

## Limited Partners Limit the Availability of Federal Diversity Jurisdiction: *Stouffer Corp. v. Breckenridge*

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# LIMITED PARTNERS LIMIT THE AVAILABILITY OF FEDERAL DIVERSITY JURISDICTION: *STOUFFER CORP. v.* *BRECKENRIDGE*

The United States Constitution provides that federal courts shall have jurisdiction over cases or controversies arising between citizens of different states.<sup>1</sup> Congress has granted this diversity jurisdiction to the federal courts only where diversity is complete.<sup>2</sup> Thus, each plaintiff named in an action must maintain citizenship diverse from that of each defendant.<sup>3</sup> In applying this standard to

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<sup>1</sup> U.S. CONST. art. III, § 2, cl. 1. "The judicial Power shall extend . . . to Controversies . . . between Citizens of different States, . . . and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." *Id.*

<sup>2</sup> See *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 267 (1806). Congress has not granted diversity jurisdiction to the fullest extent allowed by the Constitution, as evidenced by 28 U.S.C. section 1332, which provides in relevant part that: "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and is between—(1) citizens of different States . . ." 28 U.S.C. § 1332(a) (1988). Congress recently passed an amendment increasing the amount in controversy requirement from \$10,000 to \$50,000. See *Judicial Improvements and Access to Justice Act of 1988*, Pub. L. No. 100-702, sec. 201, 102 Stat. 4642, 4646 (1988).

The Supreme Court imposed the first requirement for diversity jurisdiction in *Strawbridge* stating:

The words of the act of congress are, "where an alien is a party; or the suit is between a citizen of a state where the suit is brought, and a citizen of another state." The court understands these expressions to mean, that each distinct interest should be represented by persons, all of whom are entitled to sue, or may be sued, in the federal courts. That is, that where the interest is joint, each of the persons concerned in that interest must be competent to sue, or liable to be sued, in those courts.

*Strawbridge*, 7 U.S. at 267.

<sup>3</sup> See, e.g., *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374-77 (1978) (complete diversity between plaintiff and third party defendant required when plaintiff asserts claim against latter); *Shainwald v. Lewis*, 108 U.S. 158, 161 (1883) (diversity jurisdiction does not exist unless each defendant is citizen of different state from each plaintiff). In determining whether complete diversity exists under the *Strawbridge* rule, nominal or formal parties with no interest in the action will be ignored. See *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 461 (1980).

One purpose of diversity jurisdiction is to protect out-of-state citizens against the prejudices of local courts and local juries by providing them with the benefits and safeguards of an impartial federal tribunal. See *Barrow S.S. Co. v. Kane*, 170 U.S. 100, 111 (1898) (providing impartial tribunal is underlying purpose of diversity jurisdiction); *Betar v.*

unincorporated associations, the Supreme Court consistently has demanded an examination of the citizenship of each member of the association in determining whether complete diversity exists.<sup>4</sup> The Supreme Court, however, has not specifically addressed the issue of which members' citizenship should be considered for diversity purposes in an action brought by or against a limited partner-

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De Havilland Aircraft of Canada, Ltd., 603 F.2d 30, 35 (7th Cir. 1979) ("purpose of diversity jurisdiction [is] to prevent local prejudice"), *cert. denied*, 444 U.S. 1098 (1980); Bishop v. Hendricks, 495 F.2d 289, 292 (4th Cir.) (diversity jurisdiction is designed to prevent state court bias), *cert. denied*, 419 U.S. 1056 (1974). See generally 13B C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE & PROCEDURE § 3601 (2d ed. 1984) (discussion of policies underlying diversity jurisdiction).

The origin of diversity jurisdiction dates back to the beginning of the federal judicial system. See S. REP. NO. 1830, 85th Cong., 2d Sess. (1958), reprinted in 1958 U.S. CODE CONG. & ADMIN. NEWS 3099, 3102; 13B C. WRIGHT, A. MILLER & E. COOPER, *supra*, at 335. This jurisdiction was given to the federal courts by the Judiciary Act of 1789. See S. REP. NO. 1830, *supra*. From its inception, the necessity of diversity jurisdiction has been questioned. See 13B C. WRIGHT, A. MILLER & E. COOPER, *supra*, at 345. Many argue that diversity jurisdiction should be completely abolished. *Id.* at 347; see also *Lumbermen's Mut. Casualty Co. v. Elbert*, 348 U.S. 48, 54 (1954) (Frankfurter, J., concurring) (diversity jurisdiction is a "mounting mischief inflicted on the federal judicial system"); *Carlsberg Resources Corp. v. Cambria Sav. & Loan Ass'n*, 554 F.2d 1254, 1263 n.4 (3d Cir. 1977) (Hunter, J., dissenting) (citing recommendation of Judicial Conference of the United States that diversity jurisdiction be abolished). Others, however, argue for the retention of diversity jurisdiction. See C. WRIGHT, A. MILLER & E. COOPER, *supra*, at 347. See generally Frank, *The Case for Diversity Jurisdiction*, 16 HARV. J. ON LEGIS. 403, 413-14 (1979) (discussing justifications for retaining diversity of citizenship jurisdiction); Goldman & Marks, *Diversity Jurisdiction and Local Bias: A Preliminary Empirical Inquiry*, 9 J. LEGAL STUDIES 93, 97-104 (1980) (studies suggest continued use of diversity jurisdiction); Comment, *Limiting Jurisdiction of Federal Courts—Pending Bills—Comment by Members of Chicago University Law Faculty*, 31 MICH. L. REV. 59, 61 (1932) (arguing against passage of Norris-LaGuardia bill eliminating diversity jurisdiction).

<sup>4</sup> See *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 457 (1900); *Chapman v. Barney*, 129 U.S. 677, 682 (1889). A substantial amount of commentary has addressed the *Chapman-Great Southern* rule requiring that the citizenship of each member of the association be diverse from that of each opposing party. See 13B C. WRIGHT, A. MILLER & E. COOPER, *supra* note 3, at 681-708; Note, *Diversity of Citizenship and the Limited Partnership: A "Real Party" Rule as Federal Common Law*, 71 IOWA L. REV. 235, 240-42 (1985) [hereinafter Note, *Diversity of Citizenship*]; Comment, *Limited Partnerships and Federal Diversity Jurisdiction*, 45 U. CHI. L. REV. 384, 389-93 (1978).

For purposes of federal diversity jurisdiction, a corporation is deemed a citizen of the state in which it is incorporated and of the state in which it has its principal place of business. See 28 U.S.C. § 1332(c) (1988); see also *infra* note 56 (text of § 1332(c)). Unlike corporations, unincorporated associations are not treated as juridical persons and not accorded entity status. See *United Steelworkers v. R.H. Bouligny, Inc.*, 382 U.S. 145, 147 (1965); *Brocki v. American Express Co.*, 279 F.2d 785, 787 (6th Cir.), *cert. denied*, 364 U.S. 871 (1960). See generally Note, *Civil Procedure—Acquiring Diversity Jurisdiction Over an Unincorporated Association*, 60 N.C.L. REV. 194, *passim* (1981) (discussion of procedural devices available to unincorporated associations seeking access to federal courts).

ship.<sup>5</sup> The federal appellate courts are divided on the treatment of a limited partner's citizenship for diversity purposes. While the Third, Fourth and Seventh Circuits include a limited partner's citizenship in determining the existence of complete diversity,<sup>6</sup> the

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<sup>5</sup> See *Navarro*, 446 U.S. at 475 n.6 (Blackmun, J., dissenting); *Carlsberg*, 554 F.2d at 1262 (Hunter, J., dissenting); Note, *Diversity of Citizenship*, *supra* note 4, at 236.

A limited partnership has been defined as "neither corporation nor association but a similar hybrid." See *Mesa Operating Ltd. Partnership v. Louisiana Intrastate Gas Corp.*, 797 F.2d 238, 240 (5th Cir. 1986). A limited partnership was unknown at common law and is exclusively a creature of statute. See *Klein v. Weiss*, 284 Md. 36, 50, 395 A.2d 126, 135 (1978); *Hoefler v. Hall*, 75 N.M. 751, 755, 411 P.2d 230, 232 (1965) (limited partnership created purely by statute). All fifty states and the District of Columbia have statutes providing for limited partnerships, and all but Louisiana have adopted either the original 1916 Uniform Limited Partnership Act or its subsequent revisions. See UNIF. LTD. PARTNERSHIP ACT § § 1-2, 6 U.L.A. 562 (1969 & Supp. 1985); Basile, *Limited Liability for Limited Partners: An Argument for the Abolition of the Control Rule*, 38 VAND. L. REV. 1199, 1199 n.3 (1985).

A limited partnership is defined by the Uniform Limited Partnership Act as a "partnership formed by two or more persons . . . having as members one or more general partners and one or more limited partners." UNIF. LTD. PARTNERSHIP ACT § 1, 6 U.L.A. 562 (1969). The general purpose of a limited partnership is to encourage limited partners to invest capital in the partnership yet forego participation in the management of firm business. In return for their investment, limited partners share in the profits of the business without assuming liability for the obligations of the business beyond their capital contribution. See *Vulcan Furniture Mfg. Corp. v. Vaughn*, 168 So. 2d 760, 764 (Fla. Dist. Ct. App. 1964); *Freedman v. Tax Review Bd.*, 212 Pa. Super. 442, 449, 243 A.2d 130, 135 (1968), *aff'd*, 434 Pa. 282, 258 A.2d 323 (1969). See generally H. REUSCHLEIN & W. GREGORY, *AGENCY AND PARTNERSHIP* § 264 (1979) (examination of general characteristics of limited partnerships).

<sup>6</sup> See *Carlsberg*, 554 F.2d at 1254. The Third Circuit was unable to discern any convincing policy rationale for adopting the *Colonial Realty* rule, and therefore held that diversity of citizenship does not exist when a limited partner and an opposing litigant share citizenship. *Id.* at 1262. The Fourth Circuit, following the Third and Seventh Circuits, held that "for purposes of diversity the citizenship of a limited partnership is determined by considering the citizenship of all of its partners, both general and limited." *New York State Teachers Retirement Sys. v. Kalkus*, 764 F.2d 1015, 1019 (4th Cir. 1985). The Seventh Circuit held that "the citizenship of a limited partnership is the citizenship of all the partners—both general and limited—composing the partnership." *Elston Inv., Ltd. v. David Altman Leasing Corp.*, 731 F.2d 436, 439 (7th Cir. 1984).

The division of authority among the circuits has been reviewed by many commentators. The *Carlsberg* decision in particular has been subjected to rather intense criticism. See, e.g., Note, *Who Are the Real Parties in Interest for Purposes of Determining Diversity Jurisdiction for Limited Partnerships?*, 61 WASH. U.L.Q. 1051, 1058-61 (1984) [hereinafter Note, *Who Are the Real Parties*] (*Carlsberg* criticized for not recognizing "strong analogy between limited partnerships and business trusts"); Comment, *supra* note 4, at 400 (author disapproved of conclusion in *Carlsberg* that incapacity to sue was irrelevant); *Recent Decisions, Federal Courts—Diversity of Citizenship Jurisdiction—Limited Partnerships*, 16 DUQ. L. REV. 221, 234 (1977-78) (*Carlsberg* decision will discourage use of limited partnerships). But see Note, *Including Limited Partners in the Diversity Jurisdiction Analysis*, 54 FORDHAM L. REV. 607, 627-29 (1986) (advocating *Carlsberg* rule that all members' citizenship is relevant in diversity determination); Note, *Diversity of Citizenship*, *supra* note 4, at 249 (agreeing with *Carlsberg* assertion that jurisdictional issue should not turn on "vagaries of state law").

Second and Fifth Circuits consider the citizenship of the general partners only.<sup>7</sup> Recently, in *Stouffer Corp. v. Breckenridge*,<sup>8</sup> the Eighth Circuit Court of Appeals, agreeing with the Third, Fourth and Seventh Circuits, held that in a suit brought by or against a limited partnership, the citizenship of the limited partners, as well as that of the general partners, must be considered in determining diversity jurisdiction.<sup>9</sup>

In *Stouffer*, the Stouffer Corporation, an Ohio citizen and sole general partner in a limited partnership which included several Missouri citizens as limited partners, commenced an action for breach of contract against Donald E. Breckenridge, a Missouri citizen.<sup>10</sup> The plaintiff brought the action in its individual capacity, and on behalf of the limited partnership, to recover from the defendant money owed the limited partnership.<sup>11</sup> The Stouffer Corporation based federal subject matter jurisdiction on alleged diversity of citizenship.<sup>12</sup> Breckenridge, however, contended that since several of the limited partners were Missouri citizens, no diversity of citizenship existed.<sup>13</sup> Consequently, the defendant filed a motion to dismiss for lack of subject matter jurisdiction.<sup>14</sup>

The United States District Court for the Eastern District of Missouri concluded that only the citizenship of the "real parties to the controversy" should be considered in determining diversity.<sup>15</sup> The court noted that the Supreme Court, in *Navarro Savings Association v. Lee*,<sup>16</sup> defined "real parties to the controversy" as par-

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<sup>7</sup> See *Mesa*, 797 F.2d at 243; *Colonial Realty Corp. v. Bache & Co.*, 358 F.2d 178, 183-84 (2d Cir.), cert. denied, 385 U.S. 817 (1966). The Fifth Circuit held that since the general partners are the real parties to the controversy, only their citizenship is relevant in determining diversity jurisdiction. *Mesa*, 797 F.2d at 243. Similarly, the Second Circuit held that an action brought against a limited partnership must "be considered to be against the general partners only and identity of citizenship between a limited partner and the plaintiff does not destroy diversity." *Colonial Realty*, 358 F.2d at 184.

<sup>8</sup> 859 F.2d 75 (8th Cir. 1988).

<sup>9</sup> *Id.* at 76.

<sup>10</sup> *Stouffer Corp. v. Breckenridge*, No. 86-629-C(4), slip op. at 1 (E.D. Mo. June 16, 1987), remanded with instructions to dismiss, 859 F.2d 75 (8th Cir. 1988). The defendant was a former general partner of the Missouri limited partnership. See Brief for Appellee at 1, *Stouffer Corp. v. Breckenridge*, 859 F.2d 75 (8th Cir. 1988) (No. 87-2636 EM).

<sup>11</sup> See Brief for Appellee at 1, *Stouffer*, 859 F.2d 75 (8th Cir. 1988) (No. 87-2636 EM).

<sup>12</sup> *Id.*; see 28 U.S.C. § 1332(a); *supra* note 2 (monetary requirement provided by diversity statute).

<sup>13</sup> See Brief for Appellee at 1, *Stouffer*, 859 F.2d 75 (8th Cir. 1988) (No. 87-2636 EM).

<sup>14</sup> *Stouffer*, 859 F.2d at 76.

<sup>15</sup> See *Stouffer*, No. 86-629-C(4), slip op. at 2 (E.D. Mo. June 16, 1987).

<sup>16</sup> 446 U.S. 458 (1980).

ties who own, manage and control the business assets and control the business' litigation.<sup>17</sup> The court reasoned that since the general partner was the sole manager of the partnership's assets and controlled the partnership's litigation, it alone was the "real party to the controversy."<sup>18</sup> Consequently, only the general partners' citizenship was considered and complete diversity was found.<sup>19</sup> Breckenridge's motion to dismiss was denied, but the United States Court of Appeals for the Eighth Circuit granted his request for interlocutory appeal and remanded the case to the district court with directions to dismiss for lack of subject matter jurisdiction.<sup>20</sup>

Writing for the Eighth Circuit, Judge Wolle acknowledged the division among the circuits regarding whether the citizenship of limited partners must be considered in determining diversity jurisdiction.<sup>21</sup> After noting the decisions of the five circuits, the *Stouffer* court concluded that a limited partner's citizenship must be considered in determining the existence of diversity jurisdiction.<sup>22</sup> The court reasoned that since the Supreme Court has long required consideration of the citizenship of all members of an unincorporated association, a rule mandating an analysis of the citizenship of both general and limited partners in a diversity determination would be "more consonant with Supreme Court precedent."<sup>23</sup> In addition, Judge Wolle emphasized the practical considerations that favor the application of a "bright-line" rule treating all members of a limited partnership equally for jurisdic-

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<sup>17</sup> See *Stouffer*, No. 86-629-C(4), slip op. at 5-6 (E.D. Mo. June 16, 1987).

<sup>18</sup> See *id.* at 4-5.

<sup>19</sup> See *id.* at 5.

<sup>20</sup> *Stouffer*, 859 F.2d at 76.

<sup>21</sup> *Id.* The *Stouffer* court noted that the Supreme Court has not yet addressed the issue. *Id.* Furthermore, the court recounted that "three circuits mandate consideration of the citizenship of limited partners [while t]wo circuits have adopted a less restrictive approach, deciding on a case-by-case basis whether the limited partner is a real party to the controversy." *Id.*

<sup>22</sup> *Id.* The *Stouffer* court noted that the same conclusion was reached in the decision of a district court within the circuit. *Id.*; see *Castlewood Dev. Co. v. Real Estate Assocs. Ltd. II*, 652 F. Supp. 1582, 1583 (S.D. Iowa 1987). In *Castlewood*, the district court, after evaluating cases from the several circuits, concluded that "the better reasoned rule is that citizenship of limited partners must be considered in determining diversity of citizenship." *Id.*

<sup>23</sup> *Stouffer*, 859 F.2d at 76. The *Stouffer* court stated that if the citizenship of a limited partner was not to be included in determining diversity jurisdiction, Congress should make the change. *Id.* at 76-77; see also *Elston Inn, Ltd. v. David Altman Leasing Corp.*, 731 F.2d 436, 438 (7th Cir. 1984) (rejecting rule excluding citizenship of limited partners for purposes of diversity as not consonant with Supreme Court precedent).

tional purposes.<sup>24</sup>

In dissent, Judge Ross criticized the majority's strict adherence to the traditional unincorporated association rule,<sup>25</sup> arguing that "federal courts are required to look beyond the superficial contours of a business entity to determine the real parties to the controversy."<sup>26</sup> Judge Ross asserted that the limited partners were not real parties to the controversy since, by statute, the responsibilities of managing the business and controlling the litigation were within the exclusive power of the general partner.<sup>27</sup> Consequently, the dissent concluded that the citizenship of the limited partners should not be considered for diversity purposes.<sup>28</sup>

In adopting an approach mandating consideration of the citizenship of limited partners in determining the existence of complete diversity, it is asserted that the Eighth Circuit has restricted access to the federal courts in actions brought by or against limited partnerships. It is submitted that by following this approach, the court failed to adequately assess the unique nature of a limited partnership and the impact of its structure on the complete diversity requirement. This Comment will assert that courts should dis-

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<sup>24</sup> *Stouffer*, 859 F.2d at 77. The purpose of the bright-line rule is to "enhance predictability of result and promote judicial economy." *Id.* The *Stouffer* court noted that "[t]he contrary rule of the Second and Fifth Circuits, requiring a case-by-case determination whether limited partners are real parties to the controversy, would often mandate an evidentiary hearing on the threshold issue of jurisdiction." *Id.* But see *Mesa*, 797 F.2d at 243 n.2 (considering citizenship of only general partners is easier and faster than considering citizenship of all partners).

The *Stouffer* court was also confronted with the argument that consideration of the real parties to the controversy analysis was required by the Supreme Court in light of the Supreme Court's decision in *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458 (1980). *Stouffer*, 859 F.2d at 77. However, the *Stouffer* court rejected the application of the real parties to the controversy test in the context of a limited partnership, noting that the *Navarro* Court "explicitly stated that the [*Navarro*] case involved 'an express trust' and 'neither an association nor a corporation.'" *Id.*

<sup>25</sup> See *Stouffer*, 859 F.2d at 78 (Ross, J., dissenting).

<sup>26</sup> See *Stouffer*, 859 F.2d at 77 (Ross, J., dissenting). The real parties to the controversy test "clearly provides that 'a federal court must disregard nominal or formal parties and rest [diversity] jurisdiction only upon the citizenship of real parties to the controversy.'" *Id.* at 77 (Ross, J., dissenting) (quoting *Navarro*, 446 U.S. at 461) (citations omitted).

<sup>27</sup> *Id.* (Ross, J., dissenting). Judge Ross concluded that by definition the general partner, *Stouffer Corporation* was the real party to the controversy, not the limited partners. *Id.* (Ross, J., dissenting); see Mo. REV. STAT. § 359.090 (1987) (repealed as of Jan. 1, 1989) (vesting management powers of limited partnership in general partner, not limited partner); Mo. REV. STAT. § 359.260 (1987) (providing that limited partner is not proper party to proceeding). Judge Ross added that effective January 1, 1989, section 359.260 would be repealed. *Stouffer*, 859 F.2d at 78 n.2 (Ross, J., dissenting).

<sup>28</sup> *Stouffer*, 859 F.2d at 78 (Ross, J., dissenting).

tinguish the membership structure of a limited partnership from that of other unincorporated associations in determining the existence of diversity jurisdiction. It will be suggested that the appropriate approach is a test analyzing the citizenship of only the general partners for diversity purposes. This Comment will further explore the role of the courts in this area and the need for Supreme Court intervention to establish a uniform rule for jurisdictional treatment of limited partnership litigants.

### THE UNINCORPORATED ASSOCIATION RULE

In order to obtain federal jurisdiction on the basis of diversity of citizenship, complete diversity is required between parties opposed in interest.<sup>29</sup> In an extended line of cases, the Supreme Court consistently has held that the citizenship of all members of an unincorporated association must be considered in determining whether the requirement of complete diversity has been satisfied.<sup>30</sup> However, another equally well-established rule is that the complete diversity requirement does not mandate the examination of every conceivably interested person's citizenship,<sup>31</sup> but rather the citizenship only of real parties to the controversy.<sup>32</sup> As the court in

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<sup>29</sup> See *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 267 (1806); *supra* note 2 and accompanying text.

<sup>30</sup> See *United Steelworkers v. R.H. Bouligny, Inc.*, 382 U.S. 145, 149-53 (1965); *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 456 (1900); *Chapman v. Barney*, 129 U.S. 677, 682 (1889). In *Chapman*, the Court held that a joint stock company was not a corporation but rather a "mere partnership" and therefore could not invoke federal diversity jurisdiction because all of its members were not diverse from the opposing party. *Id.* Eleven years later, the *Chapman* rule, providing that an unincorporated association is a citizen of the state of each of its individual members, was reaffirmed. See *Great Southern*, 177 U.S. at 454-55. The *Great Southern* Court held that in order to establish diversity jurisdiction "it was necessary to set out the citizenship of the individual members of the [limited] partnership." *Id.* at 457. It should be noted that the limited partnership in *Great Southern* consisted of members who were all of limited status, and was therefore not structured in the same manner as a modern limited partnership. See *Carlsberg Resources Corp. v. Cambria Sav. & Loan Ass'n*, 554 F.2d 1254, 1264 (2d Cir. 1977) (Hunter, J., dissenting); *Gordon-Maizel Constr. Co. v. Leroy Prods., Inc.*, 643 F. Supp. 188, 189 (D.D.C. 1986). See generally *Kratovil & Werner, Fixing Up the Old Jalopy—The Modern Limited Partnership Under the ULPA*, 50 ST. JOHN'S L. REV. 51, *passim* (1975) (distinguishing "old-fashioned" small-scale partnership from modern limited partnership).

<sup>31</sup> See *McNutt v. Bland*, 43 U.S. (2 How.) 8, 14 (1844); see also *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 461 (1980) (nominal or formal parties disregarded in determining existence of complete diversity); *Abels v. State Farm Fire & Casualty Co.*, 770 F.2d 26, 29 (3d Cir. 1985) (same); *Hann v. City of Clinton ex. rel. Schuetter* 131 F.2d 978, 981 (10th Cir. 1942) (same).

<sup>32</sup> See *Coal Co. v. Blatchford*, 78 U.S. (11 Wall.) 172, 176-77 (1871); *Marshall v. Balti-*

*Stouffer* observed, the Supreme Court has not determined whether the unincorporated association rule or the real parties to the controversy analysis is applicable to limited partnerships in determining diversity of citizenship.<sup>33</sup>

Although a limited partnership is one form of unincorporated association,<sup>34</sup> it is asserted that the unique nature of a limited partnership<sup>35</sup> distinguishes it from the traditional unincorporated association. With respect to other unincorporated associations, such as joint stock associations and general partnerships, federal courts consider the citizenship of each member for diversity purposes because each member possesses the power to manage and control the business.<sup>36</sup> It is submitted that the *Stouffer* court's reliance on the traditional unincorporated association rule was misplaced in light of the unique characteristics of limited partnerships. By statutory definition, a limited partnership has a two-tier membership structure, consisting of limited partners, who generally assume no personal liability beyond their capital investment, and general partners, who are personally responsible for the obligations of the business.<sup>37</sup> By equating limited partners with members

more & Ohio R.R. Co., 57 U.S. (16 How.) 314, 328 (1854). The "real party in interest" language first appeared in a case addressing the issue of joinder of parties. See *Wormley v. Wormley*, 21 U.S. (8 Wheat.) 421, 451 (1823). In *Wormley*, the Court declared:

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

*Id.* (footnote omitted). See generally 6 C. WRIGHT, A. MILLER, & E. COOPER, *supra* note 3, § 1556 (1971 & Supp. 1989) (general discussion of real party in interest rule); Comment, *supra* note 4, at 417-18 (jurisdictional test focusing on real parties to controversy promotes diversity precedents and policies).

<sup>33</sup> *Stouffer*, 859 F.2d at 76.

<sup>34</sup> *Id.*

<sup>35</sup> See UNIF. LTD. PARTNERSHIP ACT § 1, 6 U.L.A. 567 (1969); *supra* note 4. Limited partnerships are unique in form and are exclusively creatures of statute. See *Riviera Congress Assocs. v. Yassky*, 25 App. Div. 2d 291, 295, 268 N.Y.S.2d 854, 858 (1st Dep't), *aff'd*, 18 N.Y.2d 540, 223 N.E.2d 876, 277 N.Y.S.2d 386 (1966); *Millard v. Newmark & Co.*, 24 App. Div. 2d 333, 335, 266 N.Y.S.2d 254, 258 (1st Dep't 1966); UNIF. LTD. PARTNERSHIP ACT § 1, 6 U.L.A. 567 (1969); see also *Gordon-Maizel Constr. Co. v. Leroy Prods., Inc.*, 643 F. Supp. 188, 190 (D.D.C. 1986) ("Limited partnerships should be treated as the distinct creatures they are"). See generally J. CRANE & A. BROMBERG, *LAW OF PARTNERSHIP* § 26 (1968) (general discussion on formation of limited partnerships and role of limited partners).

<sup>36</sup> See Comment, *supra* note 4, at 407.

<sup>37</sup> See *Hoefer v. Hall*, 75 N.M. 751, 755, 411 P.2d 230, 232 (1965); *Freedman v. Tax Review Bd.*, 212 Pa. Super. 442, 446, 243 A.2d 130, 133 (1968), *aff'd*, 434 Pa. 282, 258 A.2d 323 (1969). The *Freedman* court described a limited partnership in Pennsylvania as "an entity in which one or more persons, with unlimited liability, manage the partnership, while

of other unincorporated associations,<sup>38</sup> it is submitted that the *Stouffer* court unjustifiably disregarded the internal structure of a limited partnership and the statutory class distinction of its members.

### THE "REAL PARTY TO THE CONTROVERSY" TEST

In their jurisdictional treatment of limited partnerships, the Second and Fifth Circuits have taken an approach antithetical to that taken in other circuits.<sup>39</sup> Recognizing the distinct membership structure of a limited partnership, the Second and Fifth Circuits adopted the real parties to the controversy analysis.<sup>40</sup> These courts have acknowledged that the interests of limited partners differ from those of general partners.<sup>41</sup> Unless otherwise agreed, general

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one or more other persons only contribute capital; these latter partners have no right to participate in the management and operation of the business and assume no liability beyond the capital contributed." *Id.*

<sup>38</sup> See 13B C. WRIGHT, A. MILLER & E. COOPER, *supra* note 3, § 3630, at 682-89. The term "unincorporated association" includes joint stock associations, labor unions, general partnerships, limited partnerships and fraternal organizations. *Id.* A joint stock company is a nonstatutory business organization with management similar to that of a corporation. See J. CRANE & A. BROMBERG, *supra* note 35, § 34, at 178-79. Despite the corporate similarities, members of the joint stock company maintain property rights and liabilities similar to those held by partners in a general partnership. *Id.* at 179-80.

<sup>39</sup> See *supra* notes 6-7 and accompanying text.

<sup>40</sup> See *Mesa Operating Ltd. Partnership v. Louisiana Intrastate Gas Corp.*, 797 F.2d 238, 240 (5th Cir. 1986); *Colonial Realty Corp. v. Bache & Co.*, 358 F.2d 178, 183-84 (2d Cir.), *cert. denied*, 385 U.S. 817 (1966). In *Colonial*, the Second Circuit's rationale for considering only the citizenship of the general partners as necessary to the diversity determination was based on a capacity to sue analysis. See *id.* Under the applicable state law a limited partner lacked capacity to sue on behalf of the partnership. See *id.* Since the power to control the litigation is part of the focus when applying the real parties to the controversy test, it is submitted that the *Colonial* court's inquiry impliedly embraced the real parties to the controversy analysis. As the *Mesa* court noted, the *Colonial* approach "constitutes a parallel route to the same result." *Mesa*, 797 F.2d at 240. Therefore, for purposes of this Comment, the Second Circuit's approach will be identified, along with the Fifth Circuit's approach, as following the real parties to the controversy analysis. For a further discussion of the approach of the Second and Fifth Circuits, see *supra* note 6. For a general discussion of the real parties to the controversy test, see *supra* notes 31-32 and accompanying text.

<sup>41</sup> See *Mesa*, 797 F.2d at 242; *Colonial*, 358 F.2d at 183-84. In *Mesa*, the Fifth Circuit examined a limited partnership agreement which clearly established exclusive control with the general partners. *Mesa*, 797 F.2d at 242. In *Colonial*, the Second Circuit distinguished the limited partner from the general partner on the basis of the New York Partnership Law which prohibited a limited partner from becoming a party in an action by or against the limited partnership with one very narrow exception. See *Colonial*, 358 F.2d at 183-84; see also *Wroblewski v. Brucher*, 550 F. Supp. 742, 745-46 (W.D. Okla. 1982) (recognition of significant restrictions afforded limited partners with respect to limited partnership affairs); N.Y. PARTNERSHIP LAW § 115 (McKinney 1988) (provision narrowing control of limited part-

partners have equal managerial and procedural rights, and their potential liability is separate and distinct from that of limited partners.<sup>42</sup> Unlike general partners, limited partners generally have no authority to participate in management activities<sup>43</sup> or in litigation matters pertaining to the business.<sup>44</sup> Consequently, the Second and Fifth Circuits eliminated consideration of limited partners' citizenship from the complete diversity evaluation on the ground that limited partners are not real parties to the controversy.<sup>45</sup>

In *Navarro*, the United States Supreme Court recently applied the real parties to the controversy test in the context of a business trust arrangement.<sup>46</sup> The question presented in *Navarro* was whether the citizenship of the beneficial shareholders of a business trust, as well as that of the trustees, must be considered in a diversity jurisdiction determination.<sup>47</sup> In evaluating which members of a business trust were real parties to the controversy, the Court focused on who possessed the power to own, manage and control the business assets and participate in the business' litigation.<sup>48</sup> The *Navarro* Court concluded that the trustees were the real parties to the controversy since they retained legal title of trust assets and were solely responsible for controlling trust litigation.<sup>49</sup> The trustees were therefore permitted to invoke federal diversity jurisdiction without regard to the citizenship of the 9,500 trust beneficiaries.<sup>50</sup>

In light of the Supreme Court's analysis in *Navarro*, it is suggested that the *Stouffer* court should have applied the real parties

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ner in partnership litigation).

<sup>42</sup> See *Waite v. Salestrom*, 206 Neb. 578, 581, 294 N.W.2d 338, 340 (1980); H. REUSCHLEIN & W. GREGORY, *supra* note 5, § 264, at 436-37.

<sup>43</sup> See *Klein v. Weiss*, 284 Md. 36, 52, 395 A.2d 126, 135 (1978); see also *Donroy, Ltd. v. United States*, 196 F. Supp. 54, 57 (N.D. Cal. 1961) ("under California law, a limited partner[ship] . . . must be left to the control of the general partners"), *aff'd*, 301 F.2d 200 (9th Cir. 1962).

<sup>44</sup> See *Colonial*, 358 F.2d at 183; see also *Westville Holdings, Inc. v. American Petroleum Partners*, 592 F. Supp. 44, 45 (S.D.N.Y. 1984) (limited partners generally not proper parties to proceedings by or against limited partnerships).

<sup>45</sup> See *Mesa*, 797 F.2d at 243; *Colonial*, 358 F.2d at 184; see also *supra* notes 32 & 40 (discussion of real parties to controversy analysis).

<sup>46</sup> 446 U.S. 458, 460 (1980).

<sup>47</sup> *Id.* at 458.

<sup>48</sup> *Id.* at 465.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 465-66.

to the controversy test,<sup>51</sup> inasmuch as this approach does not mechanically include a member in the jurisdictional determination without first ascertaining whether that member has the power to manage and control both the assets and litigation of the business.

Limited partners, like trust beneficiaries, are not real parties to a controversy as they exercise virtually no control over the affairs of the business.<sup>52</sup> Moreover, limited partners generally have a limited interest in the outcome of litigation involving the limited partnership.<sup>53</sup> It is therefore submitted that a test considering the citizenship of only the general partners should have been adopted in determining whether there has been compliance with the com-

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<sup>51</sup> While courts and commentators have recognized that *Navarro* was expressly limited to the business trust situation, many consider the reasoning analogous to, and applicable in, the limited partnership context. See *Mesa Operating Ltd. Partnership v. Louisiana Intra-state Gas Corp.*, 797 F.2d 238, 240 (5th Cir. 1986); Note, *Who Are the Real Parties*, *supra* note 6, at 1065.

<sup>52</sup> See UNIF. LTD. PARTNERSHIP ACT § 7, 6 U.L.A. 582 (1969). Section 7 of the Uniform Limited Partnership Act provides: "A limited partner shall not become liable as a general partner unless, in addition to the exercise of his rights and powers as a limited partner, he takes part in the control of the business." *Id.*

New York law requires the vesting of management powers of a limited partnership in the general partner. See N.Y. PARTNERSHIP LAW § 96 (McKinney 1988). Furthermore, limited partners are prohibited from involvement in the partnership affairs and may not bind the partnership by contract. *Id.* Additionally, a limited partner may not dispose of partnership property or vote concerning the business of the partnership. *Id.* Notwithstanding some narrow exceptions, a limited partner may not participate in lawsuits brought by or against the partnership. See *id.* at § 115; see also *Riviera Congress Assocs. v. Yassky*, 18 N.Y.2d 540, 547, 223 N.E.2d 876, 879, 277 N.Y.S.2d 386, 391 (1966) (limited partners excluded from most legal proceedings to restrict them from involvement in partnership business). But see DEL. CODE ANN. tit. 6, § 17-303(b) (Supp. 1988). In Delaware, a limited partner may exercise numerous powers which are deemed not to be participation in the control of the business. *Id.* These include advising general partners as to partnership business, acting as surety for the partnership, serving on partnership committees, and calling and participating in partnership meetings. *Id.*; see also *Mesa*, 797 F.2d at 242-43 n.1 (extent of control exercised by limited partners under Delaware law "might not meet the Court's test for the clear division between the classes of partners"). It is submitted that since a limited partner loses the privilege of limited liability if he exercises too much control, the limited partner once exercising such control will then be a real party to the controversy. See generally Comment, *supra* note 4, at 410-11 (limited partner who exercises too much control loses limited partner status).

<sup>53</sup> Limited partners are generally not subject to any personal liability beyond their investment in the business. See *McCully v. Radack*, 27 Md. App. 350, 351, 340 A.2d 374, 375 (Ct. Spec. App. 1975). Furthermore, limited partners are generally not liable for partnership obligations. See *Hartford Fin. Sys. v. Florida Software Servs., Inc.*, 550 F. Supp. 1079, 1089 (D.C. Me. 1982), *appeal dismissed*, 712 F.2d 724 (1st Cir. 1983). It is submitted that because limited partners generally are neither bound by obligations of the partnership nor subject to personal liability beyond their investment, their interest in the outcome of litigation involving the limited partnership is not as great as that of the general partners.

plete diversity requirement. It is further submitted that this approach would fulfill the *Stouffer* court's laudable interest in adopting a test that would treat all limited partnerships consistently for jurisdictional purposes, thereby promoting judicial economy and enhancing predictability of results.<sup>54</sup>

#### JUDICIAL CONSIDERATION ABSENT CONGRESSIONAL ACTION

The *Stouffer* court echoed the concern of the Third, Fourth and Seventh Circuits that the judiciary is unauthorized to deviate from the traditional unincorporated association rule absent a change in the jurisdictional guidelines by Congress.<sup>55</sup> The *Stouffer*

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<sup>54</sup> See *Stouffer*, 859 F.2d at 77. The fear of too much threshold litigation over the issue of diversity jurisdiction is a concern of federal courts. See Currie, *The Federal Courts and the American Law Institute, Part I*, 36 U. CHI. L. REV. 1, 1 (1968). Professor Currie suggested that "[j]urisdiction should be as self-regulated as breathing." *Id.* He further stated that "litigation over whether the case is in the right court is essentially a waste of time and resources." *Id.*; see *Mesa*, 797 F.2d at 243 n.2. The *Mesa* court found that a bright-line test considering only the general partners' citizenship in a diversity determination will promote judicial economy because it saves time. *Id.* The *Mesa* court posited that:

Where jurisdiction depends on citizenship of general partners and a showing that they have exclusive management and control of assets and litigation, determination of citizenship would be both faster and easier than a process of matching up long lists of members whose addresses may not even be correctly carried on the partnership's books as of the date of filing.

*Id.*

<sup>55</sup> See *Stouffer*, 859 F.2d at 76-77; *New York State Teachers Retirement Sys. v. Kalkus*, 764 F.2d 1015, 1019 (4th Cir. 1985); *Elston Inv., Ltd. v. David Altman Leasing Corp.*, 731 F.2d 436, 439 (7th Cir. 1984); *Carlsberg Resources Corp. v. Cambria Sav. & Loan Ass'n*, 554 F.2d 1254, 1262 (3d Cir. 1977). The *Carlsberg* court, interpreting 28 U.S.C. section 1332, stated that "it is apparent that Congress wished to afford the benefits of diversity jurisdiction to litigants only where the statutory requirements have been complied with in strict fashion." *Id.* The *Carlsberg* court was reluctant to deviate from the traditional treatment of unincorporated associations although the diversity question pertained to a limited partnership. See *id.* The rationale of the *Carlsberg* court was based on the "Supreme Court[']s suggestion] in a related context [that] petitions for relief from the requirements of diversity jurisdiction should be addressed not to the courts but to the legislative branch of the government." *Id.* at 1262 n.29; see also *United Steelworkers v. R.H. Bouligny, Inc.*, 382 U.S. 145, 147 (1965) (judiciary unauthorized to create individual citizenship of unincorporated association for diversity purposes unless mandated by Congress).

The *Mesa* court criticized the other circuits' treatment of a limited partnership for diversity purposes and stated that "[t]he reasoning of the other circuits comes down to a disinclination to expand diversity jurisdiction without congressional authorization [but w]e find that reason irrelevant to our decision." *Mesa*, 797 F.2d at 241.

The judiciary has played a prominent role in interpreting the diversity statute without legislative action. See, e.g., *Prakash v. American Univ.*, 727 F.2d 1174, 1180 (D.C. Cir. 1984) (judicial test created for determinations as to what constitutes citizenship); *Hargrave v. Oki Nursery, Inc.*, 646 F.2d 716, 720 (2d Cir. 1980) (interpreting meaning of word "actions" in diversity statute); *Monsanto Co. v. Tennessee Valley Auth.*, 448 F. Supp. 648, 650 (N.D. Ala.

court properly noted that although corporations have individual citizenship status for federal diversity purposes,<sup>56</sup> Supreme Court precedent precludes a federal court from granting limited partnerships citizenship status as entities comparable to the status of corporations.<sup>57</sup> It is submitted that since the *Stouffer* court was not attributing entity status to limited partnerships, it was not precluded from distinguishing between the two levels of membership which constitute a limited partnership. It is asserted that such a distinction by the *Stouffer* court would not have constituted an unauthorized attempt to judicially create citizenship for the limited partnership as an entity, but rather would represent a necessary judicial interpretation of the diversity statute that is more consonant with Supreme Court precedent.

### CONCLUSION

In relying on the traditional unincorporated association rule, the *Stouffer* court contributed to the growing disagreement among the circuits concerning the treatment of a limited partner's citizenship for diversity purposes. This Comment has suggested that the *Stouffer* court failed to consider the unique structure of a limited partnership. In addition, the court's fear of usurping congressional power, as demonstrated by its rigid adherence to prior, nonbinding decisions, was unfounded. In light of the role the judiciary plays in the interpretation of the diversity statute, it has been asserted that courts would be well within their bounds in applying a rule that considers the citizenship of only those partners that are real parties to the controversy. It is further suggested that in light of the widening conflict among the circuits<sup>58</sup> and the prolonged inaction

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1978) (concluding that "principal office" was not same as "principal place of business").

<sup>56</sup> See 28 U.S.C. § 1332(c) (1982 & 1988 Supp.). Section 1332(c) provides that "[f]or the purposes of [diversity jurisdiction] a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business." *Id.* Although legislative action ultimately provided the basis for federal courts not to consider the citizenship of a corporate shareholder in actions brought by or against a corporation, it was judicial action by the Supreme Court that provided the basis for federal courts not to consider the citizenship of a trust beneficiary in a business trust context. See Note, *Diversity of Citizenship*, *supra* note 4, at 263 n.223 (author suggests that "*Navarro* is per se proof that the Court will not wait for Congress on the diversity question in every instance").

<sup>57</sup> See *Boulogny*, 382 U.S. at 147; see also *supra* note 4 (discussing corporation's status for diversity purposes).

<sup>58</sup> Compare *Stouffer*, 859 F.2d at 76 (limited partners are included in diversity determinations) and *Kalkus*, 764 F.2d at 1019 (same) and *Elston Inv., Ltd.*, 731 F.2d at 439 (same) and *Carlsberg*, 554 F.2d at 1257-66 (same) with *Mesa*, 797 F.2d at 242-43 (limited partners

of Congress,<sup>59</sup> Supreme Court intervention is necessary to provide federal courts with guidance and to ensure unyielding certainty in jurisdictional questions involving the citizenship of limited partners in complete diversity determinations.

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not considered in diversity determination) and *Colonial Realty Corp. v. Bache & Co.*, 358 F.2d 178, 183-84 (2d Cir.) (same), *cert. denied*, 385 U.S. 817 (1966). Although the United States Court of Appeals for the Tenth Circuit has not yet addressed this issue, the district courts within that circuit have. See *Petroleum Data Servs. v. First City Bancorporation of Texas, Inc.*, 622 F. Supp. 1022, 1026 (D. Kan. 1985) (limited partner's citizenship not considered in determining diversity of citizenship). In the District of Columbia, the district courts have ruled inconsistently, making it unclear whether the citizenship of general partners only, or both general partners and limited partners, must be considered in determining diversity jurisdiction. Compare *Conroy v. Winn*, 581 F. Supp. 1280, 1281 (D.D.C. 1984) (citizenship of limited partner a factor in diversity determination) with *Gordon-Maizel Constr. Co. v. Leroy Prods., Inc.*, 643 F. Supp. 188, 189-90 (D.D.C. 1986) (only general partners considered in determining diversity jurisdiction). See generally Note, *Diversity of Citizenship*, *supra* note 4, at 242-46 (examination of split in courts regarding diversity jurisdiction in actions brought by or against limited partnerships).

<sup>59</sup> The amendment to the federal diversity statute passed by Congress on October 19, 1988, did not address the treatment of limited partnerships for diversity purposes. See *Judicial Improvements and Access to Justice Act of 1988*, Pub. L. No. 100-702, sec. 201, 102 Stat. 4642, 4646 (1988).