September 20, 2016

Honorable Trent Franks  
Chairman  
Subcommittee on the Constitution and Civil Justice  
Committee on the Judiciary  
United States House of Representatives  
Washington, D.C.  20515

Honorable Steve Cohen  
Ranking Member  
Subcommittee on the Constitution and Civil Justice  
Committee on the Judiciary  
United States House of Representatives  
Washington, D.C.  20515

Re: Hearing on Federal Diversity Jurisdiction

Dear Chairman Franks and Ranking Member Cohen:

On Tuesday, September 13, your subcommittee held a hearing titled “Exploring Federal Diversity Jurisdiction.” I am writing to share the views of the American Bar Association and its over 400,000 members on this subject and request that you include this letter and attached policy statement in the permanent hearing record. We support specific, limited changes to federal diversity jurisdiction that would not change the current requirement of complete diversity, but that would avoid unnecessary confusion in defining the citizenship of unincorporated associations for the purposes of whether complete diversity exists.

It has long been the ABA’s position that federal diversity jurisdiction serves many useful and important purposes and that it should not be abolished or curtailed in scope by precluding a resident plaintiff from invoking such jurisdiction or a nonresident defendant from removing a case. Alongside our strong support for federal diversity jurisdiction, we have consistently approached proposals to expand diversity jurisdiction with caution, heeding our own admonition delivered in testimony before the House Judiciary Committee in 1996 that “[C]ongress should not alter diversity jurisdiction in the absence of a compelling demonstration of need for changes. (Statement of ABA witness Mitchell Dolan at 2, submitted for the hearing on H.R. 1989, the Federal Courts Improvement Act, before the House Judiciary Subcommittee on Courts and Intellectual Property, March 14, 1996.)
This statement echoes policy adopted by the ABA in 1995 that “Congress should be encouraged to conserve the federal courts as a distinctive judicial forum of limited jurisdiction in our system of federalism and to exercise restraint in the enactment of new statutes that assign civil jurisdiction to the federal courts and should do so only to further clearly defined and justified interests.”

The concern with which we approach the issue is also evident in our 2003 policy responding to legislation to expand diversity jurisdiction over class actions. While acknowledging that some concerns over class action practice could be addressed with federal legislation providing for expanded federal court jurisdiction, the policy cautioned that any expansion should preserve a balance between legitimate state-court interests and federal-court jurisdictional benefits. Just as important, the 2003 policy reaffirmed ABA’s position that “when legislation is considered that may affect the federal courts, Congress should take into account the impact on judicial resources of the proposed legislation, including any increased caseload and resulting costs for the federal courts.”

We believe that your subcommittee’s deliberations over proposals to expand diversity jurisdiction, including those that seek to replace the current “complete diversity” position (which requires that all plaintiffs have a different citizenship from all defendants) with a “minimal diversity” position (which would require that only one plaintiff be diverse from one defendant), should be guided by these same principles -- respect, restraint, demonstrated need, and judicial impact.

Consistent with the theme of this hearing and with these principles, we would like to take this opportunity to bring to the attention of this subcommittee a serious problem with diversity jurisdiction that Congress should correct - the difference between the way the citizenship of corporations, on the one hand, and all unincorporated business associations, on the other, is determined for the purpose of satisfying the diversity of citizenship requirement of 28 U.S.C § 1332. The ABA adopted the attached policy in 2015 to address the problem and to propose a legislative solution.

Many nonlawyers do not know that, for purposes of determining whether diversity jurisdiction exists, a corporation is treated as a citizen of two states: the state where it is incorporated and the state where it maintains its principal place of business. The identity of any or all of a corporation’s shareholders is irrelevant to the diversity analysis. By contrast, for all business associations that are not corporations (partnerships, limited
liability companies, certain trusts, and the like), the citizenship of every individual member, shareholder, or other owner of any portion of the entity constitutes the citizenship of the entity and therefore must be examined to determine whether complete diversity exists. This distinction made sense when enacted in 1958 because, as a matter of substantive law at the time, only corporations were treated as “entities” with an existence apart from that of their membership. Today, the distinction serves no purpose other than to set a potential costly trap for plaintiffs, defendants, and even trial court judges every time litigation that involves unincorporated business associations that are not corporations is filed in, or removed to, a federal court.

The entity status of partnerships and other business forms now is recognized nationwide. Thirty-seven states have adopted a version of the Revised Uniform Partnership Act that now provides that a partnership is an entity, and court decisions and statutes of most of the other states have expressly recognized entity status for at least some purposes. Today, unincorporated associations effectively are legal constructs, like corporations, with rights and duties separate and apart from the rights and duties of their members and owners. Given the growth in the types and number of unincorporated business associations, the needless confusion created by two sets of rules is only going to increase.

Not only is there no longer a basis for treating unincorporated business associations differently for diversity purposes, but the retention of two sets of rules adversely affects the administration of justice by: (i) creating uncertainty for plaintiffs and defendants regarding the availability of filing in, or removing to, a federal forum; (ii) increasing the cost of litigation by creating a need for additional (and often costly) research to ascertain the citizenship of every member, even those with no direct contact with the business; and (iii) wasting significant judicial resources when cases that have been fully adjudicated at the federal district court level are reversed on appeal or vacated due to lack of diversity jurisdiction, even if no party raised the issue in the district court.

To avoid these outcomes and improve the administration of justice, unincorporated business associations should be treated the same as corporations for the purpose of determining citizenship. The same workable, bright-line rule should be applied to business associations that has been applied for decades to corporations. To accomplish this purpose, the ABA urges Congress to amend 28 U.S.C. § 1332 to provide that any unincorporated association shall, for diversity jurisdiction purposes, be deemed a citizen of both its state of organization and the state where the entity maintains its principal place of business, without looking to the citizenship of every one of its members.

This proposed change aligns with the way unincorporated business associations are treated for citizenship purposes under the Class Action Fairness Act. Therefore, its
enactment would have the added benefit of ensuring uniform treatment of unincorporated associations, regardless of whether the plaintiff sues solely on his or her behalf or on behalf of a putative class.

