FINDING A "HOME" FOR UNINCORPORATED ENTITIES POST-*DAIMLER AG V. BAUMAN*

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INTRODUCTION

In *Goodyear Dunlop Tires Operations, S.A. v. Brown*, the Supreme Court reshaped general personal jurisdiction (also called "all-purpose jurisdiction"), announcing that defendants are subject to general personal jurisdiction where their contacts were "so 'continuous and systematic' as to render them essentially at home in the forum State."[1] The Court reaffirmed this "at home" test in *Daimler AG v. Bauman* in 2014[2] and clarified where individuals and corporations were typically "at home."[3] To date, the Court has never expressly applied this new vision of general personal jurisdiction to unincorporated entities, leading to confusion in the federal district courts.[4]

[1] Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011).
[2] Daimler AG v. Bauman, 571 U.S. 117, 122 (2014).
[3] *Id.* at 137.
[4] *See infra* Section II.B.3.

This article examines this gap in the law: Where are unincorporated entities subject to general personal jurisdiction? Part I of this article provides context by examining the three key, overlapping jurisdictional concepts (subject matter jurisdiction, personal jurisdiction, and venue) and reviewing how these concepts apply to individuals and corporations. Part II focuses on unincorporated entities and examines the possible tests for general personal jurisdiction proffered by dicta from the Supreme Court and suggested by lower courts. Part III sets out our recommended approach for where unincorporated entities are subject to general personal jurisdiction, that is:

> An unincorporated entity (such as an LLC, LLP, general partnership, or limited partnership) is subject to general jurisdiction where its contacts are so constant and pervasive as to render it essentially "at home" in the forum state. With respect to an unincorporated entity, the place of formation and the principal place of business are paradigm bases for general jurisdiction.
> The rule is not that an unincorporated entity may be subject to general jurisdiction *only* in a forum where it was formed or has its principal place of business; it is simply that those places are paradigm all-purpose forums. In some circumstances, the contacts of an entity's members with a forum may be so constant and pervasive as to render the unincorporated entity "also at home" in that forum as well.[5]

We argue that this test is consistent with lower court holdings, with Supreme Court dicta, and with the logic of the Court's general jurisdiction jurisprudence. Finally, in Section III.D this article provides guidance to lower courts in applying the proposed test to various unincorporated entities.

I. PERSONAL JURISDICTION AND THE LARGER JURISDICTIONAL PICTURE

A. *The Interplay of Personal Jurisdiction, Subject Matter Jurisdiction, and Venue*

The focus of this article is personal jurisdiction, a court's power over the parties before it. However, personal jurisdiction overlaps with two other jurisdictional issues, subject matter jurisdiction and venue.[6] These three interrelated concepts direct litigants to the proper forum for filing claims and provide the basis for challenges to the selected forum. While each of these concepts embodies a separate jurisdictional concern, they often rely on similar terminology and related issues. Each one asks, in different ways, "where is a party at home?"

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[5] *See infra* Section III.C.2. This proposed rule deliberately parrots the language the Supreme Court adopted for corporations in *Goodyear* and *Daimler*.

[6] Some include venue as a "jurisdictional concept," and that is the approach taken in this article. Others would exclude it, using "jurisdiction" only to refer to personal jurisdiction and subject matter jurisdiction. *See, e.g.*, 14D CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3801 (3d ed. 2008) (arguing against the use of "jurisdictional" to include venue).

1. *Subject Matter Jurisdiction and Venue*

The first concept, subject matter jurisdiction, is the requirement that a court have the authority to resolve the dispute before it.[7] State courts are courts of general subject matter jurisdiction and can hear all matters that are not specifically reserved for the federal courts.[8] By contrast, federal courts have "limited subject matter jurisdiction."[9] Article III of the United States Constitution establishes the outer boundaries of federal judicial power and vests Congress with the authority to establish and ordain the lower federal courts.[10] Congress, through statute, has the power to determine the authority of the federal district courts.[11]

While Congress has authorized several bases for federal district court subject matter jurisdiction, the one most relevant to our article is diversity jurisdiction. Under 28 U.S.C. § 1332(a), litigants may bring claims that are between diverse citizens when the amount in controversy exceeds $75,000.[12] A key aspect of diversity jurisdiction is the determination of the parties' citizenship.[13] This requires courts to interpret and apply the term "*citizen*" from § 1332(a) to all types of parties that might appear in the suit, including individuals, corporations, and a variety of unincorporated entities.[14] In interpreting "citizenship," the Court has consistently made clear that the determination of this issue should remain, foremost, a congressional one.[15]

Venue is the second jurisdictional concept that informs the question of whether the chosen forum is proper. Unlike subject matter jurisdiction and personal jurisdiction, venue is not a limit on a court's power.[16] Rather, it is a concept grounded in the convenience of the selected forum for the litigants and the

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[7] *Id.*

[8] 13 WRIGHT ET AL., *supra* note 6, § 3522.

[9] *Id.*

[10] U.S. CONST. art. III, §§ 1–2.

[11] *See, e.g.*, Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 372 (1978) ("Constitutional power is merely the first hurdle that must be overcome in determining that a federal court has jurisdiction over a particular controversy. For the jurisdiction of the federal courts is limited not only by the provisions of Art. III of the Constitution, but also by Acts of Congress.") (citations omitted); s*ee also* 13 WRIGHT ET AL., *supra* note 6, § 3522.

[12] 28 U.S.C. § 1332(a) (2018).

[13] *Id.*

[14] *See infra* Sections I.B; II.A.

[15] *See infra* Section II.A.

[16] Wachovia Bank v. Schmidt, 546 U.S. 303, 316 (2006) (citing Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165, 168 (1939)). "The jurisdiction of the federal courts—their power to adjudicate—is a grant of authority to them by Congress and thus beyond the scope of litigants to confer. But the locality of a lawsuit—the place where judicial authority may be exercised—though defined by legislation relates to the convenience of litigants and as such is subject to their disposition. This basic difference between the court's power and the litigant's convenience is historic in the federal courts." *Neirbo*, 308 U.S. at 167–68; *see also* 14D WRIGHT ET AL., *supra* note 6, at § 3801.

court itself.[17] Venue is a statutory concept with no constitutional connection.[18] For the purposes of this article, we will be focusing on part of 28 USC § 1391, the general-federal-venue statute, which controls venue in the federal district courts.[19] Under § 1391(b)(1), venue is proper in "a judicial district in which any defendant *resides*, if all defendants are residents of the State in which the district is located."[20] Once again we must ask where a party is "from"; but, just as with subject matter jurisdiction, this is an area where the Court defers to Congress, seeking to simply apply the statute's definition of residency.[21]

2. *Personal Jurisdiction*

Personal jurisdiction, the final concept that determines the appropriateness of a selected forum, is the focus of this article. Personal jurisdiction is a limitation on a court's power over litigants that is derived from the Fourteenth Amendment Due Process Clause of the United States Constitution.[22] A court, whether state or federal, must have the authority to bind the litigants to the judgment it renders.[23] Under the Due Process Clause, a litigant may challenge the court's authority by establishing that the chosen forum is unconstitutionally burdensome.[24]

The origin of personal jurisdiction in the Fourteenth Amendment and the limit it puts on a forum makes it distinct from venue and from subject matter jurisdiction.[25] Namely, the Supreme Court is not simply interpreting a congressional grant of jurisdiction; rather, when ruling on matters of personal jurisdiction it is refining and explaining a jurisprudence it has created itself.[26]

Today, the Supreme Court recognizes two forms of personal jurisdiction, "general" and "specific" personal jurisdiction.[27] General jurisdiction, the sub-

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[17] *Wachovia*, 546 U.S. at 316 (venue is primarily a matter of convenience) (citations omitted); *Neirbo*, 308 U.S. at 167; *see also* 14D WRIGHT ET AL., *supra* note 6, at § 3801.

[18] 14D WRIGHT ET AL., *supra* note 6, at § 3801 (noting that while "personal jurisdiction implicates constitutional as well as statutory concerns, venue is wholly a statutory matter").

[19] 28 U.S.C. § 1391(b) (2018). The general venue statute in § 1391(b) lays venue based on either event giving rise to the claim or on the residency of the defendant. *Id.* The residency provision is discussed *infra* Sections I.B, II.A.

[20] 28 U.S.C. § 1391(b)(1) (emphasis added).

[21] *See infra* Sections I.B, II.A.

[22] Int'l Shoe Co. v. Wash., 326 U.S. 310, 311, 316 (1945).

[23] *Id*. at 316 (noting that "the jurisdiction of courts to render judgment *in personam* is grounded on their de facto power over the defendant's person."); *see also* FED. R. CIV. P. 4(k)(1)(A) (directing that service over a defendant will establish personal jurisdiction in the federal district courts when the defendant would be subject to personal jurisdiction in the state courts "where the [federal] district court is located").

[24] *Int'l Shoe*, 326 U.S. at 313.

[25] *Id.* at 316–17 (using a due process test grounded in the Fourteenth Amendment).

[26] We explore the importance of this differing role for the Court in Section III.A.

[27] The Court has at times referred to these concepts by different names: it has called "general" jurisdiction "all-purpose" jurisdiction and called "specific" jurisdiction "conduct-linked" jurisdiction. *See, e.g.*, Daimler AG v. Bauman, 571 U.S. 117, 122 (2014); *see also*

ject of this article, allows a forum to exercise personal jurisdiction over "any and all claims" against a defendant.[28] In contrast, specific jurisdiction allows a forum to assert personal jurisdiction with a much lesser showing of minimum contacts by a defendant, but only as to claims that "arise[] out of or relate[] to" those contacts.[29]

For much of the twentieth century, the Supreme Court focused on specific jurisdiction, leaving the doctrine of general jurisdiction largely undeveloped.[30] In the 1984 splintered decision of *Helicopteros Nacionales de Columbia, S.A. v. Hall*, the Supreme Court reiterated that a forum would have general jurisdiction over a defendant when the defendant's contacts with the forum were "continuous and systematic."[31] The Court reasoned that at some point a defendant's contacts with a forum are so voluminous that due process is not offended even by a suit with no connection to the forum.[32] However, the Court remained silent for almost three decades following *Helicopteros*, offering no clarification on when a defendant's contacts with a forum would be sufficiently continuous and systematic as to render it subject to general jurisdiction.[33]

It was only in *Goodyear*, in 2011, and again in *Daimler*, in 2014, that the Supreme Court refocused on general jurisdiction and reformulated its prior pronouncements into the "at home" test.[34] Today, general jurisdiction exists when defendants' "affiliations with the State are so 'continuous and systematic' as to render them *essentially at home in the forum State*."[35] The *Daimler* Court argued that this "at home" test had several advantages, namely, it was relatively

Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 727–28 (1988) (discussing the distinction between specific and general jurisdiction).

[28] *Daimler*, 571 U.S. at 127 (citations omitted).

[29] *Id.* at 126–27 (tracing the evolution of the Court's personal jurisdiction jurisprudence and noting that, after *International Shoe*, specific jurisdiction can be supported by a "single or occasional" contact with the forum if the contact gave rise to the claim).

[30] *See id.* at 129 (describing the Court's decisions on specific jurisdiction and noting that "[o]ur post-*International Shoe* opinions on general jurisdiction, by comparison, are few.").

[31] Helicopteros Nacionales de Colombia, S.A. v. Hall 466 U.S. 408, 409, 416 (1984). The phrase "continuous and systematic" was originally used by the Court in *International Shoe*. Int'l Shoe Co. v. Wash., 326 U.S. 310, 317 (1945).

[32] The *Helicopteros* Court held that "mere purchases" by the defendant did not meet the high standard for contacts required for general jurisdiction, even when the purchases (of several helicopters and parts) from the forum occurred over several years and were for significant amounts, and even when the contract was negotiated in the forum by the defendant's CEO and the defendant's staff later visited the forum for training. *Helicopteros*, 466 U.S. at 411, 414, 418.

[33] *Helicopteros* was decided in 1984, and the Court's next opinion, *Goodyear*, was in 2011. *See* Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915 (2011); Helicopteros, 466 U.S. 408 (1984).

[34] *Daimler*, 571 U.S. at 117, 127; *Goodyear*, 564 U.S. at 919, 924.

[35] *Goodyear*, 564 U.S. at 919 (citations omitted) (emphasis added); *see also Daimler*, 571 U.S. at 127. *Daimler* at times used the phrase "so constant and pervasive" rather than the classic "so continuous and systematic" formulation. *Daimler*, 571 U.S. at 122.

"simple" and easy to apply.[36] Moreover, the "at home" test was clear and provided litigants with transparency "afford[ing] plaintiffs recourse to at least one clear and certain forum in which a . . . defendant may be sued on any and all claims."[37]

This new general jurisdiction test forces the Court to ask, "where is a defendant at home?" As we detail below in Section I.B, the *Daimler* Court itself spelled out the answer to this question for individuals and for corporations, but the Supreme Court has not yet explained where unincorporated entities are "at home."[38] This article suggests an answer.

