that confer legal entity status on unincorporated associations.²²⁵ Therefore, for a court to find that a syndicate has legal entity status, it must determine that a Lloyd's syndicate is an unincorporated association and that unincorporated associations are legal entities under the applicable jurisdiction's law. Thus, the outcome of step two of the three-part analysis will vary depending on the choice-of-law determination in step one.

3. *Step Three: A Court Must Apply the Appropriate Citizenship Test Based on the Legal Status of a Lloyd's Syndicate*

Finally, a court must apply either the real party in interest test or the unincorporated association test depending on its determination of the syndicate's legal status. If a court determines that a syndicate is not an unincorporated association or is an unincorporated association but not a legal entity, then the court must apply the real party in interest test because the names will be considered "various parties" before the court.²²⁶ In such an action, the names of the syndicate will usually appear before the court through their collective agent, who is usually the lead underwriter.²²⁷ A court applying the real party in interest test will determine the citizenship of the parties based on the citizenship of each name represented and will ignore their collective representative.²²⁸ Courts have reached different conclusions as to whether the lead underwriter is the only real party in interest.²²⁹ In addition, if the

an unincorporated association. *See Four Way Plant Farm, Inc.*, 894 F. Supp. at 1548 (determining that courts should apply the laws of the forum state); 7 C.J.S. *Associations* § 47 (1980) (stating that a court has the option to apply the same law as it did to determine legal status).

224. 7 C.J.S. *Associations* § 41 (1980).

225. *Id.* § 42.

226. *Carden v. Arkoma Assocs.*, 494 U.S. 185, 187 n.1 (1990) (noting that the real party in interest test applies when various parties are before the court).

227. If a court concludes that a Lloyd's syndicate is an unincorporated association without legal entity status, then such representation is referred to as "virtual representation" and would be permissible because the names have a common interest in the subject matter of the suit. *See* 7 C.J.S. *Associations* § 43 (1980).

228. *N. Trust Co. v. Bunge Corp.*, 899 F.2d 591, 594 (7th Cir. 1990).

229. *Compare Certain Interested Underwriters at Lloyd's v. Layne*, 26 F.3d 39, 43 (6th Cir. 1994) (holding that under Tennessee law only the lead underwriter is the real party in interest), *with* *E.R. Squibb & Sons, Inc. v. Accident & Cas. Ins. Co.*, 160 F.3d 925, 930-31 (2d Cir. 1998) (holding that all underwriters are real parties in interest when the lead underwriter is a party to the action as a

underwriters are merely “various parties” before the court with separate and distinct interests, a court may allow an action against only a portion of the names with diverse citizenship.²³⁰

If a court determines that a Lloyd's syndicate is an unincorporated association with legal entity status, then it must apply the unincorporated association test to determine the citizenship of the syndicate.²³¹ Under this test, the syndicate will be considered a citizen of every state in which a name resides,²³² and diversity jurisdiction will depend upon the citizenship of all names as compared to the opposing parties. If any name is a citizen of the same state as an opposing party, diversity jurisdiction is destroyed for lack of complete diversity.²³³

B. Courts that Have Addressed a Syndicate's Citizenship Have Failed To Determine Its Legal Status Under Applicable State Law

When considering the citizenship of a group of Lloyd's underwriters, the courts of appeals have failed to address the syndicate's legal status under the applicable jurisdiction's law. In *Layne*, the Sixth Circuit assumed that the underwriting members were various parties before the court and therefore were subject to the real party in interest test.²³⁴ The court recognized that the underwriting group constitutes an unincorporated association,²³⁵ but neglected to provide any rationale for that conclusion. Similarly, in *Indiana Gas Co.*, the Seventh Circuit concluded that a syndicate is an unincorporated association, but did not

representative of all names).

230. See *E.R. Squibb & Sons, Inc.*, 160 F.3d at 937 (2d Cir. 1998) (suggesting that diverse names may be used in their individual capacity, thereby preventing the destruction of diversity jurisdiction). Federal courts have disagreed about whether names are indispensable parties as provided in Federal Rule of Civil Procedure 19(b). Compare *Allendale Mut. Ins. Co. v. Excess Ins. Co.*, 62 F. Supp. 2d 1116, 1124 (S.D.N.Y. 1999) (holding that each underwriter in Lloyd's Syndicate was an indispensable party), with *E.R. Squibb & Sons, Inc. v. Accident & Cas. Ins. Co.*, No. 82 CIV. 7327JSM, 1999 WL 350857, at *11 (S.D.N.Y. June 2, 1999) (holding that not all names were indispensable parties), *aff'd*, 241 F.3d 154, 162 (2d Cir. 2001)

231. *Carden*, 494 U.S. at 187 n.1.

232. See 13B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 2D § 3630 (2d ed. 1984 & Supp. 2004).

233. *Id.*

234. *Layne*, 26 F.3d at 42.

235. *Id.* at 41-42.

specify what law it used to make that determination.²³⁶ In addition, the Second and Fifth Circuits attempted to distinguish the Lloyd's syndicate relationship from other unincorporated associations based on a purely factual analysis.²³⁷ The Second and Fifth Circuits reasoned that the contractual provision requiring a name to honor all judgments rendered against any other name is a *vertical* obligation that runs between each name and the insured party.²³⁸ However, the courts did not specify what jurisdiction's law they used to define an unincorporated association, which they called a constructive entity.²³⁹

C. *The U.S. Supreme Court Should Have Affirmed the Fifth Circuit's Decision in Corfield Based on the Three-Step Approach*

The U.S. Supreme Court denied certiorari to *Dallas Glen Hills, L.P. v. Corfield*,²⁴⁰ the most recent case involving the issue of diversity jurisdiction and Lloyd's of London.²⁴¹ Rather than deny certiorari, the Court should have applied the three-step test to affirm the lower court's ruling that the parties have complete diversity of citizenship. Applying the three-part test would likely have led the Court to the same conclusion, albeit with a different rationale, and provided guidance to the lower federal courts on how to address this complex problem. The analysis below applies the three-part test to the facts of *Corfield*.

Step One: Under the first step, a court should apply Texas choice-of-law rules to conclude that Texas law controls the legal status of a syndicate doing business in Texas.²⁴² The Texas legislature has enacted a statute that provides that Texas law shall govern all insurance contracts where the parties are doing business in Texas.²⁴³ Therefore, a court should ignore contractual choice-of-law clauses when determining which law to apply. A court should interpret this statute to require that it apply

236. See *Ind. Gas Co. v. Home Ins. Co.*, 141 F.3d 314, 317 (7th Cir. 1998) (classifying a syndicate implicitly as an unincorporated association because it is not a corporation).

237. See *Corfield v. Dallas Glen Hills L.P.*, 355 F.3d 853, 862 (5th Cir. 2003); *E.R. Squibb & Sons, Inc. v. Accident & Cas. Ins. Co.*, 160 F.3d 925, 935-36 (2d Cir. 1998).

238. *Corfield*, 355 F.3d at 862; *E.R. Squibb & Sons, Inc.*, 160 F.3d 925, 937.

239. *Id.*

240. 124 S.Ct. 2421 (2004).

241. *Id.*

242. See *Corfield*, 355 F.3d at 856.

243. TEX. REV. CIV. STAT. ANN. art. 21.42 (Vernon 1970).

Texas choice-of-law rules to determine which jurisdiction's law should control the legal status of the syndicate. In addition, a court should dismiss the common law rule of looking to the law of "creation" as too ambiguous because it is often difficult to tell which law "created" an unincorporated association when its members reside in many different jurisdictions and when it operates throughout the world. Finally, a court should clarify the distinction between legal status and capacity in order to avoid the circular inquiry that would result if the court looked to 17(b) to determine the applicable law of legal status.²⁴⁴ Under Texas choice-of-law principles, a court should engage in an analysis under the Restatement's most significant relationship test.²⁴⁵ In applying the significant relationship test, a court should weigh the relevant factors²⁴⁶ to conclude that Texas law controls because the syndicate was doing business in Texas.²⁴⁷

Step Two: If a court applies Texas law, it must conclude that the Lloyd's syndicate is an unincorporated association.²⁴⁸ The Texas legislature opted out of the common law rule by enacting a statute that provides an unincorporated association doing business in Texas with legal entity status.²⁴⁹ Alternatively, a court could reach the same outcome by following the bifurcated approach in *Four Way Plant Farms* because it would apply English law to classify the syndicate as an unincorporated association and Texas law to determine that the syndicate is a legal entity.²⁵⁰

244. The circular inquiry results because 17(b) directs courts to the law of the forum state to determine the capacity of an unincorporated association, but a court cannot determine whether a group comprises an unincorporated association until it looks to the law of some jurisdiction.

245. See *Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan*, 883 F.2d 345, 353 (5th Cir. 1989). The Texas legislature has enacted a statute that directs courts to look to the law of the state of incorporation to resolve issues involving the internal affairs of a corporation. See TEX. BUS. CORP. ACT ANN. art. 8.02 (Vernon 2003). However, insurance entities are specifically excluded from the scope of the statute. *Id.* art. 2.01(B)(4)(d).

246. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188(2) (1988).

247. *Corfield*, 355 F.3d at 856-57.

248. *Merchs.' & Mfrs.' Lloyd's Ins. Exch. v. S. Trading Co. of Texas*, 205 S.W. 352, 354-55 (Tex. Civ. App. 1918), *rev'd on other grounds*, 229 S.W. 312, 316 (Tex. Comm'n App. 1921) (adopting judgment).

249. TEX. REV. CIV. STAT. ANN. art. 6133 (Vernon 1970).

250. Under the rationale in *Four Way Plant Farms*, 894 F. Supp. 1538, 1548 (M.D. Ala. 1995), a court could apply the law of "creation," arguably English law, to classify the syndicate as an unincorporated association and the law in which the district court resided, Texas law, to determine

Step Three: Because the syndicate is a legal entity, a court should apply the unincorporated association test from *Carden*.²⁵¹ In its application of the unincorporated association test, a court should conclude that the Lloyd's syndicate in *Corfield* is a citizen of the United Kingdom because it consists of one underwriter, a British citizen. For diversity purposes, the partnership is a citizen of Texas, Delaware, and New York, while the syndicate, which consists of one underwriter, is a citizen of Britain.²⁵² Thus, based on the application of the three-part test, the U.S. Supreme Court should have affirmed the Fifth Circuit's holding that complete diversity exists between the parties.

V. CONCLUSION

The unique institution of Lloyd's of London has caused the U.S. Courts of Appeals to disagree on the appropriate analysis to determine whether a court has diversity jurisdiction over a case involving a Lloyd's syndicate. Some courts have held that a Lloyd's syndicate is merely a collection of individuals and therefore the court must consider only the real party in interest when determining diversity jurisdiction. Other courts have held that a Lloyd's syndicate is an unincorporated association and therefore inherits the citizenship of every name. However, the courts of appeals have not provided an analysis of which law they used to determine the legal status of Lloyd's syndicates. This problem could be resolved if the U.S. Supreme Court adopts a three-step analysis to determine the legal status of a Lloyd's syndicate. Although outcomes may differ depending on the conclusion of the three-step test, the test would provide courts with a uniform approach to assess diversity jurisdiction.

the legal status of the group.

251. See *Carden v. Arkoma Assocs.*, 494 U.S. 185, 187 n.1 (1990).

252. *Corfield*, 355 F.3d at 859.