We acknowledge that the proposed change may increase the number of diversity filings in federal courts but, to the best of our ability, we estimate that the increase in filings will be limited and that at least some of the added burden on the federal courts will be offset by conserving federal judicial resources that will not be squandered on cases that are dismissed and must be re-litigated in state court due to jurisdictional infirmities. Because this proposal does not change the complete diversity requirement, but only the method of determining citizenship, local conflicts where diversity is lacking between individuals involved will not be impacted.

A copy of the 2015 ABA resolution and accompanying report is attached. Even though the accompanying report does not constitute ABA policy, we hope you have an opportunity to read it for a fuller explanation of the points made in this letter and the citations to supporting materials.

Sincerely,

[Signature]

Thomas M. Susman
RESOLVED, That the American Bar Association urges Congress to amend 28 U.S.C. §1332, to provide that any unincorporated association shall, for diversity jurisdiction purposes, be deemed a citizen of its state of organization and the state where the entity maintains its principal place of business.
REPORT

Introduction

Determining the citizenship of unincorporated business litigants has turned into a complicated jurisdictional morass. The subject matter diversity jurisdiction statute was last amended to address citizenship of business entities in 1958. At that time, as a matter of substantive law only corporations were treated as “entities” with an existence apart from that of their membership. Since that change, substantive law has changed with respect to general and other partnerships, and a host of other entities. Moreover, today exponentially more businesses are operating as unincorporated associations, such as general partnerships, limited liability companies (LLCs), limited partnerships (LPs), professional corporations (PCs), limited liability partnerships (LLPs), business trusts, and other forms of business entities. Yet, under the current subject matter jurisdiction statute, in determining whether diversity jurisdiction exists there is still a major difference between corporations and all other entities. Corporations are treated as citizens only of the states (i) where they are incorporated, and (ii) where they maintain their principal place of business. The identity of any or all of a corporation’s shareholders is irrelevant to the diversity analysis. By contrast, for all business entities that are not organized as corporations the citizenship of every member, shareholder, or other owner of any portion of the entity must be examined to determine whether complete diversity exists. For example, if even one of one hundred members in an LLC is not diverse from even one of a hundred partners of an adversary LLP, then diversity is destroyed irrespective of whether the non-diverse LLC member or limited partner had any connection with the facts giving rise to the dispute.

The current diversity regime thus sets a potential trap for plaintiffs, defendants, and even trial court judges every time litigation involves an unincorporated association. For example, the existence of a single, passive member of an LLC who was not even involved in the dispute or event being litigated can destroy diversity if he or she hails from the same state as one adverse party. Unfortunately, the LLC’s records may not even reveal the citizenship of every member, thus making it difficult if not impossible for any party to determine quickly (let alone with any assurance of accuracy) whether complete diversity exists prior to discovery. Yet because subject matter jurisdiction is not waivable and because federal courts must satisfy themselves sua sponte that they have subject matter jurisdiction over a matter, see Fed. R. Civ. P. 12(h)(3), this situation may be a ticking legal time bomb.

This problem affects plaintiffs and defendants alike. The uncertainty of whether a case can be filed in or removed to a federal forum not only increases the cost and complexity of litigation, it can completely undermine a fully-litigated case when it is discovered at the appellate stage that the trial court lacked jurisdiction in the first place. Given that litigants need absolute clarity in order to avoid litigating a case in federal court only to have it remanded on jurisdictional grounds after judgment, the diversity statute needs to be streamlined and simplified in order to apply the corporate citizenship test to unincorporated associations that are
functionally equivalent to corporations.

Given the significant developments in the structure, recognition under the law, and usage of multiple non-corporate entities over the past five decades, no principled reason exists for continuing the divergent treatment of corporations and other business entities. Revising the diversity jurisdiction statute, 28 U.S.C. § 1332, can eliminate these traps and correlate federal court jurisdiction with modern business entity structures and abolish the “disconnect between the modern business realities” of unincorporated business entities “and the formalistic rules” for determining their citizenship, simplifying the forum selection process and avoiding the waste of judicial resources and time. Debra R. Cohen, *Limited Liability Company Citizenship: Reconsidering an Illogical and Inconsistent Choice*, 90 MARQUETTE L. REV. 269, 269 (2006).

**Background**

Through a judicially-created rule, federal courts sitting in diversity have long required *complete* diversity between each and every plaintiff, on the one hand and each and every defendant, on the other. See *Strawbridge v. Curtiss*, 7 U.S. 267 (1806). Shortly after *Strawbridge*, the Supreme Court declared that corporations were *not* citizens, “and, consequently, cannot sue or be sued in the courts of the United States, unless the rights of the members, in this respect, can be exercised in their corporate name.” *Bank of the U.S. v. Deveaux*, 9 U.S. 61 (1809). Because corporations enjoyed the aggregate citizenship of their owners and members, they were able to force litigants into state court if a single shareholder was nondiverse from a single plaintiff. See Cohen, *supra*, p. 284 & n.95.

Although the Supreme Court later overruled *Deveaux* and declared that corporations were legal entities separate and apart from their members and owners, see *Louisville, Cincinnati & Charleston R.R. v. Letson*, 43 U.S. 497 (1844), it took Congress over a hundred years to codify this rule. In 1958, Congress amended the federal diversity statute, 28 U.S.C. § 1332, to tie corporate citizenship to the states where the entities are incorporated and where they maintain their principal places of business. *J.A. Olson Co. v. Winona*, 818 F.2d 401, 404-05 (5th Cir. 1987), abrogated on other grounds by *Hertz Corp. v. Friend*, 559 U.S. 77 (2010); see also Case Comment, *Seventh Circuit Holds that the Term “Corporation” is Entirely State-Defined*, Hoagland v. Sandberg, Phoenix, & von Gontard, P.C., 118 HARV. L. REV. 1347-48, 1352 (2005). The 1958 amendment also was “intended to further the original purpose of diversity jurisdiction . . . to provide to out-of-state litigants a forum free of local bias.” *J.A. Olson*, 818 F.2d at 406. Indeed, “the need for diversity jurisdiction is lessened when a foreign corporation has substantial visibility in the community.” See *id.* at 404, 406.

This logic made sense in 1958. At the time, the primary unincorporated business entities—partnerships—were merely contracts between individuals who both owned and controlled the business. Corporations, by contrast, were legal fictions created by their states of incorporation for the sole purpose of separating ownership from control. See Cohen, *supra*, p.
The 1958 amendment thus recognized the functional differences between corporations and partnerships as they existed at the time and “highlighted the citizenship of the true litigants.” *Id.* Those states that allowed the formation of partnerships, limited partnerships, limited liability companies, and other business entities did *not* recognize those business forms as entities separate and apart from their owners and members. For example, at the time of the first Uniform Partnership Act, promulgated in 1914, partnerships were frequently treated as conglomerations of the individual partners. As explained by the drafters of the 1994 revisions to the Uniform Partnership Act (“RUPA”):

“The first essential change in UPA (1994) over the 1914 Act that must be discussed as a prelude to the rest of the revision concerns the nature of a partnership. There is age-long conflict in partnership law over the nature of the organization. Should a partnership be considered merely an aggregation of individuals or should it be regarded as an entity by itself? The answer to these questions considerably affects such matters as a partner's capacity to do business for the partnership, how property is to be held and treated in the partnership, and what constitutes dissolution of the partnership. The 1914 Act made no effort to settle the controversy by express language, and has rightly been characterized as a hybrid, encompassing aspects of both theories. . . . [the Revised Uniform Partnership Act] (1994) makes a very clear choice that settles the controversy. To quote Section 201: ‘A partnership is an entity.’ All outcomes in [the Revised Uniform Partnership Act] (1994) must be evaluated in light of that clearly articulated language.”

Summary of 1994 revisions to Uniform Partnership Act (“RUPA”).

Today, general partnerships are no longer viewed solely as aggregations of individuals. Thirty-seven states plus the District of Columbia have adopted the 1994 or 1997 version of the RUPA and its entity designation. Even those states that have not adopted RUPA (1994) frequently recognize partnerships as a distinct entity for at least some purposes. In addition, while not adopting RUPA, Louisiana recognizes a partnership as a “judicial person, distinct from its partners.” La. Civ. Code art. 2801. At least six other “non-RUPA (1994)” states recognize a partnership as a separate entity by statutes providing that partnerships can sue or be sued in the

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partnership name. And some states have recognized entity status for at least some purposes, as recognized by case law. See, e.g., Hanson v. St. Luke United Methodist Church, 704 N.E.2d 1020, 1026 (Ind. 1998) (explaining that a judgment by or against a partnership binds the partnership as if it were an entity and does not bind individual members unless they were named); Michigan Employment Sec. Com. v. Crane, 54 N.W.2d 616, 620 (Mich. 1952) (“The Michigan employment security act expressly recognizes that a partnership is an ‘employing unit’ within the meaning of the act.”); Philadelphia Tax Review Bd. v. Adams Ave. Assocs., 360 A.2d 817, 820 (Pa. Commw. Ct. 1976) (“[I]t does not follow that for purposes of taxation a partnership may not be taxed, or may not have a domicile for tax purposes, separate and distinct from that of the individuals who compose it. In other words, a partnership may be recognized as a legal entity for certain purposes.”); Dept. of Revenue v. Mark, 483 N.W.2d 302, 304 (Wis. 1992) (“[T]he law recognizes a partnership as a separate legal entity for purposes of conveying real estate and for purposes of holding title.” (emphasis omitted)). In short, contrary to the situation that existed in 1958, the concept of the partnership as a separate legal entity is now well established.

Much else has changed since 1958 as well. The past five decades have seen a rise in so-called “hybrid” business forms such as LLCs, LPs, MLPs, PCs, LLPs, and multi-state general partnerships. For example, the federal Internal Revenue Service reports that in 1993, roughly 275,000 LPs and only 17,335 LLCs filed federal tax returns; by 2008, over 534,000 LPs and over 1,898,000 LLCs filed federal tax returns. Accordingly, the prospect of facing a limited partnership nearly doubled from 1993 to 2008, while the prospect of facing a limited liability company increased nearly one hundred and tenfold.

With the rise of these hybrid entities, “[e]volving organizational laws caused the distinction between business organizations to blur.” Cohen, supra, p. 289. Many states now recognize these other entities as existing separate and apart from their owners and members. See Christine M. Kailus, Diversity Jurisdiction and Unincorporated Businesses: Collapsing the Doctrinal Wall, 2007 UNIV. OF ILL. L.R. 1543, 1545-47 (Sept. 7, 2007). Similarly, the Uniform Limited Partnership Act (“ULPA”) also now recognizes that a “limited partnership is an entity

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3 These “sue and be sued” as provided by statute are Georgia (O.C.G.A. § 14-8-15.1), Indiana (Ind. R. Trial P. 17), Michigan (Mich. Comp. Laws 600.2051), New York (N.Y. C.P.L.R. § 1025), North Carolina (N.C. Gen Stat. § 1-69.1), and South Carolina (S.C. Code § 15-5-45). Cf. Pa. R. Civ. P. 2127; Pa. R. Civ. P. 2128 (together allowing a partnership to be sued in its firm name but requiring the partnership to bring suit as “A, B and C trading as X & Co.”).

distinct from its partners.”

Eighteen (18) states plus the District of Columbia have adopted the 2001 version of the ULPA. And likewise, the 2006 revisions to the Uniform Limited Liability Company Act of 1996 (“ULLCA”) recognizes that an LLC “is an entity distinct from its members.” Nine (9) states plus the District of Columbia have adopted the 2006 version of the ULLCA.

The existing law concerning the status and determination of the citizenship of non-corporate entities for diversity jurisdiction purposes has not kept up with reality. The corporate landscape simply looks much different than it did in 1958, but Section 1332(c) has not been amended to acknowledge unincorporated entities as “citizens” for diversity purposes. Nor have courts been willing to impute citizenship status on these entities because they are “corporate-like,” as courts narrowly construe statutes conferring federal jurisdiction. See, e.g., *Carden v. Arkoma Assoc.*, 494 U.S. 185 (1990); *Northbrook Nat’l Ins. v. Brewer*, 493 U.S. 6, 9 (1989) (“‘We must take the intent of Congress with regard to the filing of diversity cases in Federal District Courts to be that which its language clearly sets forth.’” (quoting *Horton v. Liberty Mutual Insurance Co.*, 367 U.S. 348, 352 (1961))); *Thompson v. Gaskill*, 315 U.S. 442, 446 (1942) (“The policy of the statute conferring diversity jurisdiction upon the district courts calls for its strict construction.”).

The Supreme Court has explicitly held that due to the plain and limited language of Section 1332(c), the statute only applies to traditional corporations. See *Carden*, 494 U.S. at 195-96. Cf. *Steelworkers v. R. H. Bouligny, Inc.*, 382 U.S. 145 (1965) (holding that unincorporated labor union was not itself a “citizen” for diversity jurisdiction purposes, but that citizenship was to be determined based upon the citizenship of each individual member of the unincorporated entity). In *Carden*, the trial court dismissed an action brought by a limited

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partnership on the ground that one of the plaintiff’s limited partners was a citizen of the same state as the defendants. The Court “firmly resist[s]” any judicial extension of “citizenship” status to entities other than corporations, and leaves any “further adjustments” to the status of business entities for diversity purposes in the hands of Congress. Carden, 494 U.S. at 189, 196.

Following Carden’s clear mandate, courts have routinely concluded that the citizenship of every member of unincorporated business entities must be diverse from all opposing parties before complete diversity of citizenship exists. In one of the earliest post-Carden decisions, the Seventh Circuit concluded that Carden “crystallized as a principle” that members of an entity are citizens for diversity purposes, at least until “Congress provides otherwise.” Cosgrove v. Bartolotta, 150 F.3d 729, 731 (7th Cir. 1998). Given the similarities between LLC’s and LP’s, the court applied Carden to LLC’s. Id.; see also Belleville Catering Co. v. Champaign Market Place L.L.C., 350 F.3d 691, 692 (7th Cir. 2003) (same). It does not matter that LP’s and LLCs “are functionally similar to corporations;” they are not entitled to corporate treatment for diversity purposes. See also Hoagland v. Sandberg, Phoenix & von Gontard, P.C., 385 F.3d 737, 739 (7th Cir. 2004). The Supreme Court drew a “bright line” in Carden between entities that are technically called “corporations” and all other types of entities, see id. at 741, such that judges need not “entangle themselves in functional inquiries into the differences among corporations,” see id. at 743.

Every court of appeals to address this question directly has followed the 7th Circuit in analogizing to Carden’s treatment of limited partnerships and requiring the examination of the citizenship of all owners/members of LLCs in determining whether diversity jurisdiction exists. See, e.g., Rolling Greens MHP, LP v. Comcast SCH Holdings LLC, 374 F.3d 1020 (11th Cir. 2004) (remanding appeal from grant of summary judgment to consider citizenship of every member of LP and LLC; noting unanimity among circuits regarding both LPs and LLCs and citing cases from 2d, 6th, 7th, 8th, and 9th Circuit Courts of Appeal); Johnson v. Smithkline Beecham Corp., 724 F.3d 337 (3d Cir. 2013); Zambelli Fireworks Mfg. Co. v. Wood, 592 F.3d 412 (3d Cir. 2010); Delay v. Rosenthal Collins Group, Inc., 585 F.3d 1003 (6th Cir. 2009); Harvey v. Grey Wolf Drilling Co., 542 F.3d 1077 (5th Cir. 2008); Pramco LLC v. San Juan Bay Marina, Inc., 435 F.3d 51 (1st Cir. 2006); Johnson v. Columbia Properties Anchorage, LP, 437 F.3d 894 (9th Cir. 2006); Gen. Tech. Applications, Inc. v. Extro Ltda., 388 F.3d 114 (4th Cir. 2004); GMAC Commercial Credit LLC v. Dillard Dept. Stores, 357 F.3d 827 (8th Cir. 2004); Belleville Catering Co. v. Champaign Mkt. Place, LLC, 350 F.3d 691 (7th Cir. 2003); Handelsman v. Bedford Village Associates Ltd. Partnership, 213 F.3d 48 (2d Cir. 2000). Neither the D.C. Circuit Court of Appeals nor the 10th Circuit Court of Appeals has directly decided this issue, though both the District of D.C. and at least the District of Colorado have agreed with other courts that the citizenship of an LLC is determined by the citizenship of each of its members. See, e.g., Makris v. Tindall, No. 13-00750, 2013 U.S. Dist. LEXIS 41397 (D. Colo. Mar. 25, 2013); Jackson v. HCA-HeathOne, LLC, No. 13-02615, 2013 U.S. Dist. LEXIS 146023 (D. Colo. Oct. 9, 2013); Shulman v. Voyou, LLC, 305 F. Supp. 2d 36 (D.D.C. 2004); Johnson-Brown v. 2200 M. St. LLC, 257 F. Supp. 2d 175 (D.D.C. 2003).
The courts have made clear that any change in how citizenship is to be determined for diversity jurisdiction purposes must be enacted by Congress. Accordingly, we propose an amendment to 28 U.S.C. § 1332 to address these issues.

Proposed Rule Revision

Attached as Appendix 1 is a proposed revision to the diversity statute that serves primarily to ensure that the letter of the diversity statute mirrors its spirit. This idea is nothing new or radical. In 1965—almost fifty years ago—the American Law Institute proposed giving unincorporated business entities the same citizenship status as corporations for diversity purposes. See Diversity Jurisdiction Over Unincorporated Business Entities: The Real Party in Interest as a Jurisdictional Rule, 56 Texas L. Rev. 243, 244 n.8 (1978) (citing ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS, PART I, 59 (Sept. 25, 1965, Official Draft)). It is well past time that the diversity statute recognizes unincorporated associations as what they effectively are—legal constructs, like corporations, with rights and duties separate and apart from the rights and duties of their members and owners.

Why the Federal Diversity Rule Should Be Amended

A. The current statute leads to unacceptable and readily avoidable wastes of time, money, and judicial resources.

Uncertainty as to whether a case belongs in federal court increases not only the “cost and complexity of litigation,” but also “the parties will often find themselves having to start their litigation over from the beginning.” Hoagland, 385 F.3d at 739-40. Both potential plaintiffs and defendants often have difficulty determining the identities, let alone citizenships, of non-management members of opposing party entities, particularly if such membership is not public information. As a result, they lack a good faith basis for pursuing (or challenging) the propriety of the federal forum. The resulting uncertainties have led appellate courts to criticize the efforts expended to address citizenship at the outset and on appeal. See, e.g., Smoot v. Mazda Motors of America, Inc. 469 F.3d 675, 677-78 (7th Cir. 2006) (and cases cited therein) (criticizing jurisdictional statements of all parties on appeal and noting “the lawyers have wasted our time as well as their own and (depending on the fee arrangements) their clients' money. We have been plagued by the carelessness of a number of the lawyers practicing before the courts of this circuit with regard to the required contents of jurisdictional statements in diversity cases.”).

This uncertainty means that parties can fully litigate a case, only to have an appellate court determine that the district court lacked jurisdiction in the first instance. GMAC Commercial Credit LLC v. Dillard Department Stores, Inc., 357 F.3d 827 (8th Cir. 2004), presents an example of this waste of judicial resources and the court’s inability effectively to
address the waste. In that case, the LLC plaintiff sued the defendant in federal court on diversity grounds. Neither party challenged subject matter jurisdiction before the district court. The defendant won partial summary judgment and a jury verdict. *Id.* at 828. After obtaining new counsel, plaintiff moved to vacate the judgment award on the ground that diversity of citizenship did not exist and thus the court lacked subject matter jurisdiction from the outset. *Id.* Unable to determine, based on the record below, whether the citizenship of the plaintiff’s members in fact destroyed complete diversity, the Eighth Circuit remanded for a discovery hearing on diversity. *Id.* at 829. Defendants also moved for attorneys fees because plaintiff—who chose the federal forum—never raised the diversity issue until appeal. *Id.* The appellate court left the decision of whether to award fees to the district court on remand. *Id.*

Sometimes even the type of entity involved can be unclear. *Tuck v. United Servs. Auto. Ass’n*, 859 F.2d 842 (10th Cir. 1988), involved an uninsured motorist who had killed Johnny Tuck in a collision. Tuck’s estate and parents sued United Services Automobile Association (“USAA”) to recover benefits under an uninsured motorist provision of Tuck’s insurance policy. *Id.* Believing that USAA was a corporation, the Tucks alleged that USAA was diverse from the Tucks, and the pretrial order incorporated the jurisdictional allegations. *Id.* at 844. The jury returned a verdict for the Tucks on all claims. *Id.* at 843. USAA filed a motion for judgment notwithstanding the verdict, or in the alternative, for a new trial. *Id.* The district court denied both motions but did reduce the Tucks’ actual damage award. *Id.* USAA appealed and “revealed, for the first time, that it was not a corporation, but rather an unincorporated association organized under the insurance laws of the state of Texas.” *Id.* USAA’s status as an association made it a citizen of every state in which its members were citizens, and in consequence, USAA argued, the court lacked subject matter jurisdiction. *Id.* at 844. Admonishing USAA, the court stated, “[t]his is not the first time that USAA has faced this problem.” *Id.* at 845 (citing *Baer v. United Servs. Auto. Ass’n*, 503 F.2d 393 (2d Cir. 1974)). To salvage the case and halt USAA’s attempted jettisoning of an unfavorable verdict, the court allowed the Tucks to amend their complaint on remand by dismissing all of the Oklahoma citizens who were “members” of USAA. *Id.* at 846. However, the court noted that even this dismissal plan might not work on the case before it as USAA had been sued as an entity, and not the individual members. Still, the appellate court remanded to allow the district court to determine if a jurisdictional basis could be identified. Otherwise, the jury verdict (even as reduced) could not stand. *Id.* at 846-67.

Two problems are highlighted by *Tuck*. First, under the current regime the distinction between a corporation and any other form of unincorporated association drives whose “citizenship” determines the entity’s citizenship. Thus, mistakenly believing that an entity with a national presence and operations in multiple states is a corporation can result in plaintiffs, defendants, and trial courts failing to examine citizenship properly. Second, and perhaps more substantively disturbing, *Tuck* highlights that once the proper analysis is applied some large unincorporated associations, with members in all 50 states, simply cannot be haled into federal court (or seek relief in federal court) unless a federal question is presented. There is no practical
reason for closing off access to federal courts in this manner either to plaintiffs who wish to bring a case in, or to non-corporate entity defendants who wish to remove a case to, federal courts.

Because federal courts are obligated to determine whether they may exercise subject matter jurisdiction regardless of whether the parties ever raise the issue, see Chapman v. Barney, 129 U.S. 677, 681 (1889), uncertainty as to forum can be an expensive and unexpected problem to address well into litigation, possibly requiring jurisdictional discovery. For example, one court addressed the LLC defendant’s citizenship *sua sponte* in order to “satisfy itself” that federal jurisdiction existed, even though neither litigant raised the question of whether any LLC members were citizens of the same state (and the complaint failed to allege facts regarding the citizenship of the LLC’s members). *Delay v. Rosenthal Collins Group, Inc.*, 585 F.3d 1003, 1004-05 (6th Cir. 2009) (directing the defendant “to submit a jurisdictional statement identifying the citizenship of all of its members.”).

In addition to the problems highlighted by *Tuck*, the problem of a case being reversed on appeal for lack of subject matter jurisdiction can wreak immense consequences upon plaintiffs. Should years pass and then a case be remanded as void ab initio due to a lack of subject matter jurisdiction, the plaintiff-litigant may discover that the statute of limitations has run during the time the matter was pending, although improperly, in federal court. Because states’ tolling statutes will vary from state to state, particularly with respect to an action that was void (as opposed to voidable or subject to an affirmative defense) from the outset, further uncertainty is injected into an already uncertain process.

While the *Smoot* and *Tuck* courts, and others, have been quick to criticize attorneys for failing to investigate sufficiently deeply, the criticism can gloss over the difficulty of the investigation. It is not enough to examine who the members were of the unincorporated association at the time it came into existence; citizenship is determined as of the time of filing. Thus, an individual member who had moved from a diverse state to a non-diverse state before the lawsuit began can destroy diversity, even if the unincorporated association was not aware of the move. And as more and more communications take place via cell phones (with “traveling” area codes) and internet communications (which do not necessarily reflect physical addresses at all), the ability to unearth this information, let alone unearth it in a timely enough manner to gather the information to file or remove a lawsuit, presents substantial practical difficulties. These difficulties are highlighted by the increased reliance upon unincorporated entities as a means of doing business that are shown in the IRS filing statistics quoted *supra*.