B. *An Overview of the Treatment of Individuals and Corporations in Subject Matter Jurisdiction, Venue and General Personal Jurisdiction*

This section provides an overview of the application of established jurisdictional law to individuals and corporations. Specifically, it will explore how individuals and corporations are treated for the purposes of diversity jurisdiction, for venue, and for general personal jurisdiction. This overview will highlight the overlapping use of terms in these separate jurisdictional concepts and suggest how the Court should craft a general jurisdiction rule for unincorporated entities.

1. *Treatment of Individuals in Subject Matter Jurisdiction, Venue, and General Personal Jurisdiction*

For an "individual", that is a natural person, the key test for all the jurisdictional concepts is "domicile."[39] Individuals are "citizens" for purposes of diversity jurisdiction in the state of "domicile";[40] "reside" under the express terms of the federal venue statute in the judicial district of "domicile";[41] and under the Supreme Court's new "at home" test, the paradigm place in which individuals are subject to general personal jurisdiction is the state of "domicile."[42] In other words, when the Court selected a test for the paradigm forum with general personal jurisdiction over an individual, it copied the test it had crafted for diversi-

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[36] *Daimler*, 571 U.S. at 137 (explaining that the "at home" test "[has] the virtue of being unique—that is, each [affiliation] ordinarily indicates only one place—as well as easily ascertainable.").

[37] *Id.*

[38] *See infra* Sections I.B, II.B.

[39] Domicile is "the place where that individual has a true, fixed home and principal establishment, and to which, whenever that person is absent from the jurisdiction, he or she has the intention of returning" 13E WRIGHT ET AL., *supra* note 6, § 3612; *see also Domicile*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[40] 13E WRIGHT ET AL., *supra* note 6, § 3611.

[41] 28 U.S.C. § 1391(c)(1) (2018) provides that "[f]or all venue purposes . . . a natural person . . . shall be deemed to reside in the judicial district in which that person is domiciled."

[42] *Daimler*, 571 U.S. at 137 (holding that "[f]or an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile").

ty jurisdiction and the one that Congress had elected to use for venue. Moreover, because an individual can have only one domicile, there will be only one state where an individual defendant is subject to general personal jurisdiction.[43]

2. *Treatment of Corporations in Subject Matter Jurisdiction, Venue, and General Personal Jurisdiction*

In contrast, corporations are treated very differently across jurisdictional concepts. For venue, Congress has defined the "residency" of a defendant corporation as any district where it is subject to personal jurisdiction.[44] Since this covers judicial districts in which a corporation is subject to either general or specific personal jurisdiction at the time the suit is commenced, a corporation typically "resides" in multiple judicial districts for venue purposes.[45]

A different test is applied when determining a corporation's "citizenship" for purposes of subject matter jurisdiction under 28 U.S.C. § 1332 (diversity jurisdiction). For many years, the Supreme Court held that a corporation was a citizen only of its state of incorporation.[46] However, in 1958, Congress expressly provided that a corporation was a citizen of *both* its state(s) of incorporation and its principal place of business (PPB).[47] The Supreme Court recently clarified that a corporation can have only one PPB, determined by the "nerve center" test, that is, the place where the corporate "officers direct, control, and coordinate the corporation's activities."[48] Thus today, a corporation typically has

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[43] *See id.*

[44] 28 U.S.C. § 1391(c)(2) ("For all venue purposes . . . an entity with the capacity to sue and be sued in its common name under applicable law, whether or not incorporated, shall be deemed to reside, if a defendant, in any judicial district in which such defendant is subject to the court's personal jurisdiction with respect to the civil action in question and, if a plaintiff, only in the judicial district in which it maintains its principal place of business . . . ."). An additional venue provision, 28 U.S.C § 1391(d), explains how to apply this rule to a corporation in a state with multiple judicial districts. In addition, if the corporation is a plaintiff—a provision triggered if it sues the United States—it resides for venue purposes only in its PPB. 28 U.S.C. § 1391(c)(2).

[45] For a review of the ways general and specific personal jurisdiction interact with venue, see John P. Lenich, *A Simple Question That Isn't So Simple: Where Do Entities Reside for Venue Purposes?*, 84 MISS. L.J. 253, 277–83, 294–98 (2015).

[46] Initially, the Supreme Court held that a corporation was not a "citizen" at all, but it later reversed that position, holding that it was a citizen of the state of its incorporation. *See* Carden v. Arkoma Assocs., 494 U.S. 185, 187–88 (1990) (reviewing the history of the Court's rulings on the citizenship of corporations).

[47] 28 U.S.C. § 1332(c) (2018); *see Carden*, 494 U.S. at 196 (exploring the Court's various rulings on the citizenship of a corporation and commenting that "Congress has not been idle. In 1958[,] it revised the rule established in *Letson*, providing that a corporation shall be deemed a citizen not only of its State of incorporation but also 'of the State where it has its principal place of business.' 28 U.S.C. § 1332(c).").

[48] Hertz Corp. v. Friend, 559 U.S. 77, 92–93 (2010). The nerve center test is explored *infra* Section III.C.2.a.

two "citizenships" for the purposes of diversity jurisdiction—its state of incorporation and its PPB (usually its headquarters).[49]

When the Court was faced with the need to define the paradigm forum(s) for "at home" general personal jurisdiction for a corporation, the Court announced it would adopt a corporation's state of incorporation and PPB.[50] The *Goodyear* Court did leave open the possibility that a corporation could be "at home" in a place other than its state of incorporation or principal place of business, if its contacts were "so 'continuous and systematic' as to render [it] essentially at home."[51] The *Daimler* Court expressly confirmed this possibility but ruled out the idea that merely doing business, even at a high level over multiple years, would be enough: "Accordingly, the inquiry under *Goodyear* is not whether a foreign corporation's in-forum contacts can be said to be in some sense 'continuous and systematic,' it is whether that corporation's 'affiliations with the State are so 'continuous and systematic' as to render [it] essentially at home in the forum State.' "[52]

Daimler has left some commentators and lower courts wondering whether any level of contacts—absent the classic fact pattern of *Perkins v. Benguet Consol. Mining Co.*,[53] where the defendant's president and corporate headquarters relocated to the forum state (admittedly on a temporary basis) during wartime activities—would be enough to meet the "at home" test.[54]

In sum, as it had done with individuals, the Court seemingly "borrowed" its general jurisdiction rule from diversity jurisdiction and selected a test that (1) produced relatively few (likely two at most) forums and (2) was typically easy to apply. Indeed, when selecting the state of incorporation and PPB as the para-

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[49] Under § 1332(c)(1) a corporation has two sources of citizenship: its state(s) of incorporation and its PPB. This typically yields two citizenships, although if a corporation is both incorporated and has its PPB in the same state this will yield only one citizenship. The language of 1332(c) makes it possible for a corporation to acquire an additional citizenship if it is incorporated in more than one state, but the realities of business make this highly unlikely.

[50] The Court explained, " 'the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home.' With respect to a corporation, the place of incorporation and principal place of business are 'paradig[m] . . . bases for general jurisdiction.' " Daimler AG v. Bauman, 571 U.S. 117, 137 (alteration in original) (citations omitted).

[51] Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011). "*Goodyear* did not hold that a corporation may be subject to general jurisdiction *only* in a forum where it is incorporated or has its principal place of business; it simply typed those places paradigm all-purpose forums." *Daimler*, 571 U.S. at 137.

[52] *Daimler*, 571 U.S at 138–39 (citing Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011)) (alteration in original).

[53] Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952) (discussed and cited with approval in *Daimler*, 571 U.S. at 129–30).

[54] *Id.* at 438, 447–48; *see also* Aspen Am. Ins. Co. v. Interstate Warehousing, Inc., 90 N.E.3d 440, 445 (Sup. Ct. Ill. 2017) (summarizing the narrow interpretation given to the "at home" test in *Daimler*). *But see* Zoe Niesel, Daimler *and the Jurisdictional Triskelion*, 82 TENN. L. REV. 833, 869–70 (2015) (arguing that the Court intended an expansive reading of "at home").

digms for "at home" general personal jurisdiction, the Court cited as an advantage that "[t]hose affiliations have the virtue of being unique—that is, each ordinarily indicates only one place—as well as easily ascertainable."[55]

II. GENERAL PERSONAL JURISDICTION FOR UNINCORPORATED ENTITIES: THE ISSUE

The application of jurisdictional principles to unincorporated entities is conflicted. In some instances, unincorporated entities are treated like corporations, but at other times, they are not.[56] As we will explore in greater detail in this Part, in traditional diversity jurisdiction, unincorporated entities are not treated like corporations because they are not seen as distinct entities, but rather as simply a collection of their members.[57] However, in certain specialized subject matter cases, Congress has stepped in and dictated that all entities, both incorporated and unincorporated, be treated alike.[58] Congress has adopted this same approach in the venue statute, electing to treat all business entities the same.[59] This dissonance has, not surprisingly, caused some confusion in lower courts when it comes to deciding where an unincorporated entity should be subject to "at home" general jurisdiction.

A. *Treatment of Unincorporated Entities in Subject Matter Jurisdiction and Venue*

1. *Diversity Citizenship of Unincorporated Entities*

a. Citizenship of Unincorporated Entities in Traditional 1332(a) Diversity Cases

For the purpose of determining diversity jurisdiction under 1332(a), business entities exist in only one of two categories: either they are incorporated or unincorporated.[60] Each has its own distinct test for purposes of traditional di-

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[55] *Daimler*, 571 U.S. at 137.

[56] An initial issue is whether an unincorporated entity even has the capacity to sue or be sued in its own name. Historically, state common law did not allow an entity to sue in its common name; rather all the individual members of the entity had to be joined. Today, most states have statutes that allow an unincorporated entity to sue or be sued in its own name. 6A WRIGHT ET AL., *supra* note 6, § 1564. If the entity is litigating in federal court, FRCP 17(b) provides that an entity's capacity to sue is typically determined by state law and only grants an entity the ability to sue or be sued "in its common name" in federal question cases. FED. R. CIV. P. 17(b). *See also* 6A WRIGHT ET AL., *supra* note 6, § 1564. Thus, an unincorporated entity in a diversity case may lack the capacity to sue, if state law takes the original common law approach. *Id.* This article assumes that the entity has the capacity to sue and be sued in its own name but questions *where* such an entity is subject to general personal jurisdiction.

[57] *See infra* Section II.A.1.a.

[58] *See infra* Section II.A.1.b.

[59] 28 U.S.C. § 1391(c)(2) (2018) and discussed *infra* Section II.A.2.

[60] Carden v. Arkoma Assocs., 494 U.S. 185, 187–90 (1990).

versity jurisdiction. While Congress has statutorily defined the citizenship of a corporate entity (i.e., its state of incorporation and its PPB),[61] it has not provided a definition of citizenship for unincorporated entities.[62] In the absence of a congressional mandate, the Supreme Court has repeatedly held that an unincorporated entity has no separate citizenship.[63] Rather, it takes on the citizenship of its members (the "*Carden* rule").[64]

In simple terms, the *Carden* rule means that an unincorporated entity may have multiple citizenships, often many more than the dual citizenship of a corporation. For instance, if Partnership P1 has five partners and these individuals are domiciled in (and are, therefore, citizens of) Ohio, Missouri, Washington, North Dakota and Texas, then Partnership P1 is a citizen of every one of those states. It can be even more expansive if one of the partners is a corporation (in which case Partnership P1 picks up the citizenship of the member corporation—its state of incorporation and PPB), or if one of the partners is another partnership, P2 (in which case Partnership P1 picks up the citizenship of every member of P2).[65] As the circuit courts have repeatedly explained, "the citizenship of unincorporated associations must be traced through however many layers of partners or members there may be."[66]

This is extreme for some unincorporated entities. For instance, a union acquires the citizenship of every worker affiliated with it, and a commercial trust acquires the citizenship of every shareholder.[67] This can lead these entities to

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[61] 28 U.S.C. § 1332(c) (2018).

[62] As discussed *infra* Section II.A.1.b, in the 2005 Class Action Fairness Act, Congress did provide a definition of an entity's citizenship, but this definition applies only in mass actions. 28 U.S.C. § 1332(d)(10) (2018). Additionally, in § 1332(c)(1), which deals with suits against insurers, Congress provided a definition that covered both incorporated and unincorporated insurers and included the insurer's state of incorporation and PPB. 28 U.S.C. § 1332(c)(1).

[63] *Carden*, 494 U.S. at 189; *see also* Americold Realty Tr. v. ConAgra Foods, Inc., 136 S. Ct. 1012, 1015 (2016); 13E WRIGHT ET AL., *supra* note 6, § 3630. This rule is sometimes called the "*Chapman"* rule (after an earlier case) but is now typically referred to as the *"Carden"* rule.

[64] *Americold*, 136 S. Ct. at 1015; *Carden*, 494 U.S. at 189, 195–96.

[65] Under *Carden*, this includes limited partners who play no active role in managing the partnership. *Carden*, 494 U.S. at 195.

[66] Meyerson v. Showboat Marina Casino P'ship, 312 F.3d 318, 319–20 (7th Cir. 2002) (Circuit Rule "requires any unincorporated association to identify the citizenship of every member"); *see also* D.B. Zwirn Special Opportunities Fund, L.P. v. Mehrotra, 661 F.3d 124, 125 (1st Cir. 2011); Zambelli Fireworks Mfg. Co. v. Wood, 592 F.3d 412, 420 (3d Cir. 2010); Delay v. Rosenthal Collins Grp., L.L.C., 585 F.3d 1003, 1005 (6th Cir. 2009); Debra R. Cohen, *Limited Liability Company Citizenship: Reconsidering an Illogical and Inconsistent Choice*, 90 MARQ. L. REV. 269, 303 (2006) (noting that this "multi-layered analysis that is both time-consuming and expensive"); Matthew Hoffman, *Unraveling the Jurisdictional Citizenship of Master Limited Partnerships*, 4 HLRE: OFF REC. ARTICLES 127, 133 (2014) (noting that the test is difficult to apply to MLPs).

[67] *Americold*, 136 S. Ct. at 1015 (noting that the citizenship of a union is that of every affiliated worker and that a commercial trust has the citizenship of every shareholder).

have hundreds, if not thousands, of citizenships for purposes of diversity jurisdiction.[68]

However, while the *Carden* rule (an unincorporated entity acquires its members' citizenships) often leads to the entity having multiple citizenships, it does not include two places. For purposes of subject matter jurisdiction, an unincorporated entity is not a citizen of the state in which it was legally created (the "formation state") nor is it a citizen of the state where it has its PPB.[69]

To what entities does the *Carden* rule apply? The Court's response seems to be that the rule applies to *every entity* known to common law that is not a corporation.[70] Thus, despite the variety of businesses recognized in state law, there are two categories of entities for purposes of federal diversity—corporations and "other"—where "other" covers every other type of entity. The Court has seemingly erected and actively defended a "doctrinal wall" between corporate and unincorporated entities.[71]

Over the years, the Court has placed in the "other" entity basket not just partnerships, but also trade unions, joint stock companies, limited partnerships, limited partnership associations and, most recently, commercial trusts.[72] In-

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[68] After *Americold*, commercial trusts are citizens of every state in which a shareholder-beneficiary is domiciled, and many such trusts have hundreds, even thousands of members. S.I. Strong, *Congress and Commercial Trusts: Dealing with Diversity Jurisdiction Post-*Americold, 69 FLA. L. REV. 1021, 1024 (2017); *see also* Hoffman, *supra* note 66, at 133 (discussing MLPs).

[69] *See, e.g.*, Kauth v. Hartford Ins. Co. of Ill., 852 F.2d 951, 959 (7th Cir. 1988) (noting that "[t]he citizenship of a partnership" is irrelevant to diversity); A.D.S. Developers, Inc. v. Tucker, 263 F. Supp. 986, 987 (E.D. Pa. 1967) (observing that an entity did not have the citizenship of its state of formation or its PPB, only of its members). Of course, if one of the entity's members happens to be a citizen of the state of its formation or PPB, it will pick up citizenship that way. "[I]f all the members of an LLC are citizens of a state other than the state of creation, under the persons composing rule[,] the LLC is not a citizen of the state of creation." *See also* Cohen, *supra* note 66, at 297 (noting that LLCs under the *Carden* rule are neither citizens of the state of formation nor where they have their PPB); Hoffman, *supra* note 66, at 134 (noting the same for MLPs).

[70] *Americold*, 136 S. Ct. at 1015; *Carden*, 494 U.S. at 196–97; *see also* 13F WRIGHT ET AL., *supra* note 6, § 3630.1 (noting that "there is now abundant case law from courts at all levels of the federal judiciary throughout the country to the effect that the *Carden* principle is not limited to the facts of that case and applies to a wide range of unincorporated associations. Accordingly, whenever a partnership, a limited partnership, a joint venture, a joint stock company, a labor union, a religious or charitable organization, a governing board of an unincorporated institution, or a similar association brings suit or is sued in a federal court, the actual citizenship of each of the unincorporated association's members must be considered in determining whether diversity jurisdiction exists.") (citations omitted).

[71] The Court has characterized this rule as a "doctrinal wall." United Steelworkers of Am., AFL–CIO v. R.H. Bouligny, Inc., 382 U.S. 145, 151 (1965). The Court repeated this phrase in *Americold* and in *Carden*. *See Americold*, 136 S. Ct. at 1017 (refusing to "tear . . . down" this "doctrinal wall"); *Carden*, 494 U.S. at 190 ("reaffirming 'the doctrinal wall . . . '")

[72] The Supreme Court has applied this rule to commercial trusts, *Americold*, 136 S. Ct. at 1015–16; limited partnerships, *Carden*, 494 U.S. at 195–96; labor unions, *Steelworkers*, 382 U.S. at 153; limited partnership associations, Great S. Fire Proof Hotel Co. v. Jones, 177 U.S. 449, 454 (1900); and joint stock companies, Chapman v. Barney, 129 U.S. 677, 682

deed, as Justice Scalia explained in *Carden v. Arkoma Assocs*, the Court has "firmly resisted extending [the test for corporations] to other entities."[73] Justice Scalia's categorical approach in *Carden*—either "corporation" or "non-corporation"—is not pretty. Even Justice Scalia admitted that it "can validly be characterized as technical, precedent-bound, and unresponsive to policy considerations raised by the changing realities of business organization," but, as he observed, "that has been the character of our jurisprudence in this field."[74] Advocating that Congress, not the Court, should step in if a more nuanced, policy-based approach was needed,[75] Justice Scalia rejected the *Carden* dissent's calls that the Court undertake an assessment of the distribution of the power and control in each non-corporation's structure.[76] In Justice Scalia's view:

> The 50 States have created, and will continue to create, a wide assortment of artificial entities possessing different powers and characteristics, and composed of various classes of members with varying degrees of interest and control. Which of them is entitled to be considered a "citizen" for diversity purposes, and which of their members' citizenship is to be consulted, are questions more readily resolved by legislative prescription than by legal reasoning, and questions whose complexity is particularly unwelcome at the threshold stage of determining whether a court has jurisdiction. We have long since decided that, having established special treatment for corporations, we will leave the rest to Congress; we adhere to that decision.[77]

Even in the 1990s when, as Justice Scalia predicted, all states began to recognize a new form of artificial entity,[78] limited liability companies (LLC's), the federal courts, following Justice Scalia's lead in *Carden*, overwhelmingly treat-

(1889). The one exception is a *sociedad en comandita*—a civil law entity—which the Court in the 1930s held was a citizen of its place of formation and PPB. Puerto Rico v. Russell & Co., 288 U.S. 476, 480–81 (1933). The *Carden* Court left this precedent undisturbed but emphasized that it was an exceptional case because it was a civil law entity. *Carden*, 494 U.S. at 189–90; s*ee also* 13F WRIGHT ET AL., *supra* note 6, § 3630 (discussing this exception).

[73] *Carden*, 494 U.S. at 189.

[74] *Id.* at 196.

[75] *Id.*

[76] *Id.* at 187 n.1. The dissent of Justice O'Connor argued that the court must examine who were the real parties to the controversy by looking at who possessed the power and control over the partnership's business and litigation. *Id.* at 198, 201–06.

[77] *Id.* at 197.

[78] While the first LLC statute was adopted by Wyoming in 1975, "[b]y 1996, all 50 states and the District of Columbia had enacted legislation recognizing LLCs." DEBORAH BOUCHOUX & CHRISTINE SGARLATA CHUNG, BUSINESS ORGANIZATIONS LAW IN FOCUS 698 (2016). Following the IRS's 1998 ruling which allowed LLCs to elect to be treated as a partnership for purposes of taxation, the number of LLCs soared. "[B]y 2007, more LLCs were formed than corporations in 46 states." *Id.; see also* Rodney D. Chrisman, *LLCs Are the New King of the Hill: An Empirical Study of the Number of New LLCs, Corporations, and LPs Formed in the United States Between 2004–2007 and How LLCs Were Taxed for Tax Years 2002–2006*, 15 FORDHAM J. CORP. & FIN. L. 459, 460, 462, 466 (2010).

ed these new entities as "not corporations."[79] While noting the similarity between these new structures and corporations, the circuit courts have simply applied the holding of *Carden* (that these entities take on the citizenship of all their members),[80] and emphasized that Congress, and not the courts, should be the one to adjust the *Carden* rule.[81] This reluctance to revisit the seemingly disjointed and inconsistent treatment of unincorporated entities has continued despite the explosive growth of unincorporated entities; in fact, by 2007, there were more LLCs than corporations formed in 46 states.[82]

Scholars, too, have repeatedly argued that the Court should abandon the *Carden* rule, often advocating that the corporate test (using the state of incorporation and PPB) be expanded so all business entities are treated alike for diversity jurisdiction.[83] Yet, any hope that the Supreme Court might revisit its ap-

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[79] For a list of all courts holding that LLCs are to be treated as unincorporated entities see 13F WRIGHT ET AL., *supra* note 6, § 3630.1 n.12 (citing to numerous cases from every circuit).

[80] *See, e.g.*, Siloam Springs Hotel, L.L.C. v. Century Sur. Co., 781 F.3d 1233, 1234 (10th Cir. 2015); D.B. Zwirn Special Opportunities Fund, L.P. v. Mehrotra, 661 F.3d 124, 125–26 (1st Cir. 2011); Zambelli Fireworks Mfg. Co. v. Wood, 592 F.3d 412, 420 (3d Cir. 2010); Delay v. Rosenthal Collins Grp., L.L.C., 585 F.3d 1003, 1005 (6th Cir. 2009); Harvey v. Grey Wolf Drilling Co., 542 F.3d 1077, 1080–81 (5th Cir. 2008); Johnson v. Columbia Props. Anchorage, LP, 437 F.3d 894, 899 (9th Cir. 2006); Gen. Tech. Applications, Inc. v. Exro Ltda, 388 F.3d 114, 121 (4th Cir. 2004); Rolling Greens MHP v. Comcast SCH Holdings L.L.C., 374 F.3d 1020, 1022 (11th Cir. 2004); GMAC Commercial Fin. L.L.C. v. Dillard Dep't Stores, Inc., 357 F.3d 827, 828–29 (8th Cir. 2004); Handelsman v. Bedford Vill. Assocs. Ltd. P'ship, 213 F.3d 48, 51–52 (2d Cir. 2000); Cosgrove v. Bartolotta, 150 F.3d 729, 731 (7th Cir. 1998).

[81] *See, e.g.*, Grynberg v. Kinder Morgan Energy Partners, L.P., 805 F.3d 901, 906, 908 (10th Cir. 2015) (applying the rule to MLPs and opining that "despite practical similarities between corporations and certain types of unincorporated entities, . . . it was up to Congress, not the courts, to make further adjustments."); *GMAC Commercial Fin.*, 357 F.3d at 829 (Congress, not the Courts, should address the citizenship of LLCs); *Cosgrove*, 150 F.3d at 731. The Supreme Court again called for Congress to act in Americold Realty Tr. v. Conagra Foods, Inc., 136 S. Ct. 1012, 1017 (2016) ("we reaffirm that it is up to Congress if it wishes to incorporate other entities into 28 U.S.C. § 1332(c)'s special jurisdictional rule."). The most recent dispute in the federal circuit courts is over the citizenship of a "Lloyd's syndicate." For a summary of conflicting case law, see 13F WRIGHT ET AL., *supra* note 6, § 3630.1.

[82] *See* BOUCHOUX & CHUNG, *supra* note 78, at 698; Chrisman, *supra* note 78, at 460.

[83] There is a wealth of literature spanning several decades that calls for the rejection of the *Carden* rule for a variety of unincorporated entities. For more recent examples, see Cohen, *supra* note 66, at 272–73 (on LLCs); Hoffman, *supra* note 66, at 133 (on MLPs); Strong, *supra* note 68, at 1058 (on commercial trusts); Kristen Curley, Note, *Achieving the Purpose of Federal Diversity Jurisdiction: Why Courts Should Abandon the Current Treatment of LLCs Under Section 1332*, 31 TOURO L. REV. 477, 477–78 (2015) (on LLCs). Most advocate applying a version of the corporate test (state of formation and PPB) to unincorporated entities, arguing that this is simple to apply and better reflects both modern business practice and the goals of diversity jurisdiction. *See, e.g.*, Cohen, *supra* note 66, at 306–07; Hoffman, *supra* note 66, at 133–34; Strong, *supra* note 68, at 1079. Some scholars advocate that the Supreme Court change the test, while others, concluding that this is unlikely, call for Congressional action. *Compare* Strong, *supra* note 68, at 1027–28 (calling for Congress to override *Americold*), *and* Hoffman, *supra* note 66, at 134 (calling for congressional action), *with* Co-

proach was dashed in 2016 in *Americold Realty Trust v. Conagra Foods, Inc.*[84] Faced with a new unincorporated entity case, this time involving a commercial trust, the unanimous Court once again stuck to the *Carden* rule and once again called on Congress to act:

> We also decline an *amicus*' invitation to apply the same rule to an unincorporated entity that applies to a corporation—namely, to consider it a citizen only of its State of establishment and its principal place of business. . . . When we last examined the "doctrinal wall" between corporate and unincorporated entities in 1990, we saw no reason to tear it down. . . . Then as now we reaffirm that it is up to Congress if it wishes to incorporate other entities into 28 U.S.C. § 1332(c)'s special jurisdictional rule.[85]

Despite these calls for reform, Congress has not altered the "doctrinal wall" established in *Carden*. Congress has been less concerned about the lack of clarity and uniformity for unincorporated entities than it has been with the possibility of overburdening the federal courts under an expanded rule of diversity jurisdiction.[86] Therefore, the *Carden* rule continues despite its many critics.

b. Citizenship of Unincorporated Entities Under CAFA

In 2005 Congress passed the Class Action Fairness Act (CAFA) designed to expand federal subject matter jurisdiction over class actions and mass tort actions.[87] The statute contained a requirement that the parties be diverse and defined the citizenship of unincorporated entities for the purposes of CAFA subject matter jurisdiction.[88] Under CAFA, "an unincorporated association shall be deemed to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized."[89] Thus, Congress expressly rejected the *Carden* rule for actions controlled by CAFA: here any entity, whether incorporated or not, is a citizen of its PPB and state of formation.[90]

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hen, *supra* note 66, at 291–94 (calling for the Supreme Court to act and arguing against deference to Congress).

[84] *Americold*, 136 S. Ct. at 1017.

[85] *Id.*

[86] Amy L. Levinson, *Developments in Diversity Jurisdiction*, 37 LOY. L.A. L. REV. 1407, 1408 (2004) ("Congress generally favors restricting diversity jurisdiction out of its concern for the rising caseload of the federal courts."); Christine M. Kailus, *Diversity Jurisdiction and Unincorporated Businesses: Collapsing the Doctrinal Wall*, 2007 U. ILL. L. REV. 1543, 1560 (2007) (same).

[87] Class Action Fairness Act of 2005, Pub. L. No, 109-2 (2005) ("[t]o amend the procedures that apply to consideration of interstate class actions to assure fairer outcomes for class members and defendants, and for other purposes."); *see, e.g.*, 28 U.S.C. § 1332(d) (2018) (SMJ requirements); 28 U.S.C. § 1453 (2018) (Removal provisions).

[88] 28 U.S.C. § 1332(d).

[89] 28 U.S.C. § 1332(d)(10).

[90] *Id.* "For qualifying class and mass actions, therefore, CAFA abrogates the long-standing rule that an unincorporated association shares the citizenship of each of its members for diversity purposes. In effect, this legislation overrules the Supreme Court's decision in Carden v. Arkoma Associates . . . in the context of class and mass actions. Instead, unincorporated

Congress apparently created this exception to the traditional *Carden* rule because it was concerned that insurance companies (often parties to mass actions), while sometimes corporations, were often unincorporated entities.[91] By making the test of citizenship the same for corporate and unincorporated entities, it eliminated this "anomaly" and achieved its goal of ensuring that all entities were treated alike.[92]

Federal courts applying this CAFA provision have concluded that it covers all types of unincorporated entities.[93] But, by its own terms, it only applies in CAFA actions.[94] As a result, in an action in federal court under both CAFA and traditional diversity subject matter jurisdiction, an unincorporated entity has to plead different citizenships in the same litigation.[95] For CAFA, it is a citizen of its PPB and state of formation, but for traditional diversity jurisdiction, it has the citizenship of each of its members.[96]

2. *Residency for Purpose of Venue of Unincorporated Entities*

For venue purposes, Congress has provided that an unincorporated entity, when a defendant, resides "in any judicial district in which such defendant is subject to the court's personal jurisdiction with respect to the civil action in question" and, when a plaintiff, resides "only in the judicial district in which it maintains its principal place of business."[97] This venue provision treats all enti-

associations receive the same treatment as corporations in determining their citizenship for diversity jurisdiction." 13F WRIGHT ET AL., *supra* note 6, § 3630.2.

[91] SENATE JUDICIARY COMMITTEE REPORT ON THE CLASS ACTION FAIRNESS ACT OF 2005. S. REP. NO. 109–14 (2005), *reprinted* in 2005 U.S.C.C.A.N. 3, 43. For a discussion of the Senate Report, see 13F WRIGHT ET AL., *supra* note 6, at § 3630.2.

[92] "It is clear that a desire to treat unincorporated associations and corporations similarly in the class action context motivated CAFA's sponsors . . . ." 13F WRIGHT ET AL., *supra* note 6, at § 3630.2.

[93] Ferrell v. Express Check Advance of S.C. L.L.C., 591 F.3d 698, 705 (4th Cir. 2010) ("[T]he term 'unincorporated association' in § 1332(d)(10) refers to all non-corporate business entities. This interpretation not only serves the language and history of § 1332 but also the purpose of broadening the reach of CAFA. Thus, a limited liability company, such as Express Check, is an 'unincorporated association' within the meaning of § 1332(d)(10)."); *see also* Heckemeyer v. NRT Mo., LLC, No. 4:12CV01532 AGF, 2013 WL 2250429, at *6 (E.D. Mo. May 22, 2013) ("This Court finds the reasoning of the Fourth Circuit persuasive and concludes, as did the Fourth Circuit, that Congress chose to treat LLCs like corporations for purposes of determining citizenship under CAFA.").

[94] 28 U.S.C. § 1332(d)(10).

[95] Geismann v. Aestheticare, L.L.C., 622 F. Supp. 2d 1091, 1098 (D. Kan. 2008) ("These two definitions of citizenship necessitate distinct factual support and reveal another material difference between Sections 1332(a) and 1332(d).").

[96] *See e.g.*, Harvey v. Grey Wolf Drilling Co., 542 F.3d 1007, 1080 (5th Cir. 2008) (noting the different citizenships). In cases pled under both CAFA and traditional diversity jurisdiction, the court must apply two different citizenship tests to the same entity. *See Geismann*, 622 F. Supp. 2d at 1097–98.

[97] 28 U.S.C. § 1391(c)(2) (2018). The reference to where "plaintiffs" reside links to § 1391(e)(1) which allows venue in a civil action against an officer or employee of the United States to be based on plaintiff's residency. 28 U.S.C. § 1391(e)(1). This venue provision

ties the same.[98] In 28 U.S.C. § 1391(c)(2), Congress expressly provided that for venue purposes corporate and unincorporated entities should be treated alike: "an entity with the capacity to sue and be sued in its common name under applicable law, *whether or not incorporated*, shall be deemed to reside . . . ."[99] The venue statute takes the *opposite approach* to the "doctrinal wall" the Court has erected in traditional diversity jurisdiction between corporate and unincorporated entities. Moreover, Congress provides that where a corporation or unincorporated entity is a plaintiff, it resides "only in the judicial district in which it maintains its principal place of business," once again showing a willingness to expand its traditional test for corporations to unincorporated entities.[100]

Finally, just as with corporations, unincorporated entities are likely to "reside" in multiple judicial districts as defendants, since they reside in every judicial district in which they are subject to either general or specific personal jurisdiction.[101] There will be multiple forums identified as appropriate for purposes of venue; this is in line with the goal of venue to simply ensure the forum is convenient to the parties, witnesses and courts.

In sum, when Congress has acted in recent years—in venue in 2011 and CAFA in 2005—it has expressly adopted provisions that treat corporate and unincorporated entities alike. However, despite requests from the Supreme Court, Congress, to date, has not stepped in to adopt this unified approach in traditional diversity jurisdiction, leaving the Court's *Carden* rule in place. This could well reflect conflicting policy goals. While in CAFA Congress wanted to expand the number of class actions that could be filed in federal court, Congress has far less interest in expanding core diversity jurisdiction.[102] By leaving the *Carden* rule in place—an unincorporated entity acquires multiple "citizenships" under 1332—it is far more likely that diversity will be destroyed and the suit will lack federal subject matter jurisdiction.

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was part of the Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, 125 Stat. 758 (2011). For an extensive discussion of this venue provision and its application to unincorporated entities, see generally Lenich, *supra* note 45.

[98] 28 U.S.C. § 1391(c)(2) (2018). The only distinction is that an additional venue provision, 28 U.S.C. § 1391(d), which explains how to apply this rule in a state with multiple judicial districts, expressly applies only to "corporations." 28 U.S.C. § 1391(d); *see* Lenich, *supra* note 45, at 256 (noting that the courts have largely ignored this distinction, but arguing that courts should instead be faithful to the text, even if the provisions are "inherently contradictory").

[99] 28 U.S.C. § 1391(c)(2) (emphasis added); *see also* Lenich, *supra* note 45, at 266, 272 (citations omitted) (noting that Congress' express aim in passing the 2011 venue amendments was to ensure "parity of treatment" between corporate and unincorporated entities, in line with recommendations of the ALI).

[100] 28 U.S.C. § 1391(c)(2).

[101] *Id.*

[102] Levinson, *supra* note 86, at 1408; Joshua J. Wes, Note, *The Anti-Injunction and All Writs Acts in Complex Litigation*, 37 LOY. L.A. L. REV. 1603, 1639–40 (2004).

B. *General Jurisdiction for Unincorporated Entities*

1. *Unincorporated Entities: Same or Different?*

Against this backdrop, we face the question of where unincorporated entities should be subject to general personal jurisdiction. As detailed above, when faced with the questions of where individuals and corporations were "at home" for general jurisdiction, it appears that the Court chose to "copy" the test for "citizenship" used in diversity jurisdiction.[103] If the Court uses the same approach for unincorporated entities, copying the *Carden* rule, an unincorporated entity would be "at home" anywhere one of its members was "at home" (and not "at home" in its state of formation or PPB).

However, the above discussion also reveals a conflicted approach to unincorporated entities. Sometimes they are thrown in with corporations (for CAFA subject matter jurisdiction and for venue purposes, all business entities follow the same rule),[104] but at other times unincorporated entities follow a distinct rule (for purposes of determining their citizenship for diversity jurisdiction).[105] Is the Court likely to adopt an "at home" general jurisdiction test that simply extends the rule for corporations to all entities, or will it craft a new and distinct rule for non-corporations? Some hints to the likely approach the Court will take may be suggested by accidental dicta in *Daimler*.

2. *The Supreme Court's Ruling/Non-Ruling in Daimler*

In *Daimler*, plaintiffs sought to argue that Daimler (a German corporation) was subject to general jurisdiction in California due to the actions of its subsidiary (the importer, Mercedes–Benz USA, LLC (MBUSA)), who plaintiffs argued acted as Daimler's "agent" when it sold cars in California.[106] While the case centered on the relationship between Daimler and MBUSA, MBUSA was never made a party.[107]

The subsidiary MBUSA, which plaintiff's sought to use to tie Defendant Daimler to California, was an LLC, a fact expressly noted by the Court.[108] In its description of the facts, the Court stated: "[j]urisdiction over the lawsuit was predicated on the California contacts of Mercedes–Benz USA, *LLC* (MBUSA), a subsidiary of Daimler incorporated in Delaware with its principal place of business in New Jersey."[109] The Court more fully describes MBUSA as follows: "MBUSA, an indirect subsidiary of Daimler, is a Delaware *limited liability corporation*. MBUSA serves as Daimler's exclusive importer and distributor

[103] *See supra* Section I.B.1.
[104] *See supra* Section II.A.1.b, II.A.2.
[105] *See supra* Section II.A.1.a.
[106] Daimler AG v. Bauman, 571 U.S. 117, 121, 134–36 (2014).
[107] *Id.* at 122, 123, n.3.
[108] *Id.* at 121, 123.
[109] *Id.* at 121 (emphasis added).

in the United States . . . . Although MBUSA's principal place of business is in New Jersey, MBUSA has multiple California-based facilities . . . ."[110] As is evident from these quotes, the *Daimler* Court described the LLC, an unincorporated entity, as a "corporation" having a "principal place of business" and a "state of incorporation." This confused terminology raises the question of whether the Court fully realized that MBUSA, as an LLC, was an unincorporated entity.

In the *Daimler* case, plaintiff never named MBUSA as a defendant, and Daimler apparently conceded that MBUSA, LLC was subject to general jurisdiction in California, so the question of where an LLC was subject to personal jurisdiction was not technically at issue.[111] As the Court noted:

> Daimler, on the other hand, failed to object below to plaintiffs' assertion that the California courts could exercise all-purpose jurisdiction over MBUSA. But see Brief for Petitioner 23, n. 4 (suggestion that in light of *Goodyear*, MBUSA may not be amenable to general jurisdiction in California); Brief for United States as *Amicus Curiae* 16, n. 5 (hereinafter U.S. Brief) (same). We will assume then, for purposes of this decision only, that MBUSA qualifies as at home in California.[112]

Nonetheless, although the Court expressly stated that the question of whether MBUSA was "at home" in California was not at issue in the case, when asking if Daimler was "at home" in California, the Court said the following: "Here, neither Daimler *nor MBUSA* is incorporated in California, nor does either entity have its principal place of business there."[113] The Court implies that for both corporations (Daimler) and LLCs (MBUSA) the test for "at home" general jurisdiction is the same: state of incorporation and PPB.[114]

There is certainly no "ruling" in *Daimler* as to where an unincorporated entity is subject to "at home" jurisdiction. It may be that while the Court acknowledged that MBUSA was an LLC, it did not focus on the fact that an LLC is not a "corporation." Therefore, the Court's possible suggestion that it would apply the state of incorporation and PPB test to the LLC may have been offered without full consideration of the fact that the LLC was an unincorporated entity.[115] Even if the Court did intend to tip its hat as to where an unincorporated entity is subject to "at home" jurisdiction, given that the Court ex-

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[110] *Id.* at 123.

[111] *Id.* at 134 (emphasis added).

[112] *Id.*

[113] *Id.* at 139 (emphasis added).

[114] *See infra* Section II.B.3 (discussing district courts' reaction to this dicta in *Daimler*); *see also* Lenich, *supra* note 45, at 290 (arguing that "[t]he ease with which the Court blended corporations and limited liability companies indicates that there is no difference between them for purposes of general personal jurisdiction").

[115] It may also be an indication that, contrary to the rulings of the Circuits, the Court intends to treat LLCs as corporations for all purposes including diversity subject matter jurisdiction, but this was obviously not before the Court. *See supra* note 80 (detailing all the Circuits' holdings that an LLC is not a corporate entity for diversity jurisdiction).

pressly stated that this issue was not before the Court, it can hardly be regarded as binding precedent. Nonetheless, as discussed below, several district courts have picked up on this language in *Daimler* and applied this general jurisdiction test to unincorporated entities.

3. *Lower Court Split on General Jurisdiction for Unincorporated Entities*

Several lower courts have relied on the language in *Daimler* and held that an LLC is subject to general "at home" jurisdiction in "the state of formation and principal place of business." A leading case is the 2016 decision in *Finn v. Great Plains Lending, LLC*, where the District Court for the Eastern District of Pennsylvania explained:

> While Great Plains is an LLC and not a corporation, the reasoning of *Daimler* applies with equal force. Although the language of *Daimler* speaks only in terms of corporations, the subsidiary at issue in *Daimler* was Mercedes-Benz USA, LLC (MBUSA). In determining whether the United States District Court for the Northern District of California could exercise general jurisdiction over Daimler-Chrysler Aktiengesellschaft (Daimler), the Supreme Court concluded that the district court could not exercise general jurisdiction over Daimler because "neither Daimler nor MBUSA is incorporated in California, nor does either entity have its principal place of business there." Even though MBUSA is an LLC, the Court looked to MBUSA's place of incorporation and principal place of business to determine whether it was essentially at home in California and thus subject to general jurisdiction in the State.[116]

Several other district courts have reached the same conclusion, that the test for "at home" jurisdiction for an unincorporated entity, such as a LLC, is its state of formation and PPB, citing favorably to *Finn* and *Daimler*.[117]

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[116] Finn v. Great Plains Lending, L.L.C., No. 15-4658, 2016 WL 705242 at *3 n.3 (E.D. Pa. Feb. 23, 2016) (citations omitted).

[117] *See, e.g.*, Spencer v. Harley-Davidson, Inc., No. 2:16-CV-00427-DN, 2019 WL 1382285 at *5 (D. Utah Mar. 27, 2019) (citing Daimler and concluding that the "[p]aradigm forums for general jurisdiction over a company are its place of formation and its principal place of business" and applying this standard to an LLC); Stubbs v. REV Grp., Inc., No. 2:18-CV-00913-RDP, 2018 WL 6504396 at *2 (N.D. Ala. Dec. 11, 2018) ("LLCs are subject to general jurisdiction in the state of their formation and where they have their principal place of business"); *In re* Packaged Seafood Prods. Antitrust Litig., 338 F. Supp. 3d 1118, 1139 n.14 (S.D. Cal. 2018) (adopting "*Daimler*'s two-part paradigmatic location approach for general jurisdiction and tests both the place of organization and the principal place of business" for a limited partnership); Griggs v. Swift Transp. Co., No. 2:17-CV-13480-MCA-SCM, 2018 WL 3966304, at *2 (D. N.J. Aug. 16, 2018) (noting that "[c]ourts have applied the *Daimler* rules to limited liability companies with 'equal force'."); Blocker v. Black Entm't Television, L.L.C., No. 3:17-CV-01406-AC, 2018 WL 3797568, at *6 (D. Or. June 26, 2018) (explaining that "[a] court should consider the LLC's place of 'incorporation' and principal place of business, rather than to the citizenship of all of an LLC's members . . . ."); Miller v. Native Link Constr., L.L.C., No. 15-1605, 2017 WL 3536175, at *30 (W.D. Pa. Aug. 17, 2017) ("Under the rule of *Daimler* as it has been applied to limited liability companies, Native Link will only be subjected to general jurisdiction in the state of its organization and principal place of business."); Duncanson v. Wine & Canvas IP Holdings L.L.C., No. 1:16-CV-00788-SEB-DML, 2017 WL 6994541, at *1–2 (S.D. Ind. Apr. 20, 2017) (reversing prior

However, another district court, also citing to *Daimler* and two diversity jurisdiction cases, concluded that an LLC is subject to general jurisdiction *both* in its own state of formation *and* where its sole-member was incorporated and had its principal place of business.[118]

It is fair to say that there is now a mild trend in district courts to hold that LLCs are subject to general "at home" jurisdiction in the "state of their formation" and their "principal place of business." Indeed, one court reversed its position—withdrawing an opinion that found an LLC at home in the state of each of its members, and instead adopting the *Finn* approach that an LLC is only at home in its state of formation and the state of its PPB.[119] However, this approach has not been uniformly embraced. At least one district court has applied the citizenship test for unincorporated entities to determine where they would be subject to general personal jurisdiction by looking to the citizenship of the members.[120]

To date, no court has addressed the issue for other unincorporated entities such as partnerships, trade unions, or LLPs; however, one article, relying on *Daimler*, concludes that the place of formation and PPB test for general jurisdiction will apply to all unincorporated entities[121]

conclusion on the issue) ("Based on this discussion in *Daimler* (which identified an LLC's state of formation and principal place of business in deciding general jurisdiction), other district courts have ruled that a limited liability company, like a corporation, is 'at home' in the state of its formation and the state where it has its principal place of business."); Magna Powertrain De Mexico S.A. De C.V. v. Momentive Performance Materials USA L.L.C., 192 F. Supp. 3d 824, 828 (E.D. Mich. June 16, 2016) (explaining "personal jurisdiction rules governing corporations generally have been applied to limited liability companies as well."); Mitchell v. Fairfield Nursing & Rehab. Ctr., L.L.C., No. 2:15-CV-00188-MHH, 2016 WL 1365586, at *6 (N.D. Ala. Apr. 6, 2016) ("Several courts have extended the rationale of Daimler to LLCs.").

[118] Allen v. IM Sols., L.L.C., 83 F. Supp. 3d 1196, 1203–04 (E.D. Okla. 2015).

[119] Duncanson v. Wine & Canvas IP Holdings L.L.C., No. 1:16-CV-00788-SEB-DML, 2017 WL 6994541, at *1–3 (S.D. Ind. 2017).

[120] Head v. Las Vegas Sands, LLC, 298 F. Supp. 3d 963, 975–76 (S.D. Tex. 2018) (finding general personal jurisdiction did not exist over the defendant unincorporated associations because there were no "members in Texas"). The United States Court of Appeals for the Fifth Circuit affirmed the district court on appeal with no discussion of this issue, but appeared to implicitly accept the district court's interpretation of the general personal jurisdiction test, noting that the unincorporated "Casino Defendants are not Texas *residents*." Head v. Las Vegas Sands, Ltd. Liab. Corp., 760 F. App'x 281, 284 (5th Cir. 2019) (emphasis added).

[121] Lenich, *supra* note 45, at 290–91 (presuming on the basis of the dicta in *Daimler* that the place of formation and PPB test for general jurisdiction will apply to all unincorporated entities, including limited liability companies, limited liability partnerships, limited partnerships, unincorporated associations and joint ventures).

III. PROPOSED SOLUTION FOR GENERAL PERSONAL JURISDICTION FOR UNINCORPORATED ENTITIES

A. *The Appropriateness of Judicial Resolution*

Because the Court has expressed great reluctance to address the seemingly awkward and inconsistent application of the *Carden* test to unincorporated entities in diversity jurisdiction,[122] it is critical to demonstrate the need for judicial resolution of the general personal jurisdiction question. First, there is *good* reason for the Court to use judicial restraint in the context of diversity jurisdiction. As we discussed above, Article III of the Constitution directs that the subject matter jurisdiction of the federal courts is within the power of Congress.[123] The Court has traditionally limited its role in interpreting the subject matter jurisdiction statute to avoid judicial overreach into the authority expressly granted by the Constitution to Congress.[124] Therefore, while the Court might identify some of the unfortunate results of the *Carden* rule to unincorporated entities, it is up to Congress to legislate a solution. Moreover, Congress has acted as recently as 2005, in CAFA, when it changed the definition of citizenship of unincorporated entities in class and mass-action cases, leaving the *Carden* rule intact in other areas.[125] Thus, the Court may be wise to leave to Congress the definition of the citizenship of unincorporated entities for subject matter jurisdiction.[126]

By contrast, personal jurisdiction has its origins in the Fourteenth Amendment Due Process Clause.[127] Personal jurisdiction jurisprudence is a creature of the Supreme Court: a constitutional doctrine that prevents the imposition of overly burdensome suits on parties against their consent.[128] The Court should not exercise the restraint and deference it shows in the context of subject matter jurisdiction. Personal jurisdiction, unlike subject matter jurisdiction, is not about interpretation of a congressional statute.[129] Unlike in subject matter jurisdiction, Congress cannot simply step in and clarify the gap in general personal jurisdiction law.[130] Moreover, *Daimler* applies to *both* the federal and state

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[122] Americold Realty Tr. v. Conagra Foods, Inc., 136 S. Ct. 1012, 1015 (2016); Carden v. Arkoma Assocs., 494 U.S. 185, 195–96 (1990). These opinions are discussed *supra* in Section II.A.1.a.

[123] Discussed *supra* Section I.A.1.

[124] *See supra* Section I.A.1.

[125] 28 U.S.C. § 1332(d)(10) (2018). Discussed *supra* Section II.A.1.b. Congress also acted as recently as 2011 to amend venue. 28 U.S.C. § 1391(c)(2) (2018) (amended in 2011).

[126] Scholars have long called for Congress to act in this area. *See* Cohen, *supra* note 66, at 294, 303 (arguing against judicial deference on the issue).

[127] *See* Int'l Shoe Co. v. Wash., 326 U.S. 310, 311 (1945).

[128] *See id.* at 319.

[129] *See id.* at 311.

[130] *Id.* at 324. There is a limited role for Congress in the context of personal jurisdiction, namely in the creation of a federal long arm statute or by amendment to Rule 4. *See* Stephen E. Sachs, *How Congress Should Fix Personal Jurisdiction*, 108 NW. U. L. REV. 1301, 1317–18 (2014) (arguing that Congress could amend Rule 4 to permit nationwide personal juris-

courts.[131] Congress has no authority to craft a statutory response to *Daimler* that could reach the state courts. Therefore, the Court need not show deference to Congress and should clarify this issue.

Finally, there is good reason for the Court to provide clarity. As the current Court has repeatedly stated, there should be predictability and certainty on jurisdictional matters.[132] Parties should be able to predict answers to jurisdictional matters, and courts should have consistent approaches to resolving jurisdictional disputes, because a lack of clarity increases litigation expenses, unnecessarily extends disputes, and leads to an inefficient operation of our judicial system.[133]

B. *Considering the* Daimler *Approach: The Court's Apparent Requirements for a General Jurisdiction Test*

The Court in *Goodyear* and *Daimler* seemed to suggest that several attributes were desirable in any test for general jurisdiction. Of course, the Court requires there to be an extremely high level of contacts with that forum; it has repeatedly stated that, to satisfy general jurisdiction, the defendant's contacts with the forum must be "'so continuous and systematic' as to render [the de-

diction in the federal courts and have personal jurisdiction in the federal courts limited under the 5th Amendment). However, Congressional authority would still be limited by the Fourteenth Amendment so long as Congress chooses to continue to link personal jurisdiction in the federal courts to the existence of personal jurisdiction over the defendant in the state court in which the district court is located. *See* FED. R. CIV. P. 4(k)(1)(A).

[131] Even if Congress alters Rule 4 or creates a federal long arm statute, the state courts' jurisdiction will remain limited by the Fourteenth Amendment. *Int'l Shoe*, 326 U.S. at 319.

[132] *See* Daimler AG v. Bauman, 571 U.S. 117, 137(2014); Hertz Corp. v. Friend, 559 U.S. 77, 94–95 (2010).

[133] In addition to clarifying the confusing language in *Daimler*, the Court should take up this issue to clarify some of the inconsistent messaging about the due process concerns raised in general jurisdiction and the underlying goals promoted by the Court. Traditionally, personal jurisdiction has been understood as a recognition of the limits on a court's power to exercise judgment over non-resident defendants when the forum was unduly burdensome. For this reason, when the forum is not one in which the defendant would predict or be able to foresee being hauled into court, the forum is typically an unconstitutional selection by the plaintiff. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980). This is often the focus for specific personal jurisdiction analysis. *See id.*; *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473, 475 (1985). However, this concept is still implicit within general jurisdiction analysis. Under general jurisdiction, the forum is not unconstitutional because it is the defendant's "home;" therefore, the defendant can always foresee the possibility of litigating in it. The Court in *Daimler*, however, seemed to move the focus on predictability, or foreseeability of the suit, to the *plaintiff*. *Daimler*, 571 U.S. at 137 (reasoning that the "at home" test "afford[s] plaintiffs recourse to at least one clear and certain forum in which a corporate defendant may be sued on any and all claims"). For example, the Court noted that general jurisdiction afforded the plaintiff with an option to easily and judiciously identify an appropriate forum for her suit. *Id.* This is an important goal of jurisdictional rules; however, the Court should again clarify that the *focus* for personal jurisdiction analysis is in the fairness it affords the defendant.

fendant] essentially at home in the forum State."[134] However, one of the equally consistent messages of both *Goodyear* and *Daimler* is that in-state activities that are continuous and systematic alone are not enough for general jurisdiction; the affiliation between the defendant and the forum must be so strong as to make the defendant "at home."[135]

The Court also repeatedly emphasized a desire that only a very limited number of forums would qualify for general jurisdiction—ideally only one or two.[136] In *Daimler*, the Court explained, "*Goodyear* made clear that only a *limited set* of affiliations with a forum will render a defendant amenable to all-purpose jurisdiction there."[137] Indeed, in settling on domicile as the paradigm for where an individual is "at home" and on state of incorporation and PPB for where a corporation is "at home," the Court praised these tests because they had "the virtue of being unique—that is, each *ordinarily indicates only one place*."[138]

The Court also emphasized that any test should be easy to apply so that the forum is "easily ascertainable."[139] It touted as a virtue of the paradigms it adopted that these "afford plaintiffs recourse to at least one *clear and certain* forum" in which the defendant can be sued on any claim.[140] Thus, the Court seems likely to prefer a test for unincorporated defendants that is simple to apply, over one that is fact-intensive or nuanced. The Court also suggested that "predictability" is very important in jurisdictional rules, commenting that "[s]imple" rules "promote greater predictability."[141]

These considerations—a high level of contacts by defendant; only limited forums; easy application and predictability—seem likely to influence the Court's decision as to where an unincorporated entity will be subject to general jurisdiction.

C. *Examining Possible Tests and the Proposed Test*

Obviously, the Court will hold that unincorporated entities (just like individuals and corporations) are subject to general jurisdiction in the forum(s)

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[134] *Daimler*, 571 U.S. at 127 (citations omitted); Goodyear Dunlop Tires Operations, S.A., v. Brown, 564 U.S. 915, 919 (2011); *see also* Helicopteros Nacionales de Colombia S.A. v. Hall, 466 U.S. 408, 414 n.9 (1984) (citations omitted).

[135] *Daimler*, 571 U.S.at 127.

[136] *Id.* at 137.

[137] *Id.* (emphasis added).

[138] *Id.* (emphasis added).

[139] *Id.*; *see also* Lenich, *supra* note 45, at 288, 290–91 (noting that "[b]oth *Hertz* and *Daimler* reflect a preference for jurisdictional rules that are relatively easy to apply.").

[140] *Daimler*, 571 U.S. at 137 (emphasis added); *see also* Lenich, *supra* note 45, at 290–91 (arguing that allowing general jurisdiction over an unincorporated entity in its PPB would provide a convenient forum for the defendant entity to defend itself and support the Court's desire to have a clear and convenient place for the plaintiff to file).

[141] *Daimler*, 571 U.S. at 137.

where they are "essentially at home."[142] The debate is over what the Court will announce as the "paradigm bases" for general jurisdiction over unincorporated entities.

The main options the Court seems likely to consider in framing an "at home" test are either the subject matter jurisdiction test for unincorporated entities that focuses on the members (the so-called *Carden* rule) or some version of the "at home" test for corporations that focuses on the entity's state of formation and PPB.

Another possible option is to use the test for where an entity resides for purposes of venue[143] to determine where an unincorporated entity resides for purposes of at home jurisdiction. This seems highly unlikely for three reasons. First, such a test will often lead to an unincorporated entity being "at home" in multiple places (everywhere it is subject to jurisdiction) and the test (because it relies on personal jurisdiction analysis) would be fact intensive and hard to apply. Both of these violate the Court's demand that, ideally, the test for at home personal jurisdiction should "ordinarily indicate[] only one place" and be "easily ascertainable."[144] Second, the Court could have adopted such a test for corporations (who also have the same residency rule), and yet it did not.[145] Finally, and most tellingly, this circular definition would mean that an entity would be subject to general "at home" jurisdiction wherever it was subject to either general or specific jurisdiction—completely effacing the distinction between the two. Thus, this option seems a non-starter.

Given that the most likely tests for the Court to consider are the *Carden* rule or a version of the "at home" test currently used for corporations, we will consider each of these variations in turn.

1. *Rejecting the "Where Members Are at Home" Test*

The Court could copy the *Carden* rule it created in subject matter jurisdiction to determine where an unincorporated entity would be considered "at home." Using such an approach, an unincorporated entity would be subject to general "at home" jurisdiction wherever its members are subject to "at home" jurisdiction. This does have the advantage of predictability. For every type of defendant (individual, corporation, and now unincorporated entity), the test for "at home" would be identical to the test for citizenship in traditional diversity jurisdiction. Such a uniformity of approach may lead to fewer errors in court selection. It could also be argued that it would be easy to apply. In any case in federal court under diversity jurisdiction, the parties should have alleged, and

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142 *See supra* Section II.B.1.

143 28 U.S.C. § 1391(c) (2018).

144 *Daimler*, 571 U.S. at 137.

145 *Id.* at 141.

the trial court double-checked, that there was diversity jurisdiction.[146] This check requires the court to identify all the entity's members and ascertain their citizenships, so the court would have already done all the work needed to determine whether the entity was subject to general jurisdiction in the selected forum.

On the other hand, declaring that an unincorporated entity is "at home" wherever its members are "at home" flies in the face of some of the Court's announced policy goals.[147] First, while the test may be easy to apply in diversity jurisdiction cases in federal court because the parties and the trial court should have already ascertained an entity's citizenship (and thus, where it is at home), this is not true for cases in federal court under federal question subject matter jurisdiction where inquiry into the parties' citizenship is not required. This is even truer in state courts, where diversity is not required so the courts never have to consider the federal diversity jurisdiction citizenship rules. Therefore, for state courts in particular, an "at home" test that copies the subject matter jurisdiction test will add a layer of unwelcome complexity.

In addition, the "at home where members are at home" test may not achieve the certainty or predictability the Court wanted.[148] A plaintiff may not know all the members of an entity or where they are "at home," making it far from "clear and certain" where there will be general jurisdiction.[149] Under this test, an unincorporated entity will typically *not* be "at home" in the state of its formation or where it has its PPB (facts that are often easy to learn from public records).[150] Instead, plaintiffs might have to trace the citizenship of the unincorporated entity through all the layers of members, a task that has often proved burdensome in diversity jurisdiction cases.[151] Consequently, plaintiffs may be far from "clear and certain" where an entity is subject to general jurisdiction.[152]

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[146] FED. R. CIV. P. 8(a)(1) (requiring a statement of subject matter jurisdiction for every claim). It is the burden of the person asserting jurisdiction (either as plaintiff or removing defendant) to meet this burden. *See, e.g.*, Am.'s Best Inns, Inc. v. Best Inns of Abilene, L.P., 980 F.2d 1072, 1073–74 (7th Cir. 1992). Most Circuits hold that allegations of subject matter jurisdiction citizenship may not be pled upon information and belief but require actual knowledge of all the members' citizenship. Leslie Coletti & Thomas E. Rutledge, *Diversity Jurisdiction and Unincorporated Entities: Recent Developments*, A.B.A.: BUS. L. TODAY, Sept. 2016 at 1–2 (discussing split). The trial court must itself check that subject matter jurisdiction exists. 13 WRIGHT ET AL., *supra* note 6, at § 3522.

[147] *See supra* Section III.B (examining *Daimler*'s policy goals).

[148] *See supra* Section III.B (examining *Daimler*'s policy goals).

[149] Cohen, *supra* note 66, at 275, 303 (noting that ascertaining an LLC's citizenship is "a multi-layered analysis that is both time-consuming and expensive" and that "the membership of an LLC is not public information"); Hoffman, *supra* note 66, at 133 (discussing MLPs); Coletti & Rutledge, *supra* note 146, at 3; Matthew C. Dodge, *Determining the Citizenship of LLC Members for Diversity Purposes: Seemingly Simple, Difficult Enough to Compel an Amendment to 28 U.S.C. 1332(c)(1)*, 80 TUL. L. REV. 661, 673 (2005).

[150] *Supra* Section II.A.1.a.

[151] *See, e.g.*, Meyerson v. Showboat Marina Casino P'ship, 312 F.3d 318, 319–21 (7th Cir. 2002) (reminding lawyers that "the citizenship of unincorporated associations must be traced through however many layers of partners or members there may be[,]" and threatening sanc-

Equally, while the Court has repeatedly emphasized that general jurisdiction requires an extremely high level of contacts,[153] application of the *Carden* rule to determine "at home" general jurisdiction for unincorporated entities would render personal jurisdiction over the entity in forums with a weak connection to the operations of the entity itself. Because the *Carden* rule uses the citizenship of every member of an unincorporated entity, there could possibly be general jurisdiction over an entity in a forum whose only connection with the entity is that one member of the entity is a citizen.[154] For instance, under this test, Partnership P (with individual partners domiciled in Ohio, Missouri, Washington, North Dakota and Texas) would be "at home," and subject to general jurisdiction, in every one of those states. Yet, when examining the operations of the partnership itself, the only contacts between the partnership and the forum could be that a partner is domiciled in that state; and, under the Supreme Court's *Carden* rule, it could even be a limited partner who has no day-to-day control over the partnership's affairs.[155] This result seems contrary to the Court's desire to identify a high level of forum contacts as the key to general jurisdiction.[156]

Finally, and we think likely most persuasive for the Court, is that the "at home where members are at home" test is likely to lead to multiple places where an entity is "at home" since every member's home will count, as is illustrated by the example above. This will be all the more so if an entity's members are other entities, a more common occurrence in today's business world. Rather than ordinarily yielding "only one place" for "at home" general jurisdiction for the defendant, this test will likely indicate "multiple homes."[157] This conflicts

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tions, including suspension from practice, because counsel had failed to comply with the Circuit Rule 28(a)(1) that required any unincorporated association to identify the citizenship of every member); *see also* D.B. Zwirn Special Opportunities Fund, L.P. v. Mehrotra, 661 F.3d 124, 125 (1st Cir. 2011); Zambelli Fireworks Mfg. Co. v. Wood, 592 F.3d 412, 420 (3d Cir. 2010); Delay v. Rosenthal Collins Grp., L.L.C., 585 F.3d 1003, 1005 (6th Cir. 2009). For an example of a typical order directed at the plaintiff, see Avery Family Farm, L.L.C. v. Highlands Country Club Prop. Owner's Assoc., Inc., No. 2:09CV57, 2010 WL 584006, at *1 (W.D.N.C. Feb. 16, 2010) (noting that plaintiff is "required to file with the court a Notice of Citizenship of Plaintiff, in which it names and identifies the citizenship of all its constituent members or partners, and, for any such constituent members or partners that are also LLCs or partnerships, to identify the citizenship of their respective constituent members or partners, until all such constituents are fully identified"); *see also* Cohen, *supra* note 63, at 275, 275 n.30, 303, 303 n.208; Dodge, *supra* note 149 at 672–73; Hoffman, *supra* note 66, at 133.

[152] *See supra* Section III.B (examining *Daimler's* policy goals).

[153] *See supra* Section III.B (examining *Daimler's* policy goals).

[154] Discussed *supra* Section II.A.1.a.

[155] Carden v. Arkoma Assocs., 494 U.S. 185, 195–96 (1990) (internal citations omitted); discussed *supra* Section II.A.1.a.

[156] *See supra* Section III.B (examining *Daimler's* policy goals).

[157] *See supra* Section III.B (examining *Daimler's* policy goals). As noted *supra* Section II.A.1.a, at note 65, some unincorporated entities have hundreds, if not thousands, of members and so would likely be subject to general jurisdiction in every state—hardly the "limited" number of forums the Court is seeking.

with the Court's objective that general jurisdiction be in a very "limited" number of forums—ideally "only one place."[158]

In short, while copying the diversity citizenship test for unincorporated entities may offer a parallel approach to the Court's position for individuals and corporations, it contradicts the Court's espoused goals of simplicity, certainty, predictability, limited forums, and a focus on a forum with an extremely high level of defendant contacts.[159] For these reasons, we recommend the Court reject such an approach.

2. *The Proposed Test: "State of Formation, PPB and Also at Home"*

The other alternative is to recognize a test that focuses on an unincorporated entity's state of formation and PPB as the paradigm "homes" for the purpose of general jurisdiction. This is the position the *Daimler* Court may have implicitly endorsed, and it is the one that has the support of a majority of the federal trial courts that have addressed the issue.[160]

This article proposes that the Court adopt such a test, but with an important qualification, the addition of the "also at home" provision set out below in the second paragraph of our test and discussed in Section III.C.2.c. Our proposed test is:

> An unincorporated entity (such as an LLC, LLP, general partnership, or limited partnership) is subject to general jurisdiction where its contacts are so constant and pervasive as to render it essentially at home in the forum State. With respect to an unincorporated entity, the place of formation and principal place of business are paradigm bases for general jurisdiction.
>
> The rule is not that an unincorporated entity may be subject to general jurisdiction *only* in a forum where it is formed or has its principal place of business; it is simply that those places are paradigm all-purpose forums. In some circumstances, the contacts of an entity's members with a forum may be so constant and pervasive as to render the unincorporated entity "at home" in that forum as well.[161]

First, we'll address how and why the test should focus on an entity's state of formation and PPB, and then we'll explain our modification. Then in Section III.D, we offer more detailed guidance on how this test applies to a variety of unincorporated entities.

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[158] Daimler AG v. Bauman, 571 U.S. 117, 137 (2014); s*ee also supra* Section III.B (examining *Daimler'*s policy goals).

[159] *See supra* Section III.B (examining *Daimler'*s policy goals).

[160] *See supra* Section III.B and Section II.B.3 (examining district court decisions).

[161] As indicated earlier, this proposed rule deliberately parrots the language the Supreme Court adopted for corporations in *Goodyear* and *Daimler*.

a. What is the Basic Test?

An unincorporated entity would be subject to general jurisdiction where it is "at home" and "the place of formation and principal place of business" should be the "paradigm bases" for general jurisdiction.

Much of this test could replicate the approach the Court has laid out for corporations, and the test should be relatively easy to modify. First, the criteria "state of incorporation" used by the Court for corporations will have to be altered to the "state of formation," since unincorporated entities are not technically incorporated, but rather formed, under state law. In the vast majority of instances, state law requires unincorporated entities to file a formal formation agreement, so this prong of the test will be easy to apply.[162]

Equally, courts are familiar with determining a corporation's PPB and the Supreme Court's definition of a PPB as the "nerve center" where the "officers direct, control, and coordinate the corporation's activities."[163] The test's highly practical focus on where the entity's activities are controlled and directed works well for most business entities, incorporated or not. Thus, adapting the Supreme Court's language in *Hertz*, an unincorporated entity's PPB "should normally be the place where the [entity] maintains its headquarters—provided that the headquarters is the actual center of direction, control, and coordination, *i.e.*, the 'nerve center.' "[164]

The *Hertz* Court was careful to explain that the PPB should not be "simply an office where the [entity] holds its . . . meetings (for example, attended by [members] who have traveled there for the occasion)."[165] Equally, while some types of unincorporated entities may present application issues because they have more diffuse control, the *Hertz* Court acknowledged that this was present in some corporations. The Court explained, "there will be hard cases. . . . in this era of telecommuting, some corporations may divide their command and coordinating functions among officers who work at several different locations, perhaps communicating over the Internet."[166] Nevertheless, the Court felt that, even in such cases, the district courts could successfully locate a "center of overall direction, control, and coordination" of the entity, (ignoring other fac-

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[162] For further discussion, see *infra* Section III.D (discussing how to deal with entities that have different formation agreements, and sometimes, no formal formation agreement).

[163] Hertz Corp. v. Friend, 559 U.S. 77, 92–93 (2010).

[164] *Id.* at 93.

[165] *Id.*

[166] *Id.* at 95–96. For a discussion of *Hertz*, arguing that the test will be more difficult to apply to corporations than expected, *see* Michael E. Chaplin, *Resolving the Principal Place of Business Conundrum: Adopting a Single Test for Federal Diversity Jurisdiction*, 30 REV. LITIG. 75, 95 (2010) (discussing challenges in applying the *Hertz* test to large entities with "dispersed command and control functions."); Caitlin Sawyer, *Don't Dissolve the "Nerve Center": A Status-Linked Citizenship Test for Principal Place of Business*, 55 B.C. L. REV. 641, 642–43 (2014) (discussing challenges in applying the *Hertz* test to entities with only an internet presence and with entities that are dissolving or ceasing operations); Strong, *supra* note 68, at 1084–85 (discussing concerns in application of the *Hertz* test to corporations).

tors such as "corporate functions, assets, or revenues"), and successfully apply the test.[167]

In many, if not most, cases, the PPB test should be simple to apply to unincorporated entities. Scholars (writing in the field of subject matter jurisdiction) have long argued that such a "state of formation and PPB" test can be applied to unincorporated entities.[168] Moreover, Congress itself has already twice tasked the courts with determining an unincorporated entity's state of formation and PPB, so this task should be a somewhat familiar one.[169] Indeed, as discussed previously, the problem most federal courts have experienced is not that unincorporated entities have difficulty in determining their state of formation and PPB, but rather that the entities often erroneously cite these as their citizenship for diversity purposes, perhaps in part because they are so easy to ascertain.[170] For those entities where a PPB is difficult to determine,[171] we believe that the addition of the "also at home" provision to the test can accommodate these outliers.[172]

b. Why the Proposed Test Meets the Policy Goals of Daimler

Adopting a test for general jurisdiction based on an unincorporated entity's state of formation and PPB seems to align with many of the Court's announced goals for general jurisdiction.[173] First, such a test promotes simplicity and predictability in the sense that all entities—corporate or otherwise—will follow the same core rule (an approach Congress already adopted for venue and in CAFA actions). The test, as explained above, will be easy to apply because it repli-

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[167] *Hertz*, 559 U.S. at 96.

[168] As one scholar observed of applying the state of formation and PPB to LLC's: "This approach is still simple in theory. Additionally, it is simpler in practice. Logistically it is easier to determine the state of organization and principal place of business than the citizenship of each member of an LLC. It also reduces the likelihood of manufactured diversity. The approach also more accurately reflects the realities of modern business organizations and more consistently promotes the purpose of diversity jurisdiction." Cohen, *supra* note 66, at 307; s*ee also* Hoffman, *supra* note 66, at 133 (the test is easy to apply to MLPs); Strong, *supra* note 68, at 1084–85 (noting that many states require commercial trusts "to file some sort of statement regarding their business conduct within the state, which would assist with the task of identifying which state was the trust's primary place of business," but noting that it may be hard to apply given their diversified power structure).

[169] 28 U.S.C. § 1332(d)(10) (2018); 28 U.S.C. § 1391(c)(2) (2018). These provisions are discussed *supra* Section II.A.1.b and *supra* Section II.A.2, respectively.

[170] *See supra* text accompanying note 151(citing examples of cases where counsel have mistakenly alleged an unincorporated entity's state of formation and PPB, rather than the members' citizenships); *see also* Cohen, *supra* note 6, at 283 (discussing LLCs).

[171] *See supra* note 166.

[172] As we detail below in Section III.C.2.c because there are so many distinct forms of unincorporated entities, some may present unique application challenges.

[173] *See supra* Section III.B (examining *Daimler*'s policy goals).

cates an inquiry that the courts are already used to undertaking for corporations and even, in some cases, for unincorporated entities.[174]

The use of state of formation and PPB as the paradigms for general jurisdiction will also likely produce only a limited number of forums. As discussed above, the Court's test for PPB is designed to yield only one location; and, while an entity could be formed under the law of more than one state, this is not typical.[175]

Therefore, the "at home as the state of formation and PPB" paradigm for entities seems to promote the Court's announced goals of simplicity, certainty, predictability, limited forums, and a similar level of contacts as the Court has deemed acceptable for corporations.[176]

One counter-argument is that such a test would lead to some confusion, at least in federal courts, because an unincorporated entity would be treated differently from corporations for purposes of diversity-jurisdiction citizenship, but the same as a corporation for purposes of general personal jurisdiction.[177] However, state courts would not face this potential confusion, and federal courts are already used to sometimes treating an unincorporated entity like a corporation when they apply the federal venue provisions and CAFA.[178] Moreover, there is a chance that Congress may act to clarify the citizenship of unincorporated entities in diversity jurisdiction, and given the approach it adopted in CAFA, it might adopt a universal rule of treating all entities alike for all of diversity jurisdiction, eliminating any confusion.[179]

Therefore, because this test is already seemingly endorsed by the majority of trial courts and by the Court's dicta in *Daimler*, and because it is best suited to meet the Court's stated goals, we recommend the Court adopt this approach with the one modification suggested below.

c. The "Also at Home" Provision

The second paragraph of our proposed test—the "also at home" provision—is intended to reach, in limited situations, forums other than the state of formation and the PPB. This is an important addition, not currently present in the majority of district court cases, and one we believe is necessary to ensure the best application of the *Daimler* test for unincorporated entities.

Our additional "also at home" provision is consistent with the Court's test for corporations. As the *Daimler* court pointed out, "*Goodyear* did not hold that a corporation may be subject to general jurisdiction *only* in a forum where it is

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[174] *See supra* Section III.C.2.a.

[175] *See supra* Section III.C.2.a.

[176] *See supra* Section III.B (examining *Daimler*'s policy goals).

[177] *See supra* Sections II.A, III.C.2.

[178] *See supra* Sections II.A, II.B.

[179] *See supra* text accompanying notes 83–86 (discussing calls for Congress to alter the rule for unincorporated entities).

incorporated or has its principal place of business; it simply typed those places as paradigm all-purpose forums."[180]

For corporations, the "also at home" analysis may rarely be applied. In fact, the Court may well have been thinking about its prior holding in *Perkins*, a holding affirmed in both *Daimler* and *Goodyear*, as the example of when a corporation could be "at home" in a forum despite not being incorporated or having its PPB in that the forum.[181] In *Perkins*, the corporation was forced to cease its mining operations and to function out of its President's home in Ohio by the invasion of the Philippines during WWII.[182] Thus, whatever headquarters it had, the only place it was really functioning was in Ohio. The Court treated this as the "home" of the corporation and found general personal jurisdiction to exist in Ohio.[183]

While it may be the rare case where a corporation is at home in a forum other than its PPB or state of incorporation, we believe that the nature of some unincorporated entities may suggest that another forum operates as their "home." As we detail in the section below, some unincorporated entities have diffuse control structures, making it hard to ascertain where the members direct the business of the entity. The "also at home" analysis provides the court with an additional option for identifying the existence of general personal jurisdiction for unincorporated entities.

In addition to responding to the unique operation of some unincorporated entities, we believe that this additional "also at home" provision is essential to a balanced operation of general jurisdiction. At the same time as the Court has taken a decidedly narrower approach to interpreting general jurisdiction, criticizing courts that extended the general jurisdiction test when contacts were only "continuous and systematic,"[184] it has also adopted a narrower approach to specific personal jurisdiction.[185] The effect of these simultaneous trends in personal jurisdiction jurisprudence is to close the courthouse doors to more cases. Some foreign defendants are able to slip into the void left between these two doctrines, evading general jurisdiction by not being formed in nor having the PPB in any state and evading specific jurisdiction by using third parties to conduct business activities on their behalf in the United States.[186] The test we pro-

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[180] Daimler AG v. Bauman, 571 U.S. 117, 137 (2014) (citations omitted).

[181] *Id.* at 129; Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 925 (2011).

[182] Perkins v. Benguet Mining Co., 342 U.S. 437, 447–48 (1952).

[183] *Id.* at 448.

[184] *Daimler*, 571 U.S. at 131.

[185] J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 883 (2011) (plurality opinion) (narrowing the scope of specific personal jurisdiction analysis by clarifying that the court should only consider contacts directed at the forum, and not more diffuse contacts directed towards the nation).

[186] *See id.* at 906 (Ginsburg, J., dissenting) (noting that "[c]ourts, both state and federal . . . have rightly rejected the conclusion that a manufacturer selling its products across the USA may evade jurisdiction in any and all States, including the State where its defective product is distributed and causes injury. They have held, instead, that it would undermine principles

vide remains consistent with *Daimler* and provides plaintiffs with an opportunity to identify a constitutionally permissible forum when the unincorporated entity is "at home" in the forum.

While we recognize that there may be more instances in which an unincorporated entity is subject to general personal jurisdiction under this "also at home" extension than a corporation, we caution against an overly broad interpretation of the rule. Given the Court's more limited interpretation of general jurisdiction in *Daimler*, courts applying this rule should be mindful of the operating principles we identified above and interpret this rule in a narrow manner consistent with those principles. We provide some guidance to the application of the "also at home" test in the next section.

D. *Application of the Proposed Test*

In this section, we explore how our proposed test would operate when applied to various unincorporated entities. As Justice Scalia explained in his *Carden* opinion, the challenge for federal courts will always be the pace at which states are authorizing new forms of business entities, especially ones that adopt some of the characteristics of corporations.[187] Any application we offer will be limited by the fact that new forms of business entities will spring up after our explanation. However, given that unincorporated entities are outpacing corporations in the vast majority of states,[188] we believe it is imperative to offer federal districts courts some guidance. This section offers broad characterizations of common unincorporated entities and some suggestions for determining where general personal jurisdiction may exist over these entities.

1. *General Partnerships*

A general partnership is a "default form of organization for multi-owner businesses."[189] Unlike other forms of unincorporated entities, a general partnership can be created "inadvertently" through conduct[190] or through an express written agreement.[191] Under the default rules of state partnership law, all part-

of fundamental fairness to insulate the foreign manufacturer from accountability in court at the place within the United States where the manufacturer's products caused injury.").

[187] Carden v. Arkoma Assocs., 494 U.S. 185, 196–97 (1990) (Scalia noted that the *Carden* rule "can validly be characterized as technical, precedent-bound, and unresponsive to policy considerations raised by the changing realities of business organization.").

[188] "[M]ost new businesses in the United States that choose to operate via a legal entity (and not as a sole proprietorship or general partnership) choose the LLC form." BOUCHOUX & CHUNG, *supra* note 78, at 24. "[T]he number of new LLCs formed in the United States now outpaces the number of new corporations created by nearly two to one." *Id.* at 698.

[189] *Id.* at 12.

[190] *Id.* at 13.

[191] *Id.*

ners have an equal right to make management decisions[192] and share "unlimited personal liability for partnership debts."[193]

Because the general partnership can be formed without formal filings with a secretary of state,[194] and can even be created without the partners' appreciation of or intention to create a partnership,[195] the proposed test will operate in a different manner than identifying the state of incorporation for corporations. For the "state of formation" test, a general partnership would be subject to "at home" jurisdiction where either a partnership agreement was executed or the actions necessary to establish the common law standard for an "inadvertent partnership" took place. We believe that, despite the unique fluidity with which a general partnership can spring up, the "state of formation" test will still be fairly easy to apply. In fact, courts already identify the state of formation when determining which state's partnership laws will govern the operation of the partnership.[196] This same determination can be used to support a finding of general jurisdiction over the partnership.

Under the next portion of the proposed general jurisdiction test, a partnership would be "at home" in the place of its PPB—that is, its nerve center, or the place from where the activities of the partnership are directed and controlled. For a general partnership, this would be where the majority of business decisions are made. General partnerships, under default rules of operation, are very different from corporations. The decision-making authority of the partnership is split equally among the partners,[197] creating a more fractured form of operation where the entity's actions are tied to multiple general partners in a way that is dissimilar from a corporation that is controlled through directors at the corporate headquarters (PPB). As a practical matter, most partners will likely direct the operations of the partnership in the same state. This affords an easy application of the PPB test: the state where the partnership is managed. If the partners are conducting partnership business in different states, it is also likely that they have designated a principal office for the partnership.[198] The principal office would be the PPB, similar to the corporate headquarters. Therefore, when the general partnership agreement establishes a principal office in one state or establishes management rights such that the majority of partnership decisions emanate from one state, the PPB would be in that state.

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192 *Id.*

193 *Id.* at 14.

194 *Id.* at 12–13.

195 *Id.* at 13.

196 *Id.* Choice of law is typically determined by looking to the "law of the state in which the partnership was formed" or the law of the state where the partnership's principal office is located. Of course, a partnership agreement can alter these default rules. *Id.*

197 *Id.* Again, this default division of management can be altered by partnership agreement.

198 *See id.* (discussing the reliance on the partnership "principal office" to determine choice of law).

There may be instances, however, when the management of the partnership obscures the determination of the single PPB. For example, this may occur when the partnership is being actively directed by partners from multiple states and there is no designated principal office. In these situations, we believe that a plaintiff may well choose to rely on the "also at home test" under the proposed rule.[199] So long as the partnership activity in the forum is "so substantial" that it is the functional equivalent of the partnership's "home," the court should exercise general jurisdiction over the partnership in that forum.

2. *Limited Partnerships*

A limited partnership is a business organization comprised of "one or more general partners and one or more limited partners."[200] While the general partners have rights and responsibilities similar to those in a general partnership, limited partners do not have management rights and are shielded from personal liability for the debts of the partnership.[201] Unlike the general partnership, a limited partnership *must* file a certificate of limited partnership with the secretary of state to obtain limited liability for the limited partners.[202] Therefore, there are no "inadvertent" limited partnerships.

Because the limited partnership has a formal aspect to its formation, it presents fewer challenges to courts and litigants applying the proposed general jurisdiction test. Under the first part of the test, the "state of formation" test, litigants and the court should be able to readily identify the state where the partnership filed its certificate of limited partnership.

Under the second part of the test, the "principal place of business" test, the court should examine the partnership agreement or state filing to determine if there is a designated principal office. If one is not readily apparent, the court should look to the management of the general partners to determine where the majority of business operations are controlled and directed. That state would be the state of the PPB.

Similar to the general partnership, a limited partnership's general partners may manage the partnership in such a manner that the determination of a PPB

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[199] Let's consider an example using Partnership P discussed above. Presume that Partnership P is formed under the laws of Illinois with its PPB in Ohio, (with individual partners domiciled in Ohio, Missouri, Washington, North Dakota and Texas). The suggested rule would make Partnership P "at home" in Illinois (where it is formed) and Ohio (the location of its PPB). However, let's presume that the active partners who control the partnership are domiciled in Missouri and Ohio. The other partners (Washington, North Dakota and Texas) are just investors with little or no say in the partnership business. Under the "also at home rule" if the plaintiff can show that the Missouri partner does a vast amount of the partnership's business out of Missouri and exercises control of Partnership P from Missouri, the Partnership could also be subject to "at home" general jurisdiction in Missouri.

[200] BOUCHOUX & CHUNG, *supra* note 78, at 18.

[201] *Id.*

[202] *Id.*; *see also* Hoffman, *supra* note 66, at 128 (discussing the master limited partnership along with general characteristics of limited partnerships).

may be difficult to assess. For example, when the general partners maintain equal management of the partnership but operate in several states, identifying one state as a "nerve center," or PPB, may not be possible. Again, the plaintiff may well consider using the "also at home" aspect of the proposed test and identify a forum where the partnership business is "so substantial" that it is the functional equivalent of the partnership's "home."

3. *Limited Liability Partnerships*

A limited liability partnership, or LLP, operates similarly to general partnerships in terms of management.[203] In an LLP, the partners have equal rights to manage the partnership, much like general partners.[204] The key distinction, however, is that in an LLP, the partners do not have unlimited liability for the partnership's debts.[205] To form an LLP, the partners must file a statement of qualification with the secretary of state's office.[206]

Much like the limited partnership, the first part of the proposed test, "state of formation," should be easy to identify. This will be the state in which the statement of qualification is filed. The "principal place of business" test will apply to limited liability partnerships much as it does to limited partnerships. The primary difference between limited partnerships and LLPs is that *all* of the partners' management activities will count in assessing a PPB or determining the "home" of the LLP.

4. *Limited Liability Companies*

Limited Liability Companies, or LLCs, more than any other unincorporated entity, most closely resemble the corporation. Similar to a corporation, an LLC must file "articles of organization" with the secretary of state's office.[207] However, an LLC offers the owners some features of partnerships, including management rules, while providing some of the benefits of corporations, such as limited personal liability for LLC debt and perpetual existence of the company.[208]

In terms of management options, there are two types of LLCs—member-managed and manager-managed.[209] The default state rules in most states direct that an LLC will be member-managed, where the members have equal rights to

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[203] BOUCHOUX & CHUNG, *supra* note 78, at 16.
[204] *Id.*
[205] *Id.*
[206] *Id.*
[207] *Id.* at 24.
[208] *Id.*; *see* Cohen, *supra* note 66, at 290 (noting that "the LLC, like the limited partnership, is a hybrid organization that combines attributes of partnerships and corporations" however, given the changes to tax law and state business law, most LLCs today "are more analogous to corporations than limited partnerships.").
[209] BOUCHOUX & CHUNG, *supra* note 78, at 24.

management similar to general partners in a partnership.[210] However, most states permit LLCs to be manager-managed if designated as such in their "articles of organization."[211] Under the manager-managed LLC, members manage by voting, similarly to a corporation.[212] LLCs became a much more attractive form of business organization when the IRS allowed LLCs to elect to be treated as a partnership or as a corporation for tax purposes.[213]

Because there is a clear state of formation, similar to corporations, the first test of general jurisdiction will be easy to identify. The state in which the "articles of organization" are filed would meet this test. Additionally, in determining the PPB, the analysis would be virtually identical to that of a corporation for manager-managed LLCs. As for member-managed LLCs, the process would be similar to that for general partnerships.

Following *Daimler*, several district courts have applied the first two parts of the proposed test to LLCs with little difficulty.[214] The parties alleged the state(s) of formation and PPB and had little factual disagreement as to the appropriate forum. Given the similarities between corporations and LLCs, this is not surprising.

5. *Considerations with Other Unincorporated Entities and Future Unincorporated Entities*

As noted above, states offer many more varieties of unincorporated entities and will continue to do so. In this section, we offer some general guidance for litigants and courts to use in applying the proposed test to other unincorporated entities or to those created in the future.

First, it is important to recognize that *any incorporated entity* should follow the *Daimler* test. This includes even more specialized forms of corporations, including statutory closed corporations, professional corporations, benefit corporations, and nonprofit corporations.[215]

Second, if an unincorporated entity must file a formal document with the secretary of state (or other state agency) to be a recognized organization under state law, the state where such documentation is filed will count as the "state of formation." If the unincorporated entity must file or register to do business in the state, however, such filings should not be considered in determining whether the entity is "at home" in that state. Corporations have historically filed such papers and the Court has never afforded them any consideration in the "at

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[210] *Id.*

[211] *Id.*

[212] *Id.*

[213] *Id.* at 25; Cohen, *supra* note 66, at 290 (noting the upward trend to form an LLC after the 1997 changes to the tax code).

[214] *See supra* Section II.B.3 (discussing the conflicted application of the *Daimler* decision to unincorporated entities).

[215] *See* Cohen, *supra* note 66, at 300–02 (discussing these specialized corporations and applying the approach in *Carden*).

home" general jurisdiction analysis.[216] The same should be true for unincorporated entities. To do otherwise would run contrary to the Court's admonishment of not treating business activities, even when "continuous and systematic," as a basis for general jurisdiction.[217]

To determine the "principal place of business," the court should consider the management of the entity.[218] If the entity has multiple authorized managers (like general partners), the court should look to each and determine if there is one state where the majority of management decisions are made. This is similar to the *Hertz* nerve center test.[219] If no one state can meet this test because there are similar management decisions by similarly empowered managers/members in multiple states, there will likely not be a PPB for purposes of the proposed test.

Finally, the proposed test does not limit the analysis to the state of formation or the PPB. While these are the paradigm places for "at home" general personal jurisdiction for the incorporated entity, the court may consider the "also at home" test. When using this part of the proposed test, the court should be certain to follow the restraint suggested by the *Daimler* Court and only find general personal jurisdiction when enough of the entity's management decisions are made such that the entity would be considered "at home" in that state.

CONCLUSION

Despite the substantial growth of unincorporated entities in the United States,[220] the Supreme Court has left uncertainty for courts and parties in determining where an unincorporated entity is "at home" for purposes of general personal jurisdiction. In its 2014 decision of *Daimler AG v. Bauman*, the Court clarified that corporations should be considered "at home" in their state of incorporation and their PPB.[221] While some courts have tried to fashion a similar test for unincorporated entities, there has been inconsistency and little support for the tests used.[222] This article provides a proposed test to fill this void and give guidance to courts and parties.

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[216] While some jurisdictions have permitted personal jurisdiction over an entity that is registered to do business in the state under a theory of consent, our focus is on the exercise of "at home" general personal jurisdiction, which is based on the substantial number of contacts the defendant has with the forum. *See, e.g.*, Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 CARDOZO L. REV. 1343, 1363–64, 1369–70, 1407 (2015). In these instances, the Court has never found "at home" jurisdiction based on the mere "doing of business" in the forum.

[217] Daimler AG v. Bauman, 571 U.S. 117, 139 (2014).

[218] *See* Strong, *supra* note 68, at 1082 (discussing how to work out the state of formation and PPB for commercial trusts following the *Americold* decision).

[219] Hertz Corp. v. Friend, 559 U.S. 77, 93 (2010).

[220] BOUCHOUX & CHUNG, *supra* note 78, at 24.

[221] *Daimler*, 571 U.S. at 137 (citations omitted).

[222] *See supra* Section II.B.3.

This Article proposes that an unincorporated entity be considered "at home," and subject to general personal jurisdiction, in the "state of its formation," its PPB, and in a state where its contacts are "so substantial" that it would be considered "also at home." The proposed test harmonizes the goals established by the *Daimler* Court, namely simplicity, certainty, predictability, limited forums, and a focus on a forum with an extremely high level of defendant contacts,[223] with the need to provide a clear and predictable test for courts and parties. Additionally, this article discusses how the proposed test would operate and provides examples using a variety of unincorporated entities.[224] Despite the wide variety of unincorporated entities recognized under state law and the rapidly evolving nature of such entities, we believe the proposed test will be relatively easy to apply in the majority of instances. Moreover, we believe the guidance provided by the proposed test offers much needed clarity for courts attempting to apply the principles of *Daimler* to unincorporated entities.

[223] *See supra* Section III.B.

[224] *See supra* Section III.D.

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