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Resolving an Open Question On Diversity Jurisdiction

By Martin Flumenbaum and Brad S. Karp
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In *Windward Bora* v. *Browne*, 110 F.4th 120 (2d Cir. 2024), the U.S. Court of Appeals for the Second Circuit considered whether the state domiciles of an LLC's permanent resident members are relevant to determining diversity jurisdiction. In a unanimous opinion authored by Circuit Judge John M. Walker Jr. and joined by Circuit Judges Steven J. Menashi and William J. Nardini, the Second Circuit held that state domicile is relevant, and therefore there is no diversity jurisdiction in a suit between U.S. citizens and unincorporated associations with permanent resident members if such jurisdiction would not exist in a suit between the same U.S. citizens and those permanent resident members as individuals. In so holding, the Second Circuit resolved a divide between district courts in the Second Circuit on this question. Going forward, parties to cases involving unincorporated associations can seek to defeat diversity jurisdiction by pointing to the state domicile of the association's permanent resident members, irrespective of those members' national citizenship.

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The Diversity Statute and the District Court Split Regarding Unincorporated Associations

Prior to 1988, permanent residents were treated the same as non-resident foreign citizens for jurisdictional purposes because Section 1332(1)(2), the diversity statute, granted jurisdiction over controversies between "citizens of a state and citizens or subjects of a foreign state." 28 U.S.C. Section 1332(a)(2). But a logical corollary was that a federal court had diversity jurisdiction in a case between a U.S. citizen and a permanent resident even when both were domiciled in the same state (including because permanent residents were not considered "citizens of a state" because state citizenship required both U.S. citizenship and state domiciles.)

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In 1988, Congress amended the diversity statute to address this issue, adding language that deemed permanent residents to be citizens of the state in which they were domiciled. Specifically, Congress added language stating that "an alien admitted to the U.S. for permanent residence shall be deemed a citizen of the state in which such alien is domiciled." But this change gave rise to a different issue: The diversity statute could be read to expand jurisdiction to controversies between permanent residents and non-resident foreign citizens.

To address this anomalous result, Congress amended Section 1332 in 2011, removing the language inserted in 1988 and adding language denying federal jurisdiction over "an action between citizens of a State and citizens or subjects of a foreign state who are lawfully admitted for permanent residence in the U.S. and are domiciled in the same state." With this amendment, permanent residents were no longer deemed to have state citizenship (as provided for by the 1988 amendment).

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This amendment has given rise to a split in the district courts regarding the existence of diversity jurisdiction between U.S. citizens and unincorporated associations with permanent resident members. It is well established that, for the purpose of diversity jurisdiction, an LLC is treated as an unincorporated association. The Supreme Court has held that diversity jurisdiction in a suit by or against such an "entity depends on the citizenship of all its members." Because the current version of the diversity statute provides that permanent residents are a "citizen[] or subject[] of a foreign state" rather than deemed a state citizen, some district courts in the Second Circuit—including the district court in *Windward Bora*—have concluded that an LLC adopts the national citizenship of its permanent resident members.

The District Court's Decision in 'Windward Bora v. Browne'

This case arose from the Brownes' financing of their purchase of a property in the Bronx. To purchase the property, the Brownes obtained two loans by executing two promissory notes secured by two mortgages on the property. The Brownes defaulted on both mortgages in 2008. In 2009, the holder of the senior mortgage and promissory note brought a foreclosure action on the mortgage against the property in New York state court and obtained a final judgment of foreclosure. Without obtaining leave of the New York state court in which that action was brought, Windward—the then-holder of the junior promissory note—filed the underlying diversity action against the Brownes, seeking to enforce the note.

It was undisputed at the time of filing that the Brownes were U.S. citizens domiciled in New York and Windward's sole member, Yonel Devico, was a citizen of Morocco and a U.S. permanent resident. Devico's domicile was disputed: While Windward alleged that Devico was a Florida domiciliary, the Brownes argued that Devico was actually domiciled in New York.

After the close of discovery, the parties filed cross-motions for summary judgment. As relevant here, the Brownes argued that the district court did not have diversity jurisdiction because both they and Devico were domiciled in New York and, as a limited liability company, Windward took on Devico's state domicile. Although concluding that Devico was domiciled in Florida, the district court rejected this argument, finding that Devico's state domicile was irrelevant to the jurisdictional analysis. It held that only Devico's national citizenship was relevant and, since Devico was a Moroccan citizen at the time of filing, Windward was also a Moroccan citizen such that the court did have diversity jurisdiction. The district court proceeded to grant summary judgment in favor of the

Brownes and dismissed the complaint on the basis that New York's election-of-remedies law barred Windward's suit.

The Second Circuit Decision

On appeal, the Brownes argued as a threshold matter that the district court erred in finding that there was diversity jurisdiction. Like the district court, the Second Circuit rejected this argument, but adopted different reasoning.

The Second Circuit agreed that, in assessing diversity jurisdiction of unincorporated associations with permanent resident members, courts should consider the national citizenship of the permanent resident members. But it explained that "it is not where the inquiry should end." It held that courts should "additionally consider whether the state domiciles of an LLC's permanent resident members should also be attributed to the LLC" such that there would be no diversity jurisdiction in suits between U.S. citizens and LLCs with permanent resident members domiciled in the same state.

The court reached this conclusion for two reasons. First, it explained that an unincorporated association does not possess legal personhood or identity separate from its members. It therefore followed that, if a suit between a U.S. citizen and a permanent resident would lack diversity jurisdiction because they are domiciled in the same state, there should also be no diversity jurisdiction in suits between a U.S. citizen and an LLC of which the same permanent resident is a member. The court saw no reason why an LLC should adopt only its permanent resident members' national citizenships but not their state domiciles.

Second, the court reasoned that the history of congressional amendments to the diversity statute evinced a clear intent by Congress to limit federal diversity jurisdiction. It pointed to the 1988 amendment, which it interpreted as an attempt to "curtail jurisdiction between U.S. citizens and permanent residents domiciled in the same state." The court held that "[i]t would be incongruous with the statutory history if, without clear signs from the text or legislative record," the court "held that the 2011 [a]mendment unlocked a different door to jurisdiction."

In sum, the court articulated "a simple rule" for "determining whether there is diversity jurisdiction over a case involving an unincorporated association with lawful permanent resident members: If there would be no jurisdiction if the case involved only an unincorporated association's permanent resident members but not the association itself, there can be no jurisdiction in the case involving the unincorporated association." Because there would be diversity jurisdiction in a case between the Brownes (U.S. citizens domiciled in New York) and Devico (a Moroccan citizen and permanent resident domiciled in Florida), it reasoned, there was diversity jurisdiction in the case between the Brownes and Windward.

Conclusion

The Second Circuit's holding that state domicile is relevant to the diversity jurisdiction analysis in cases involving an unincorporated association with permanent resident members resolves a disagreement among district courts on this question. Because parties can raise subject matter jurisdiction issues at any time, we may see parties bring jurisdictional challenges in cases involving an unincorporated association with permanent resident members regarding the state domicile of those members. And going forward, before filing suit, parties to cases potentially involving an unincorporated association with permanent resident members should carefully consider the state domicile of those members, not just their national citizenship, in assessing whether the parties are diverse for jurisdictional purposes.