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## Note

### Determining a Corporation's Principal Place of Business: A Uniform Approach to Diversity Jurisdiction

*Lindsey D. Saunders\**

Where is a corporation located for purposes of diversity jurisdiction? As this question is fundamental to many lawsuits involving a corporation, we might expect the answer to be clear. Federal courts, however, use various tests to determine a corporation's location, providing several possible answers.

Surprisingly, scholars have been slow to address the lack of uniformity in this important area. Perhaps the legal community hesitates to disrupt widely accepted principles that the federal courts have used for almost half a century.<sup>1</sup> However, having various answers to the question of a corporation's location is not ideal. Nonuniformity encourages forum shopping at the federal level, breeds uncertainty, and, in many cases, serves to thwart Congress's intent to limit federal jurisdiction. The adoption of the Class Action Fairness Act of 2005 (CAFA or the Act), which makes it easier for corporate defendants to get into federal court, further complicates the situation.<sup>2</sup> There are

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1. The diversity jurisdiction statute, 28 U.S.C. § 1332, was amended in 1958 to establish that a corporation is a citizen of both its place of incorporation and its principal place of business. Pub. L. No. 85-554, 72 Stat. 415, 415 (1958) (codified at 28 U.S.C. § 1332 (2000)); *see also* S. REP. NO. 85-1830, at 2 (1958), *as reprinted in* 1958 U.S.C.C.A.N. 3099, 3099. That is when the federal courts began to develop the now widely accepted methods for determining the location of a corporation's principal place of business from those tests used to interpret the same language under the Bankruptcy Act. *Id.* at 4.

2. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (to be

now more opportunities for plaintiffs, defendants, and their attorneys to shop around for the best forum, class of plaintiffs, or choice of parties to sue.

Diversity jurisdiction, while familiar, continues to stoke heated debate and litigation all the way to the Supreme Court.<sup>3</sup> Because access to federal courts requires a jurisdictional basis,<sup>4</sup> the resourceful attorney will always look for a way to attack the opposing party on jurisdictional grounds. The interplay of CAFA with the nonuniformity of the principal place of business test provides a whole new dimension to this game.

This Note argues that either Congress or the Supreme Court should adopt a uniform test for determining a corporation's principal place of business for purposes of federal diversity jurisdiction. Part I of this Note briefly explains the history of diversity jurisdiction and the development of the federal courts' principal place of business tests. Part II describes each of the tests currently in use—the “nerve center” test, “corporate activities” test, and “total activity” test—and the circuit split regarding their application. Part III discusses the importance of designating a uniform test in light of CAFA and finds that, without one, forum shopping and “party-shopping” are encouraged. Part IV of this Note discusses the advantages and disadvantages of either limiting a corporation's citizenship to its state of incorporation or choosing one uniform method for determining a corporation's principal place of business. It concludes that the latter is the better option. Part IV also discusses three main considerations in selecting a test: providing a true representation of the corporation, fulfilling Congress's intent, and lessening the administrative burden on the courts. Finally, Part V proposes a uniform test based upon the total activity test.

## I. HISTORY OF DIVERSITY JURISDICTION AND PRINCIPAL PLACE OF BUSINESS TESTS

The Constitution confers upon the federal courts the power to adjudicate civil actions between parties from different

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codified at 28 U.S.C. §§ 1, 1711–15, 1332, 1335, 1603, 1453, 1441, 1651, 2074, 2071).

3. See, e.g., *Lincoln Prop. Co. v. Roche*, 126 S. Ct. 606, 610–16 (2005); *Wachovia Bank v. Schmidt*, 125 S. Ct. 2904, 2904 (2005) (mem.), *granting cert. to* 388 F.3d 414 (4th Cir. 2004).

4. See, e.g., *Ex parte McCardle*, 73 U.S. (6 Wall.) 318, 326–27 (1867) (indicating that jurisdiction is necessary for the Court to decide a matter).

states.<sup>5</sup> Congress currently limits diversity jurisdiction to cases where the amount in controversy is at least \$75,000 and no defendants are citizens of any state in which a plaintiff is a citizen.<sup>6</sup> Although an individual may be a citizen of only one state, a corporation may have dual citizenship—it is a citizen of the state in which it is incorporated *and* of the state where it has its principal place of business.<sup>7</sup>

Congress added the dual citizenship provision to 28 U.S.C. § 1332—the diversity statute—in 1958 in order to reduce the federal courts’ caseload.<sup>8</sup> Under the old statute, a corporation was only a citizen of its state of incorporation.<sup>9</sup> Therefore, a corporation engaged in local business could get into federal court if sued by a citizen of that same state merely because it had a corporate charter from a different state.<sup>10</sup> This meant that many cases arising under state law and between nondiverse parties were sneaking into the federal court system and burdening the federal docket.

Diversity jurisdiction is intended to provide an unbiased forum for foreign citizens.<sup>11</sup> Congress’s intent was to protect those foreign parties “against the prejudices of local courts and local juries by making available to them the benefits and safe-

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5. U.S. CONST. art. III, § 2, cl. 1.

6. 28 U.S.C. § 1332(a). This section provides:

The district courts shall have [diversity] jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000 . . . and is between—

- (1) citizens of different States;
- (2) citizens of a State and citizens or subjects of a foreign state;
- (3) citizens of different States in which citizens or subjects of a foreign state are additional parties; and
- (4) a foreign state . . . and citizens of a State or of different States.

*Id.*; see *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 373 (1978).

7. 28 U.S.C. § 1332. “For the purposes of this section . . . a corporation shall be deemed to be a citizen of any [s]tate by which it has been incorporated *and* of the [s]tate where it has its principal place of business . . .” *Id.* § 1332(c) (emphasis added).

8. Pub. L. No. 85-554, 72 Stat. 415, 415 (1958) (codified at 28 U.S.C. § 1332); see also S. REP. NO. 85-1830, at 3 (1958), as reprinted in 1958 U.S.C.C.A.N. 3099, 3101 (“In adopting this legislation, the committee feels that . . . it will ease the workload of our [f]ederal courts by reducing the number of cases involving corporations which come into [f]ederal district courts on the fictional premise that a diversity of citizenship exists.”).

9. See S. REP. NO. 85-1830, at 3 (1958), as reprinted in 1958 U.S.C.C.A.N. 3099, 3101.

10. See *id.* at 3101–02; see also *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518 (1928).

11. See S. REP. NO. 85-1830, at 4 (1958).

guards of the [f]ederal courts.”<sup>12</sup> But, a corporation is unlikely to face prejudice in a state where it has its principal place of business, so allowing it to remove to federal court when sued in its home state does not further Congress’s goal.<sup>13</sup> By amending § 1332, Congress sought to address these problems and reserve the federal courts for those cases in which the parties are truly diverse.<sup>14</sup>

While this concept may seem rather straightforward, § 1332 does not provide a method of determining a corporation’s principal place of business. Rather, Congress felt that there was ample precedent interpreting “principal place of business” under the Bankruptcy Act for the courts to make their own determinations.<sup>15</sup> Around the time of the 1958 amendment, courts used two tests to determine a corporation’s principal place of business under the Bankruptcy Act: the “home office” test and the “actual place of operations” test.<sup>16</sup> Courts using the home office test considered where the corporation kept its books and bank accounts, where it prepared correspondence and business reports, where it paid debts and generated sales, and where the officers lived and held shareholder meetings.<sup>17</sup> Courts using the actual place of operations test considered the location of the corporation’s mining, production, or manufacturing facilities.<sup>18</sup>

Without more guidance from Congress, the federal courts apply variations and combinations of three different tests to determine a corporation’s principal place of business under § 1332. The Bankruptcy Act’s home office test has evolved into the “nerve center” test and is the only test used in the Seventh Circuit.<sup>19</sup> The actual place of operations test is now the “corpo-

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12. *Id.*

13. *See id.* at 4–5.

14. *See id.* at 5.

15. *Id.*

16. *See Note, A Corporation’s Principal Place of Business for Purposes of Diversity Jurisdiction*, 44 MINN. L. REV. 308, 316 (1959) (referring to the two tests developed in the bankruptcy context as the “home office” test and the “actual place of operations” test).

17. *See, e.g., Shearin v. Cortez Oil Co.*, 92 F.2d 855, 858 (5th Cir. 1937); *Burdick v. Dillon*, 144 F. 737, 737 (1st Cir. 1906).

18. *See, e.g., Dryden v. Ranger Ref. & Pipe Line Co.*, 280 F. 257, 259 (5th Cir. 1922) (“The business of a corporation is its activities in the acquisition or production of that which its charter authorizes it to produce or acquire, and its dealings with its customers . . . .”); *Cont’l Coal Corp. v. Roszelle Bros.*, 242 F. 243, 247 (6th Cir. 1917).

19. *See Metro. Life Ins. Co. v. Estate of Cammon*, 929 F.2d 1220, 1223 (7th Cir. 1991); *Dimmitt & Owens Fin., Inc. v. United States*, 787 F.2d 1186,

rate activities” test and is the only test used in the Third Circuit.<sup>20</sup> Some circuits have combined the two tests into the “total activity” test,<sup>21</sup> while still others pick and choose which test to apply in any given situation.<sup>22</sup> As one businessman recently testified before Congress, “the rule is quite muddy.”<sup>23</sup>

## II. THE CIRCUIT SPLIT REGARDING THE PRINCIPAL PLACE OF BUSINESS TEST

As discussed above, the federal courts apply three main tests to determine a corporation’s principal place of business: the nerve center test, the corporate activities test, and the total activity test.

### A. THE NERVE CENTER TEST

The nerve center test considers a corporation’s principal place of business to be the place from which corporate decision making, policy making, control, and direction emanate.<sup>24</sup> More simply, it is the location of the “corporation’s brain.”<sup>25</sup> Under this test, the corporation’s principal place of business will usually, if not always, be the state in which its executive headquarters are located.<sup>26</sup>

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1191 (7th Cir. 1986).

20. See *Kelly v. U.S. Steel Corp.*, 284 F.2d 850, 853–54 (3d Cir. 1960).

21. See *MacGinnitie v. Hobbs Group, LLC*, 420 F.3d 1234, 1239 (11th Cir. 2005); *Capitol Indem. Corp. v. Russellville Steel Co.*, 367 F.3d 831, 836 (8th Cir. 2004); *Gadlin v. Sybron Int’l Corp.*, 222 F.3d 797, 799 (10th Cir. 2000); *Gafford v. Gen. Elec. Co.*, 997 F.2d 150, 162 (6th Cir. 1993); *J.A. Olson Co. v. City of Winona*, 818 F.2d 401, 411 (5th Cir. 1987).

22. See *Diaz-Rodriguez v. Pep Boys Corp.*, 410 F.3d 56, 61 (1st Cir. 2005); *Long v. Silver*, 248 F.3d 309, 314 (4th Cir. 2001); *Tosco Corp. v. Cmty. for a Better Env’t*, 236 F.3d 495, 500 (9th Cir. 2001); *R.G. Barry Corp. v. Mushroom Makers, Inc.*, 612 F.2d 651, 655 (2d Cir. 1979); *Masterson-Cook v. Criss Bros. Iron Works, Inc.*, 722 F. Supp. 810, 812 (D.D.C. 1989).

23. *Hearing on Regulatory Relief Proposals Before the S. Banking, Hous. and Urban Affairs Comm.*, 109th Cong. (2005) (statement of Steve Bartlett, President and Chief Executive Officer, Financial Services Roundtable), available at 2005 WLNR 9917862.

24. See *Capitol Indem. Corp.*, 367 F.3d at 835; *Metro. