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THE CORPORATE PRINCIPAL PLACE OF BUSINESS: A RESOLUTION AND REVISION

Jurisdiction over controversies between citizens of different states was vested in the federal courts by Congress in 1789.¹ Until 1958, however, the statutory language was silent as to corporations; they were woven into the diversity pattern by a judicial fiction that made them citizens of their states of incorporation. In 1958, desire to reduce the mounting backlog of federal cases and dissatisfaction with the fiction that allowed a local corporation to enter federal courts merely because it had a foreign charter led to the enactment of section 1332(c) of the Judicial Code. Corporate citizenship was extended to the state in which the corporation has its principal place of business as well as its states of incorporation. The term principal place of business introduced complications not envisioned by Congress.

"Principal Place of Business"

The corporation's berth in the diversity structure was first before the Supreme Court in 1809.² The Court held that corporations, though not citizens, could sue and be sued, diversity jurisdiction being dependent on the citizenship of their stockholders. The complete diversity doctrine³ precluded corporate use of the federal courts unless all shareholders had citizenship diverse from all adversaries.⁴ Because of the growth of the economic importance of corporations, and the disaffection with the effect of the complete diversity doctrine, the Supreme Court in 1844 held that corporations would be "deemed" citizens of their state of incorporation.⁵ To avoid calling corporations citizens, the Court later con-

1. Judiciary Act of 1789 § 11, 1 Stat. 78.

2. *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61 (1809). The Constitution and the Judiciary Act of 1789 did not mention corporations. Apparently prior to 1809 they were sued without jurisdictional problems. Green, *Corporations as Persons, Citizens, and Possessors of Liberty*, 94 U. Pa. L. Rev. 202, 211 (1946); Warren, *Corporations and Diversity of Citizenship*, 19 Va. L. Rev. 661, 662-63 (1933).

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

4. See, e.g., *Commercial & R.R. Bank v. Slocomb, Richards, & Co.*, 39 U.S. (14 Pet.) 60 (1840); *Sullivan v. Fulton Steam Boat Co.*, 19 U.S. (6 Wheat.) 450 (1821). The Court has distinguished corporations having national charters. *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824). Diversity exists when the branch of the national corporation involved is located in another state. *Ex parte Jones*, 164 U.S. 691 (1897). See 28 U.S.C. § 1348 (1964).

5. *Louisville, C. & C.R.R. v. Letson*, 43 U.S. (2 How.) 497 (1844). This step has been criticized. McGovney, *A Supreme Court Fiction: Corporations in the Diverse Citizenship Jurisdiction of the Federal Courts*, 56 Harv. L. Rev. 853, 874 (1943).

clusively presumed the stockholders to be citizens of the incorporating state,⁶ and subsequent cases made contrary averments inadmissible.⁷

This insistence on looking to the natural persons composing corporations to determine corporate citizenship and the refusal to recognize their actual citizenship soon led to conceptual difficulties. Remedies, such as Equity Rule 94⁸ and the "forum doctrine,"⁹ were unsuccessful, and an anomaly thus developed permitting a local corporation to invoke diversity jurisdiction in litigation with local parties merely by incorporating in another state.¹⁰

The expansion of state jurisdictional statutes and the "corporate presence" doctrine¹¹ broadened the field of operation of the fictional presumption of stockholder citizenship,¹² and federal dockets became congested with diversity

6. *Marshall v. Baltimore & O.R.R.*, 57 U.S. (16 How.) 314 (1854). A similar presumption has been applied to foreign corporations, *Ferrigno v. Ocean Transp. Ltd.*, 188 F. Supp. 179 (S.D.N.Y. 1960), *rev'd on other grounds*, 309 F.2d 445 (2d Cir. 1962), but not to unincorporated associations. *United Steelworkers of America v. R. H. Bouligny, Inc.*, 382 U.S. 145 (1965).

7. See, e.g., *St. Louis & S.F. Ry. v. James*, 161 U.S. 545 (1896); *Covington Drawbridge Co. v. Shepherd*, 61 U.S. (20 How.) 227, 233 (1857).

8. 104 U.S. IX (1882). A stockholder sued his own corporation alleging his home citizenship as diverse from that of the corporation while, at the same time, he was presumed a citizen of the corporation's home state. *Dodge v. Woolsey*, 59 U.S. (18 How.) 331 (1856). Corporations then refused to enforce their legal rights; stockholders from foreign states were selected to sue the directors and the other party, joining the suit in equity obtaining standing in the federal diversity courts otherwise not available. Equity Rule 94 was intended to restrict this collusive use of the federal courts. The rule, however, was ineffective absent proof of collusion. *Greenwood v. Freight Co.*, 105 U.S. 13 (1882).

9. Corporations incorporated in more than one state posed a dilemma. Natural persons could not be presumed to be citizens of more than one state simultaneously. The problem was resolved in favor of the "forum doctrine" which may be illustrated as follows: Assume a corporation is incorporated in states A and B and is sued by a citizen of A. If the suit is in a federal court of A, there is no diversity. See, e.g., *Jacobson v. New York, N.H. & H.R.R.*, 206 F.2d 153 (1st Cir. 1953), *aff'd per curiam*, 347 U.S. 909 (1954). If the suit is in a federal court of B, diversity exists as the corporation's charter in A is not considered. *Boston & Maine R.R. v. Breslin*, 80 F.2d 749 (1st Cir. 1935), *cert. denied*, 297 U.S. 715 (1936). If the suit is in a federal court of state C, diversity does not exist since all the states of incorporation are then considered. *Waller v. New York, N.H. & H.R.R.*, 127 F. Supp. 863 (S.D.N.Y. 1955); 3 U.C.L.A.L. Rev. 98 (1955). *But see* *Gavin v. Hudson & M.R.R.*, 185 F.2d 104 (3d Cir. 1950). See generally *Weckstein, Multi-State Corporations and Diversity of Citizenship: A Field Day For Fictions*, 31 Tenn. L. Rev. 195 (1964).

10. The most spectacular case was *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518 (1928), noted 27 Mich. L. Rev. 212 (1928). *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), removed the incentive to reincorporate to take advantage of federal common law but did not cure the anomaly.

11. While it had been established that a corporation might sue in other states, *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519 (1839), it was presumed that personal service on a corporate agent outside the state of incorporation was insufficient because it had no legal existence there. In 1856, the Supreme Court upheld such jurisdiction in state courts, *Lafayette Ins. Co. v. French*, 59 U.S. (18 How.) 404 (1856), and in 1877 overruled the federal court's refusal to do so. *Ex parte Schollenberger*, 96 U.S. 369 (1877). The doctrine has subsequently been extended, *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957), and refined. *Hanson v. Denkla*, 357 U.S. 235 (1958).

12. The Court still refused to confer "citizenship" on corporations. Some subsequent cases, however, rested on the 1844 *Letson* decision, 43 U.S. (2 How.) 497 (1844)—not on the pre-

cases.¹³ In 1958, Congress responded to many calls for action¹⁴ and, believing limitation of diversity jurisdiction the best overall corrective measure, extended corporate citizenship to the state in which the corporation has its principal place of business in addition to the state of incorporation.¹⁵

The phrase "principal place of business" was drawn from the Bankruptcy Act¹⁶ on the assumption that experience under that act would provide precedent for application of the standard. This proved a naive hope, for the only agreement among bankruptcy cases was that principal place of business is a question of fact to be determined in light of all relevant evidence.¹⁷ More specifically, the decisions applying section 1332(c) cluster around two distinct tests: One looks to the corporate home office, considering location of managing offices, meeting place of the stockholders, and location of the corporate records, but not business volume in particular states.¹⁸ The other looks to the actual place of operations, considering the bulk of corporate activity controlling and weighing such elements as location of factories, business volume, and the number of employees in each state.¹⁹

This Note will compare these dichotomous tests, propose refinement of the home office test, and suggest alternative legislative language.

sumption fiction of *Marshall v. Baltimore & O.R.R.*, 57 U.S. (16 How.) 314 (1854). See *Railway Co. v. Whittson's Adm'r*, 80 U.S. (13 Wall.) 270 (1871). Practically, it makes little difference which theory is applied. The treatises generally do not distinguish them. Ballantine, *Manual of Corporation Law and Practice* 39 (1930); 8 Fletcher, *Private Corporations* § 4030 (rev. perm. ed. 1931).

13. See Note, *New Federal Jurisdictional Statute Achieves Early Success in Reducing Number of District Court Case Filings But Presents Interpretative Difficulties*, 58 Colum. L. Rev. 1287 (1958).

14. (1) To abolish diversity jurisdiction: S. 939, H.R. 11508, 72d Cong., 1st Sess. (1932), criticized in comment by members of the University of Chicago Law Faculty, *Limiting Jurisdiction of the Federal Courts—Pending Bills*, 31 Mich. L. Rev. 59 (1931); Howland, *Shall Federal Jurisdiction of Controversies Between Citizens of Different States Be Preserved?*, 18 A.B.A.J. 499 (1932); Parker, *The Federal Jurisdiction and Recent Attacks Upon It*, 18 A.B.A.J. 433 (1931). (2) To make a corporation a citizen of every state in which it does business: E.g., H.R. 3092, H.R. 3969, 87th Cong., 1st Sess. (1961); H.R. 1987, 82d Cong., 1st Sess. (1951). (3) To limit diversity to natural persons: E.g., H.R. 2516, 85th Cong., 1st Sess. (1957). (4) To make corporations citizens of states in which they do business in all litigation arising out of such business: S. 937, H.R. 10594, 72d Cong., 1st Sess. (1931); Warren, *supra* note 2; Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 Law & Contemp. Prob. 216 (1948); Yntema, *The Jurisdiction of the Federal Courts in Controversies Between Citizens of Different States*, 19 A.B.A.J. 71, 149 (1933). (5) To make corporations citizens of states where they are incorporated and have their principal place of business: Henderson, *The Position of Foreign Corporations in American Constitutional Law* 191-93 (1918).

15. "For purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any state by which it has been incorporated and of the state where it has its principal place of business." 28 U.S.C. § 1332(c) (1964). The decision not to abolish diversity jurisdiction was apparently based on the belief that local bias still exists. This question has long been debated. See Frank, *Historical Bases of the Federal Judicial System*, 13 Law & Contemp. Prob. 3, 22-24 (1948); Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 Harv. L. Rev. 483 (1928). For consideration of the effect of the amendment on the "forum doctrine," see Friedenthal, *New Limitations on Federal Jurisdiction*, 11 Stan. L. Rev. 213, 225 (1959); Moore & Weckstein, *Corporations and Diversity of Citizenship Jurisdiction: A Supreme Court Fiction Revisited*, 77 Harv. L. Rev. 1426, 1433 (1964).

16. 66 Stat. 420, 11 U.S.C. § 11(a)(1) (1964).

17. See, e.g., *Carolina Motor Express Lines, Inc. v. Blue & White Serv., Inc.*, 192 F.2d 89 (7th Cir. 1951); *Bank of Commerce v. Carter*, 61 F.2d 986 (8th Cir. 1932).

18. See, e.g., *Burdick v. Dillon*, 144 Fed. 737 (1st Cir. 1906), *appeal dismissed*, 205 U.S. 550 (1907); *In re Pennsylvania Consol. Coal Co.*, 163 Fed. 579 (E.D. Pa. 1908).

19. *Continental Coal Corp. v. Roszelle Bros.*, 242 Fed. 243 (6th Cir. 1917).

Home Office Versus Actual Place of Operations

The place of operations test attempts to identify the state in which the bulk of corporate activity is conducted²⁰ on the theory that this is where the corporation's litigation most likely will arise and that diversity will therefore be dissolved more often, which result effectuates the primary congressional intent to reduce the federal caseload.²¹ Further, it apparently eliminates the unfairness resulting from a local corporation's use of diversity jurisdiction because it has a foreign charter while an identical corporation with a local charter or a local citizen is barred, thus fulfilling a secondary purpose of the amendment.²²

This test, however, has serious difficulties. Collection and consideration of pertinent evidence is burdensome.²³ Further, there is a danger of reversal by an appellate court attaching different weight to such factors as volume of production and sales at each place of operations²⁴ than did the trial court. Moreover, the party alleging diversity must establish it by a preponderance of the evidence,²⁵ and the question may not be stipulated or waived.²⁶ This task, complicated enough for the plaintiff corporation, may prove insuperable for the individual plaintiff seeking to sue the corporation in a federal court. Although federal discovery procedures²⁷ will compel disclosure of the corporate records, the individual may find such materials voluminous and unintelligible.²⁸ The obstructions to finding an actual place of operations from a surfeit of unfamiliar payroll accounts, production records, and inventories leave the non-corporate litigant at a clear disadvantage.²⁹

The fundamental objection to the place of operations test, however, arises when it is applied to large corporations operating in several states, for it may serve as no more than a facade for an arbitrary decision. A court cannot meaningfully compare, for example, a smelter in one state with an ore pit in another. The court must endeavor to select a factor or combination of factors that it deems point to one state.³⁰ An arbitrary result is avoided only when the corporation's activities are concentrated in one state; the wider the spread of corporate activity, the more voluminous and possibly unrelated the data to be weighed. Absent a common denominator, what is announced as a precise formula is,

20. For a full description see Moore & Weckstein, *supra* note 15, at 1438-45; Scott, *The Dual Citizenship of Corporations, and Their Principal Place of Business*, 23 Fed. B.J. 103, 116-19 (1963); Note, 44 Minn. L. Rev. 308, 316-24 (1959).

21. Scott, *supra* note 20, at 117; Note, *supra* note 20, at 320.

22. S. Rep. No. 1830, 85th Cong., 2d Sess. 4 (1958). [Hereinafter cited as Senate.]

23. See *Kelly v. United States Steel Corp.*, 284 F.2d 850, 853-54 (3d Cir. 1960).

24. *Meek v. City of Sacramento*, 132 F. Supp. 546 (N.D. Cal. 1955) (presumption of lack of jurisdiction at every stage of the proceedings); Note, 46 Calif. L. Rev. 831, 834 (1958).

25. *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936).

26. *Ibid.*; *Barkhorn v. Adlib Associates, Inc.*, 345 F.2d 173 (9th Cir. 1965); *Underwood v. Maloney*, 256 F.2d 334, 340 (3d Cir.), *cert. denied*, 358 U.S. 864 (1958); *Spencer v. Patey*, 243 Fed. 555, 556 (2d Cir. 1917).

27. Fed. R. Civ. P. 26-37.

28. See Note, *supra* note 20, at 322.

29. Scott, *supra* note 20, at 111-13; Note, 72 Harv. L. Rev. 391, 394 (1958).

30. *Kelly v. United States Steel Corp.*, 284 F.2d 850, 853 (3d Cir. 1960).

in fact, mere guesswork. It seems incongruous to demand delay-producing analysis³¹ of an issue unrelated to the substantive questions of the case when the express purpose of the act was to clear congested dockets.³²

The home office test³³ avoids these problems since fixing its location is generally a simple task. In *Scott Typewriter Co. v. Underwood Corp.*,³⁴ the court found that, since defendant's executive offices and promotional and administrative activities were in New York and that basic policy decisions were made there, its home office was New York. Facts that will establish the home office often are a matter of public record; the court is not forced into arbitrary decisions. Moreover, the nerve center of a corporation generally will be in the same state as its operations.³⁵ Being manifestly simple and quick, the home office test is more responsive to the principal goal of Congress—reducing the backlog of cases.³⁶

It has been suggested, however, that since the home office and the bulk of corporate activity will not always coincide, the home office test will neither produce the maximum reduction in diversity litigation³⁷ nor cure the anomaly of the local corporation using the federal courts to the exclusion of other local parties who do not have a foreign home office.³⁸ To examine these propositions, the cases should be classified according to corporate patterns: (1) the home office and the bulk of corporate activity are in the same state; (2) the home office is in one state and the bulk of corporate activity in another; (3) the home office is in one state and the corporation carries on substantial business in that state and numerous other states.

Applied to pattern one, the tests are equally effective because they place corporate citizenship in the same state. Under pattern two, most corporate litigation will presumably arise in the state of maximum corporate activity with citizens of that state. Thus, the place of operations test would destroy diversity in more cases than would the home office test. But, in reality, pattern two would rarely arise. Thus, the failure of the home office test to meet this problem should not militate against its adoption in light of the simplicity of its application.

Nevertheless, the home office test has been criticized for preserving the anomaly of the local corporation gaining access to the federal courts merely because it has a foreign charter—the anomaly Congress hoped to eradicate with the amendment.³⁹ The test will allow some local corporations to invoke diversity jurisdiction merely because they have foreign home offices while similar local corporations with local home offices will be barred. Because Congress spoke only of the local corporation with a foreign charter—not a foreign home

31. Note, *supra* note 29, at 393; Note, 53 Nw. U. L. Rev. 637, 645 (1958); Note, 6 Utah L. Rev. 231, 243 (1958). See *Smith v. Sperling*, 354 U.S. 91, 95 (1957) (eight years spent determining the issue of jurisdiction).

32. *Hearings Before Subcommittee No. 3 of the House Committee on the Judiciary*, 85th Cong., 1st Sess., ser. 5, at iii (1957) [hereinafter cited as 1957 *Hearings*]; Note, *supra* note 24, at 833-34; Note, 6 Utah L. Rev. 231 (1958).

33. For a full description, see Scott, *supra* note 20, at 116-19; Note, *supra* note 20, at 316-17.

34. 170 F. Supp. 862 (S.D.N.Y. 1959).

35. *Eldridge v. Richfield Oil Corp.*, 247 F. Supp. 407 (S.D. Cal. 1965); *Inland Rubber Corp. v. Triple A Tire Serv., Inc.*, 220 F. Supp. 490 (S.D.N.Y. 1963); *Moesser v. Crucible Steel Co. of America*, 173 F. Supp. 953 (W.D. Pa. 1959).

36. See Senate at 5.

37. Note, *supra* note 20, at 320.

38. Note, *supra* note 29, at 394.

39. See Senate at 4.

office—the home office test actually creates a new anomaly. The “old” anomaly falls within pattern one; the home office test is as effective as the place of operations test in obviating it. The “new” anomaly falls within pattern two, a matter on which Congress expressed no intent.⁴⁰

Again, this new anomaly is not so serious that courts should venture into the place of operations quagmire to cure it.⁴¹ Because of the inconvenience of maintaining management and business activity in different states for relatively small corporations, the new anomaly likely will be an exceptional case rather than the rule.

The number of corporations gaining access to federal courts via this pattern could be further reduced by defining the home office as the place where day-to-day control of the business is exercised. Such a test should rule out the locations of stockholder and director meetings. For large corporations, it would be the site of the executive offices; for others, it might be that of the office of the general manager or the superintendent. In *Inland Rubber Corp. v. Triple A Tire Service, Inc.*,⁴² in which the directors and officers met in one state while the managers in charge of corporate operations were in another, the home office would be deemed to be the manager's location, the same state the court identified as the principal place of business using the place of operations test.

Pattern three—the corporation doing substantial business in several states—presents different considerations. As noted by Judge Goodrich, the difficulty lies in attempting to pinpoint the principal place of business of a corporation such as United States Steel Corporation:⁴³

This great corporation has fourteen divisions of the parent corporation and eleven principal subordinate companies. Its various manufacturing activities are spread over practically all the United States and extend to foreign countries. It has literally dozens of important places of business one of which we must pick out as the principal one because the statute says so.

The complications of the place of operations test reach their apogee in pattern three. Accordingly, as more unrelated factors are placed on the scales, the balance tips heavily toward the possibility of arbitrary decisions.⁴⁴

The place of operations test might name any one of the states in which the corporation does substantial business as the principal place of business. Yet, litigation may arise in any of them, and the aggregate activity in the remaining

40. The courts have strictly interpreted 28 U.S.C. § 1332(c) (1964) in terms of the express Congressional intent. *United Steelworkers of America v. R. H. Bouligny, Inc.*, 382 U.S. 145 (1965), criticized in 34 Geo. Wash. L. Rev. 793 (1966) (refusal to apply § 1332(c) to an unincorporated association with all the characteristics of a corporation); *Tsakonites v. Transpacific Carriers Corp.*, 246 F. Supp. 634, 641 (S.D.N.Y. 1965) (refusal to apply § 1332(c) to a corporation with an alien charter whose principal place of business was New York); *Chemical Transp. Corp. v. Chemical Petroleum Corp.*, 246 F. Supp. 563, 567 (S.D.N.Y. 1964) (refusal to apply § 1332(c) to a corporation with an alien charter).

41. See text at notes 20-32 *supra*.

42. 220 F. Supp. 490 (S.D.N.Y. 1963).

43. *Kelly v. United States Steel Corp.*, 284 F.2d 850, 853 (3d Cir. 1960).

44. See text at notes 30-31 *supra*.

states may well exceed that of the place of operations. But the court can find only one principal place of business, and other courts usually will abide by that determination in subsequent litigation.⁴⁵ Thus, the place of operations test will allow corporations to invoke diversity in states in which they do substantial business.⁴⁶

The result under the home office test will be the same. Section 1332(c), however, was not directed at large multi-state operators.⁴⁷ The original proposal would have made corporations citizens of the state from which they derived over one-half their gross income.⁴⁸ This scheme would not have reached large corporations deriving their income from many states. Congress discarded this proposal—not because of dislike for this exemption—but only because it thought the bankruptcy precedents would prove more useful.

When the inadequacies and complexities of the place of operations test are compared with the simplicity of the home office test in light of this congressional intent, the latter seems more consonant with the purposes of the amendment.

Judicial Application of the Amendment

A particular court's choice of the home office or the place of operations test generally has turned on the type of corporation first confronting it with the issue. Thus, if the corporation has its home office in one state and its bulk of activity in another, courts have applied the actual place of operations test.⁴⁹ If the corporation is diversified and does roughly equal amounts of business in several states, the home office test has been applied.⁵⁰

Drawing on these alternative approaches, the literature has suggested that courts adopt a less rigid stand on either test. The courts could apply either test depending on the corporate structure before them in each case.⁵¹

Finally, it has been suggested that the two tests be combined, including the location of the home office along with the considerations of the actual place of operations test.⁵² This approach supposedly will place corporate citizenship in the state bearing the corporation's greatest impact.⁵³

45. See *Woods v. United Air Lines, Inc.*, 216 F. Supp. 340 (E.D.N.Y. 1963).

46. *Eagan v. American Airlines, Inc.*, 324 F.2d 565 (2d Cir. 1963).

47. "[The amendment] will eliminate those corporations doing a local business with a foreign charter but will not eliminate those corporations which do business over a large number of States. . . . Even such a corporation, however, would be regarded as a citizen of that one of the States in which was located its principal place of business." Senate at 5. (Emphasis added.)

48. Senate at 30-31; 1957 *Hearings* 36.

49. *Inland Rubber Corp. v. Triple A Tire Serv., Inc.*, 220 F. Supp. 490 (S.D.N.Y. 1963).

50. *Sabo v. Standard Oil Co.*, 295 F.2d 893 (7th Cir. 1961); *Lancer Indus., Inc. v. American Ins. Co.*, 197 F. Supp. 894 (W.D. La. 1961); *Scot Typewriter Co. v. Underwood Corp.*, 170 F. Supp. 862 (S.D.N.Y. 1959).

51. Pugh, *Federal Jurisdiction and Practice*, 36 N.Y.U.L. Rev. 142, 147 (1961); 40 N.C.L. Rev. 122, 130-31 (1961).

52. *Kelly v. United States Steel Corp.*, 284 F.2d 850 (3d Cir. 1960). Although *Kelly* is subject to differing interpretations, compare *Textron Electronics, Inc. v. Unholtz-Dickie Corp.*, 193 F. Supp. 456 (D. Conn. 1961) with *United Indus. Corp. v. Gira*, 204 F. Supp. 410 (D. Del. 1961), many courts have adopted its approach of weighing factors from both tests. See, e.g., *Bullock v. Wiebe Constr. Co.*, 241 F. Supp. 961 (D. Iowa 1965); *Farnen v. Coastal Tank Lines, Inc.*, 195 F. Supp. 777 (W.D. Pa. 1961); *Gilardi v. Atchison T. & S.F. Ry.*, 189 F. Supp. 82 (N.D. Ill. 1960); *Bryfogle v. Acme Mkt., Inc.*, 176 F. Supp. 43 (E.D. Pa. 1959).

53. See Note, *supra* note 29.

All these approaches, however, suffer from difficulties. Although it is simple to distinguish between extreme examples of local corporations and multi-state operators (the local grocery store vis-à-vis General Electric), the determination becomes difficult between these poles; a determination of the amount of multi-state activity in which a local corporation engages merely adds a new dimension to an already complex question. First, the court must determine which test should apply. Then if it concludes the place of operations test will be administered, the court is still faced with the vagaries of its application. The approach confronts the court with a dual possibility of reversal. It may err in designating the type of corporation or in applying the relevant test.

A more promising tool of judicial repair lies in interpreting section 1332(c) to create more than one principal place of business; corporations would then be citizens of states in which they did substantial business. This interpretation would be internally consistent since section 1332(c) has been interpreted as making corporations citizens of each state in which they are incorporated.⁵⁴ It would be a small step to apply a plural interpretation to principal place of business; this construction would require "the" to be interpreted as "a".⁵⁵ The problems of weighing unrelated factors from different states would be eliminated; each state in which there was activity would be an independent principal place of business. The volume of diversity litigation would be reduced, and the anomaly of the local corporation gaining access to the federal courts to the exclusion of other local parties would be obviated.

This interpretation, however, conflicts with an express congressional intent to make the principal place of business singular.⁵⁶ Such an interpretation was suggested to Congress before enactment of the 1958 amendment in the extreme form of making corporations citizens of states in which they were "doing business"⁵⁷—rather than substantial business—and was rejected. Not only would these multiple place of business interpretations effectively close the doors of federal courts to large multi-state corporations, they would also raise interpretative problems. Setting an arbitrary limit on "substantial" business or "doing business" may leave the courts in the same quandary of determining, for example, the monetary value of a warehouse or mine in the various states of corporate activity. Thus, the efficacy of this solution is seriously diminished by the problems it engenders.

A Legislative Proposal

Faced with weaknesses inherent in both the home office and the actual place of operations test, and judicial refusal to go beyond the letter of the 1958

54. *Evans-Hailey Co. v. Crane Co.*, 207 F. Supp. 193, 201 (M.D. Tenn. 1962); *Stroup v. Pittsburgh & Lake Erie R.R.*, 186 F. Supp. 154 (N.D. Ohio 1960); Weckstein, *Multi-State Corporations and Diversity of Citizenship: A Field Day for Fictions*, 31 *Tenn. L. Rev.* 195, 210-16 (1964).

55. 28 U.S.C. § 1332(c) (1964).

56. Senate at 5.

57. H.R. 1987, 82d Cong., 1st Sess. (1951).

amendment,⁵⁸ the remaining path for change is legislative action. Many of the problems of the amendment result from the requirement that there be only one principal place of business, Congress believing out-of-state corporations still needed protection from local prejudice against foreign citizens.⁵⁹

Local prejudice against foreign citizens—not prejudice against corporations, unions, or racial and religious groups in general which exists independent of citizenship—if ever bona fide,⁶⁰ has been vitiated as a rationale.⁶¹ Federal courts draw juries from the same sources as state courts⁶² and, since *Erie R.R. v. Tompkins*,⁶³ are to apply the same substantive law. In conjunction with the cosmopolitanism of an increasingly transient population, these considerations make it difficult to give credence to fears of local prejudice based on diverse citizenship.⁶⁴ Any prejudice against corporations stems from their size, wealth and impersonal nature—not their foreign citizenship.⁶⁵ The handicap, therefore, is present in both state and federal courts.

Convincing statistics argue that instead of fear of local prejudice, litigants are motivated to enter federal courts by such factors as convenient location, the federal right to jury trial, the superiority of federal procedure, and the real or imagined superiority of federal judges and juries.⁶⁶ Since convenience, rather than prejudice, is dominant, entry to the federal courts assumes the character of a privilege rather than a protectory device; and fairness dictates that all litigants, corporations and individuals, should be placed on an equal footing in enjoying this privilege.⁶⁷ Furtherance of equality, therefore, rather than protection against prejudice should be central to a revision of section 1332(c). Accordingly, the requirement responsible for many of the problems and which militates against equal treatment—the requirement of one principal place of

58. See note 40 *supra*.

59. Senate at 4-5; 1957 Hearings 11-14.

60. See generally Friendly, *supra* note 15.

61. *Lumberman's Mut. Cas. Co. v. Elbert*, 348 U.S. 48, 54-56 (1954) (Frankfurter, J., concurring). See also Jackson, *The Supreme Court and the American System of Government* 37 (1955); Ball, *Revision of Federal Diversity Jurisdiction*, 28 Ill. L. Rev. 356, 360 (1933); Summers, *Analysis of Factors That Influence Choice of Forum in Diversity Cases*, 47 Iowa L. Rev. 933 (1962); Warren, *Corporations and Diversity of Citizenship*, 19 Va. L. Rev. 661, 684-85 (1933). This position is not inconsistent with *United Steelworkers of America v. R. H. Bouligny, Inc.*, 382 U.S. 145, 150 (1965), where the Court recognized the existence of anti-union bias in a particular town. This bias, prejudice against labor unions because they are labor unions, is distinct from the bias which is the historic underpinning of diversity jurisdiction—prejudice against foreign citizens solely because they are foreign citizens. This latter prejudice is also distinguishable from racial bias, which exists against all members of the particular race irrespective of their citizenship. It is this prejudice against members of a class regardless of citizenship to which the Supreme Court has shown sensitivity. See *Bouligny supra*; *Dombrowski v. Pfister*, 380 U.S. 479 (1965) (by implication).

62. Ball, *supra* note 61, at 361.

63. 304 U.S. 64 (1938).

64. Wright, *Federal Courts* 67 (1963). *Contra*, Note, 53 Nw. U. L. Rev. 637, 643-44 (1958); Comment, 62 W. Va. L. Rev. 405 (1960).

65. Ball, *supra* note 61, at 361.

66. See generally Summers, *supra* note 61.

67. Although the historic justification for it is invalid, this note assumes the desirability of retaining diversity jurisdiction. This question has been debated and adequate treatment would require great length. It should suffice, however, to say the assumption is supported by convincing reasons. See Wright, *supra* note 64, at 67-69; Frank, *For Maintaining Diversity Jurisdiction*, 73 Yale L.J. 7 (1963); Phillips & Christenson, *The Historical and Legal Background of the Diversity Jurisdiction*, 46 A.B.A.J. 959, 962-63 (1960).

business although a corporation may have many significant places of business⁶⁸—should be abolished.

With this background, section 1332(c) should be amended to read as follows:

For purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of the state in which control of the corporate act or omission out of which the litigation arose is exercised *in the normal course of business*.

Some examples illustrate the operation of this proposal: United States Steel operates a mill in Provo, Utah. A truck dispatched from the mill hits a Utah citizen on a Utah road. The Third Circuit, using a variant of the place of operations test, has placed U.S. Steel's principal place of business in Pennsylvania.⁶⁹ The home office test would locate it in New York.⁷⁰ The proposal, however, would place U.S. Steel's citizenship, for purposes of this litigation, in Utah because control over the truckdriver was exercised there in the ordinary course of business.

This approach would ignore the Utah mill's "organization chart" connection to U.S. Steel's headquarters and accord it the same treatment as the local businesses which in fact it resembles. The only distinction between the branch and the local business is the ultimate authority exercised by an out-of-state office. The activity resulting in the litigation was indigenous to the branch's locality; it is anomalous to link it to a foreign state simply because the parent's principal place of business is there.

A truck is dispatched from the Utah mill and strikes a California citizen in California. U.S. Steel's citizenship under the proposed legislation would be in Utah although U.S. Steel does substantial business in California. The proposed test would concentrate on control of the litigation causing activity—not volume of business. This results in placing corporations on a parity with natural citizens and purely local corporations. If a corporation were considered a citizen of every state in which it did substantial business or just did business, large multi-state corporations would be effectively excluded from the federal courts and the objective of fair and equal treatment would not be met.

The result would be the same if the truck from the Utah mill struck a truck dispatched from Litton Industries in California even though Litton does substantial business in Utah and U.S. Steel does substantial business in California—the Litton and U.S. Steel branches are treated as individual citizens carrying on activities in foreign states. For if a Utah citizen who owned property in California struck a California citizen who owned property in Utah, diversity would exist.

The proposed legislation is well suited for tort law because it focuses on control of an act or omission; the parties involved and the time and place of a

68. Kelly v. United States Steel Corp., 284 F.2d 850, 853 (3d Cir. 1960).

69. *Id.* at 854.

70. *Id.* at 853-54.

tortious act are usually readily identifiable. However, contracts or cases involving both tort and contract require identification of the site of such elusive events as offer, acceptance, and breach.

But the proposal will apply equally well if it is understood that the "control" of the proposal is not the control concept of agency. The touchstone is control in the ordinary course of business; the design is to place citizenship in the state or states in which normal operating control over the activity resulting in the breach is exercised. This circumvents agency questions of who had control in specific cases, and instead asks who normally has control in the majority of cases. In the normal course of business, the management of the branch is responsible for its own operations; control over a contract default likely will be exercised there.

Again, most cases should offer few problems. Examples will illustrate the solution of apparently difficult cases: A Utah citizen, insured by a Texas insurance company, is struck in Utah by the Utah steel mill's truck. The victim settles with the Texas company, which is subrogated to his rights as insured. In jurisdictions regarding the subrogee as standing in the shoes of the insured,⁷¹ the insurance company's citizenship will be identical to the insured's. In jurisdictions treating the insurance company as the real party in interest,⁷² the company's citizenship will be in the state containing the nearest claims adjuster. In most cases, the result will be the same, for most large companies have claim agents in every state. These agents are responsible for claims in their area resulting from both permanent and transient citizens. The outcome would be the same in states having direct action statutes in which the insurer is sued directly as the real party in interest; the insurer is a citizen of the state in which control over the litigation producing activity is exercised. This result is identical to that of the 1958 amendment.⁷³

A construction company negotiates a contract with U.S. Steel for delivery of steel from the Utah mill at a Utah damsite. The mill defaults, and a contract action is brought in Utah. Since the omission causing the litigation occurred in Utah, U.S. Steel's citizenship will be in Utah for that litigation. The Utah mill should be precluded from pleading that it did not negotiate the contract or that the home office caused the breach. The test looks to control as it is exercised year in and year out. Once it is established that the branch had acted on, or received notice of, the contract, special circumstances causing the breach that originate elsewhere will not remove the corporation's citizenship to another state.

The construction company negotiates a contract with U.S. Steel at its home office in New York for delivery at the Utah damsite. The time of breach will be determinative of citizenship. If the breach occurs after the Utah branch or any other branch has taken affirmative action to fulfill the contract, U.S. Steel's

71. See, e.g., *United States v. Aetna Cas. & Surety Co.*, 338 U.S. 366 (1949); *Aetna Life Ins. Co. v. Moses*, 287 U.S. 530 (1933).

72. See, e.g., *Pittsburgh Ry. v. Home Ins. Co.*, 183 Ind. 355, 108 N.E. 525 (1915); *Cunningham v. Seaboard Air Line Ry. Co.*, 139 N.C. 427, 51 S.E. 1029 (1905).

73. *Provided further*, 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 the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business.
28 U.S.C. § 1332(c) (1964).

citizenship will lie in the state or the states in which the branch or the branches working on the contract are located. If the breach occurs before the contract is transmitted to a branch or branches, or while it is in transit, the citizenship will be in New York, the location of the control over the breach at that time.

The requirement of an affirmative act should avoid litigation over whether the breach was caused by the branch or the home office. The plaintiff will attempt to prove that the branch knew of the contract and its obligations thereunder and that it was in the process of complying; the corporation will attempt to prove that the branch had not yet been notified and was not complying. The clearest evidence would be of an affirmative act (*i.e.*, notice of intent to deliver or request for instructions) to fulfill this particular contract distinct from the mill's daily operations. If the contract designates a specific mill to deliver from, of course, the problem will be minimal. Further, the courts could prescribe reasonable time limits before presuming that the designated branch was notified of the contract and thus locating the breach in the state of the branch. A contract calling for the participation of several branches would place corporate citizenship in all the states concerned for purposes of litigation arising out of that contract.

The proposal will apply equally well when the corporation is the plaintiff. Even though the contract makes payment direct to the New York home office, if delivery was to be made by the Utah mill and the customer wrongfully refused delivery, the litigation arose out of corporate activity controlled in Utah.

The proposed statute, giving corporations several places of business yet no permanent citizenships, will achieve a greater reduction in diversity litigation than does the 1958 amendment. Additionally, the anomaly, in whatever form, of the corporation doing substantial local business using the federal courts to the exclusion of other local corporations or citizens will be eradicated as much as is conceptually possible. The proposal will, however, require premature offering of evidence relevant to substantive issues in contract cases to determine jurisdiction. For example, the test, in some instances, will require evidence relevant to responsibility for a breach to determine the location of operating control over that breach. This burden should not be an intolerable inconvenience since this evidence will be required for trial of the issues anyway.

Further, the test abolishes the corporate charter as an indicia of citizenship; concurrently, it abolishes all fictions concerning citizenship of stockholders. This seems reasonable since the place of incorporation often has little relation to the place of operations. Further, it has long been recognized that corporations, if they can choose where to incorporate, rest their decisions on reasons other than doing business in the given state.⁷⁴

In summary, the proposed test offers a comparatively simple standard that

74. Senate at 5.

not only will permit direct attention to the substantive issues, but also will effectuate the congressional intent to constrict diversity jurisdiction and abolish the anomaly of the local corporation being admitted to the federal courts merely because it has a foreign charter.

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