Given that litigants need absolute clarity in order to avoid litigating a case in federal court only to have it remanded on jurisdictional grounds after judgment, the diversity statute needs to be streamlined and simplified in order to apply the corporate citizenship test to unincorporated associations that are functionally equivalent to corporations.
B. The proposed amendment provides a workable, bright line rule that courts have been applying for decades to corporations.

Currently, counsel for plaintiffs and for defendants can find themselves guessing about citizenship at critical filing or removal stages. Plaintiffs in non-federal question cases who choose to file their lawsuits in federal court must plead that diversity jurisdiction exists. This requires pleading the citizenship of the defendant. Should the defendant be an LLC or other unincorporated association, however, the information may not be available to the plaintiff. Information regarding the ownership of unincorporated entities like LLCs frequently is not a matter of public record. While the LLCs themselves should be able to identify their members, even they may have difficulty identifying the citizenship of every member on any given date. Cohen, supra, p. 303. Yet plaintiffs filing or defendants trying to remove, are forced to determine and plead citizenship under tight timeframes.

Further, the current rules, which ignore the reality of where an unincorporated association actually does business, can result in diversity citizenship, and thus removal, being available where the purposes of diversity jurisdiction are not met. In Johnson v. Smithkline Beecham Corp., 724 F.3d 337 (3d Cir. 2013), the Third Circuit granted interlocutory appeal after plaintiffs unsuccessfully tried to remand their personal injury lawsuit after the defendants, including two LLC’s, removed the action to federal court. Plaintiffs, who were citizens of Pennsylvania, argued that one LLC defendant was headquartered and largely managed in Pennsylvania. See id. at 342. The defendant’s sole member, however, was incorporated in and operated primarily out of Delaware. The Third Circuit concluded that even though the LLC was based in the same state where plaintiffs were citizens, the district court properly exercised diversity jurisdiction. Id. at 346-48; see also Gen. Tech. Applications, Inc. v. Exro Ltda, 388 F.3d 114, 116 (4th Cir. 2004) (remanding case after defendants removed and won summary judgment, concluding that there was not complete diversity, and the case should proceed in state court).

C. The proposed change will bring cohesion between 28 U.S.C. § 1332(c) and the Class Action Fairness Act.

Other changes to federal law have recognized the benefit of treating all unincorporated associations in the same manner as corporations. The Class Action Fairness Act of 2005 (“CAFA”) expressly defines the citizenship of “unincorporated association[s]” as limited to the state where the association has its principal place of business and the state under whose laws the association is organized. See 28 U.S.C. § 1332(d)(10). While the statute does not clarify what entities are considered “unincorporated associations,” several courts have construed it to include any business entity that is not organized as a corporation. See, e.g., Ferrell v. Express Check Advance of SC LLC, 591 F.3d 698, 699 (4th Cir. 2010) (holding that a limited liability company is an “unincorporated association” for diversity purposes under CAFA); Bond v. Veolia Water Indianapolis, LLC, 571 F. Supp. 2d 905, 910 (S.D. Ind. 2008) (same). Indeed, Congress’ express purpose in adding subsection (d)(10) was to ensure that unincorporated entities were as protected
from state-court bias in class actions as were incorporated entities. See Christine M. Kailus, *Diversity Jurisdiction and Unincorporated Businesses: Collapsing the Doctrinal Wall*, 2007 UNIV. OF ILL. L.R. 1543, 1554 (Sept. 7, 2007).

The CAFA citizenship test for unincorporated associations mirrors the test for corporations under the existing 28 U.S.C. § 1332(c), but it applies only in the context of class action litigation. This disconnect means that an LLC, for example, is a legal fiction with “separate entity” status if the lawsuit is a class action; whereas in a non-class suit, the LLC is merely the sum of its members. It begs the question whether, had the Supreme Court decided *Carden* after CAFA was passed rather than 15 years prior, the Court might have reached a different result in order to avoid interpreting the diversity statute in a manner that yields an absurd result. Regardless, the proposed revision will ensure uniform treatment of unincorporated associations regardless of whether the plaintiff sues solely on his or her own behalf or on behalf of a putative class.

**D. The proposed change will not lead to additional administrative difficulties but will lessen existing administrative burdens.**

The proposed change should not result in new administrative difficulties. Experience with the Class Action Fairness Act (28 U.S.C. § 1332(d)(10)) has not led to difficulties in determining either the state under which entities are organized or where they have their principal places of business. To the extent issues may arise with respect to identifying an unincorporated association’s principal place of business, the guidance regarding determining the same for corporations, as cited in *Hertz Corp. v. Friend*, 559 U.S. 77 (2010), and subsequent cases applying that decision, is available, as well as nearly a decade of precedent under the Class Action Fairness Act. Moreover, removing the requirement of examining the citizenship of every member of unincorporated business associations can greatly simplify administrative burdens upon parties both filing and removing actions on the basis of diversity of citizenship.

**E. The proposed change will not greatly increase filings in federal courts or removals to federal courts.**

Criticism of the proposed change has focused upon whether a change is necessary and whether federal filings will greatly increase. The need and rationale for the change are set forth above in the “Background” section and sections A-D above. One case that goes to trial, only to be reversed due to a “hidden” lack of subject matter jurisdiction from the outset, represents a tremendous waste of judicial resources. The proposed change will allow lawyers and judges at the outset to achieve certainty about the citizenship of parties and then proceed accordingly.

The proposed change should not greatly increase the number of filings in federal courts or removals to federal court. Only situations where the citizenship of an uninvolved owner/shareholder would have been at issue and would have a different result. The proposed
change only deals with citizenship of entities. The “complete diversity” requirement of *Strawbridge v. Curtiss* is retained. As a result, in situations where a member of an unincorporated association is an active participant in providing the services at issue (frequently professional services for various LLCs and LLPs), that individual may still be named as a defendant. If that naming destroys diversity because that individual is a citizen of the same state as the plaintiff, then the plaintiff’s choice of a state forum will remain. The only situation in which a plaintiff would lose the ability to keep a case in state court due to the proposed change would involve the fortuitous citizenship of an uninvolved member of an entity, and even that fortuitous citizenship must be different from that of the state in which the entity is organized or where the entity has its principal place of business.

While it is impossible to forecast the total number of “new” federal filings (including removed actions) that would become available,\(^9\) and thus might result, under the new proposal the impact should be minimal. Unincorporated associations with their principal place of business where they generally perform work (and thus impact potential plaintiffs), and which have as members citizens of that same state, will still have the same citizenship. The major change involves providing clarity concerning where to look – the now well-developed “principal place of business” and state of organization sites – and where not to look – eliminating the need to examine the citizenship of every record owner at the time the suit is filed.

A presumably accurate forecast of the potential number of new filings and removals would require knowing or estimating the total number of cases currently being filed in state courts where (i) there is a lack of diversity *solely* because of the citizenship of a member of an unincorporated association and that member is a citizen of a state other than the principal place of business of the entity,\(^10\) and (ii) either the plaintiff would wish to file in federal court or the defendant would wish to remove (assuming that the forum state is not the defendant’s principal place of business). We are not aware of research from state court dockets that would reveal this type of information.


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\(^9\) The “Judicial Caseload Indicators” for the twelve-month periods ending September 30 show that between September 30, 2014 and September 30, 2013, civil filings in United States District Courts increased 3.8 percent. The percent increase from 2010 to 2014 was 3.8 percent. [http://www.uscourts.gov/Statistics/JudicialBusiness/2014/judicial-caseload-indicators.aspx#fn2](http://www.uscourts.gov/Statistics/JudicialBusiness/2014/judicial-caseload-indicators.aspx#fn2)

\(^10\) For purposes of this analysis this Report assumes that the jurisdictional amount can be satisfied at a pleading stage for a complaint or at the removal stage, if a defendant removes.
two-phase study was published in April 2008, and concluded the statistical analysis of filings through June 2007 with prior years, including a year-by-year comparison with experience under CAFA and a comparison to the pre-CAFA year of 2001. This study was limited to class actions, and the authors note that while there was an increase in federal filings, “[m]uch of that increase was in federal question cases, especially labor class actions and class actions filed under federal consumer protection statutes.” Lee & Willging, “Impact” (April 2008) at 1. In fact, “about 86 percent [of the increase in federal filings and removals from the pre-CAFA to post-CAFA periods studied] was accounted for by the increase in federal question class action filings and removals.” id, at 3, n.2. This impact in federal question cases does not reflect an increase due to CAFA, and serves as a noteworthy reminder that increased federal filings pursuant to federal statutes providing federal jurisdiction will not be impacted by the current proposal to change the citizenship analysis for diversity jurisdiction. That is, increased filings under consumer protection statutes such as the Fair Debt Collection Practices Act, Fair Credit Reporting Act, and similar statutes will be unaffected.

The April 2008 “Impact” study revealed two key points. First, there was an increase in class actions filed under CAFA’s expanded diversity jurisdictions. This was, of course, one of the express purposes of CAFA. The April 2008 “Impact” study notes that the number of cases varied widely jurisdiction to jurisdiction.

The “Impact” study also separately examined removed actions. As shown in the tables accompanying the study, “[a]lthough diversity class action removals, like filings, increased in the

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12 The purpose section of CAFA expressly noted that: “Abuses in class actions undermine the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended by the framers of the United States Constitution, in that State and local courts are--

(A) keeping cases of national importance out of Federal court;

(B) sometimes acting in ways that demonstrate bias against out-of-State defendants; and

(C) making judgments that impose their view of the law on other States and bind the rights of the residents of those States.”

immediate post-CAFA period, the prevailing trend for such cases in both the pre-CAFA and post-CAFA periods is downward. . . . [D]iversity class action removals have been initiated in federal court in the last twelve months of the study period [2006-2007] at about the same rate as they were in the pre-CAFA period. CAFA appears to have temporarily increased the number of diversity class action removals to the federal courts, especially in comparison with the immediate pre-CAFA period, when removals of such cases were few. But in both the pre-CAFA and post-CAFA periods, the trend has been for fewer class actions to be removed to federal courts on the basis of diversity of citizenship jurisdiction.” Lee & Willging, “Impact” (April 2008), at 7. In short, following CAFA’s passage there was a temporary uptick in removals and then removals returned to pre-CAFA levels.13

With the proposed change in diversity jurisdiction, one would not expect the type of increase in original filings and removals created with CAFA. CAFA’s citizenship provisions were expressly crafted to increase diversity jurisdiction in a class action context and in response to concerns that a more uniform rule was needed. The diversity changes in the current proposal are more limited. Also significantly, the current proposal will still allow “local” disputes to be adjudicated “locally,” because when the unincorporated association has its principal place of business in a state and deals with others within that state, diversity jurisdiction will not exist. Similarly, if a member, shareholder, partner, or other stakeholder of an entity is non-diverse from a party on the other side of the case, and if that member or shareholder or partner or the like was sufficiently actively involved in the matter giving rise to the lawsuit, then naming the member, shareholder, partner or the like would also defeat diversity. The only change occurs when a non-involved member, shareholder, partner, or the like happens to have the same citizenship as a party on the other side of the dispute.

Removal experience under the proposed statutory change may track that of CAFA. While there may be an initial increase in removals to federal court, the ability to craft a complaint within ethical bounds to still add non-diverse defendants and the fact that truly local disputes will likely remain local should avoid a long-term increase. The structure and purpose of CAFA would likely have resulted in a more significant prospect for removal, as unlike the current proposal, one of CAFA’s stated goals was to move multi-state actions filed in state courts to federal courts via the removal process.

**Summary of Potential Costs/Benefits**

Any analysis of the impact of the proposed change must not stop at attempting to “count new cases.” Under the present system, as shown by cases such as *Smoot, Tuck,* and *GMAC*

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13 A variety of reasons may be postulated for the return to pre-CAFA levels. Plaintiffs may have begun filing cases in federal court initially, thus obviating the need for removal. Or plaintiffs desiring to litigate in state courts may have changed the mix of defendants named.
Commercial Credit LLC v. Dillard Department Stores (all cited supra), the judicial resources that can be expended are huge when a case is improperly in federal court due to a misapprehension of the current jurisdictional rules. A mistake on the part of both parties can result in the appellate reversal of a case tried to a jury because lack of subject matter jurisdiction is an unwaivable defect. On the other side of the equation, one can predict that a substantial percentage of new cases that are filed or removed solely because of the new citizenship proposal for unincorporated entities will not result in the resources of a full jury trial being expended. In short, for every case that, like Dillard, results in an appellate reversal, multiple cases would have to be filed and resolved before the same level of resources expended is reached. One late reversal under the current system would equate the same resources as multiple new filings made possible by the proposed change in the statute.

The current difference in treatment between corporations and unincorporated associations was defensible when (i) there were far few unincorporated associations being used, (ii) partnership and other unincorporated entity association rules in the majority of states did not recognize the association as distinct from its members, and (iii) entities could reasonably be expected to keep up with the citizenship of their individual members at all times. Today, every one of these considerations has changed. Unincorporated associations are chosen as the appropriate structure for businesses at an ever-increasing rate. The rules on the association/partnership distinction have completely reversed, with the association being recognized as separate from its individual members and capable of suing and being sued in model statutes enacted across the country. And increased communication to non-physical locations has increased substantially the difficulty of knowing “where” individual members are “citizens” in an increasingly mobile society. In short, the time to re-examine the citizenship rules has long since arrived.

Respectfully submitted,

Nancy Scott Degan
Chair, ABA Section of Litigation
Submitted August __, 2015.
Appendix 1: Proposed Revision

Existing Provisions (No changes to § 1332(c)(1) and (2) are proposed except the addition of a semicolon at the end of (2) in lieu of a period.)

28 U.S.C. § 1332(c)(1):

A corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of—

(A) every State and foreign state of which the insured is a citizen;

(B) every State and foreign state by which the insurer has been incorporated; and

(C) the State or foreign state where the insurer has its principal place of business;

and

28 U.S.C. § 1332(c)(2):

The legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent; New Provisions and


Any unincorporated association that has the capacity to sue or be sued as determined as set forth in Federal Rule of Civil Procedure 17(b) (including any amendments or revisions as may subsequently be made thereto), including without limitation an entity that is a general partnership, a limited partnership, a master limited partnership, a professional corporation, a limited company, a limited liability company, a professional limited liability company, a business trust, a union, or any other unincorporated association irrespective of name or designation, shall be deemed to be a citizen of every State and foreign state by which it has been organized and of the State or foreign state where it has its principal place of business without reference to the citizenship of each partner, shareholder, member, or beneficiary, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of—
(A) every State and foreign state of which the insured is a citizen;
(B) every State and foreign state by which the insurer has been organized; and
(C) the State or foreign state where the insurer has its principal place of business.
GENERAL INFORMATION FORM

Submitting Entity: Section of Litigation

Submitted By: Nancy Scott Degan, Chair American Bar Association Section of Litigation

1. **Summary of Resolution(s).** The resolution requests that Congress change the definition of “citizenship” for purposes of 28 U.S.C. § 1332 to provide that all unincorporated associations be treated in the same manner as corporations.

2. **Approval by Submitting Entity.** Section of Litigation. Approved by Council on April 18, 2015.

3. **Has this or a similar resolution been submitted to the House or Board previously?** No.

4. **What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?** None identified.

5. **If this is a late report, what urgency exists which requires action at this meeting of the House?** This is not a late report.

6. **Status of Legislation.** (If applicable) Legislation has not yet been introduced.

7. **Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.** Coordinate concerning identification of appropriate contacts for planned submission to Congress once ABA Policy.

8. **Cost to the Association.** (Both direct and indirect costs) None

9. **Disclosure of Interest.** (If applicable) None.
10. **Referrals.** Business Law Section, Judicial Division, Standing Committee on the American Judicial System, TTIPS.

11. **Contact Name and Address Information.** (Prior to the meeting. Please include name, address, telephone number and e-mail address)

   Dennis Drasco  
   Lum, Drasco & Positan LLC  
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   404-581-8425  
   ghanthorn@jonesday.com

**Contact Name and Address Information.** (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

Dennis Drasco and/or Greg Hanthorn, information above.
EXECUTIVE SUMMARY

1. **Summary of the Resolution:** The resolution requests that Congress change the definition of “citizenship” for purposes of 28 U.S.C. § 1332 to provide that all unincorporated associations be treated in the same manner as corporations.

2. **Summary of the Issue that the Resolution Addresses**

   Currently, the definition of “citizenship” of unincorporated associations ignores that today (unlike when § 1332 was last amended in 1958) unincorporated associations are both widespread and generally recognized as separate entities capable of suing and being sued and distinct from their members and partners. Moreover, the current definition of “citizenship” can lead to waste of judicial time and effort, needless appellate review and even reversals even following jury verdicts and judgments, and related problems with determining the citizenship of unincorporated associations. Because unincorporated associations are currently treated as citizens of every state where any of their members, shareholders, partners, beneficiaries, etc., are citizens; there can be significant problems arising when determining whether to sue in federal court in the first instance and whether a case can be removed to federal court. Because the citizenship issue impacts subject matter jurisdiction, an erroneous determination mandates a dismissal from the outset, no matter how long the proceedings have been pending or what stage has been reached. Subject matter jurisdiction issues are not waivable.

3. **Please Explain How the Proposed Policy Position will address the issue**

   The proposed amendments to the statute will treat unincorporated associations in the same manner as corporations. For diversity of citizenship purposes, the unincorporated association will be deemed to be a citizen of up to two places: (i) the state of organization and (ii) the unincorporated association’s principal place of business. As with corporations, the citizenship of the individual members or partners would not be a factor.

4. **Summary of Minority Views**

   The one potential, expected minority view is a concern that the amendment might result in more cases finding their way to federal courts. Yet, by replacing uncertainty with a more workable rule, the extreme judicial waste of cases being tried that would never have been filed in federal court can be substantially avoided. The avoidance of this waste alone may counterbalance any minimal increase in filings or removals. Moreover, the “complete diversity” rule will remain and is likely to lessen any potential, minimal increase in filings or removals.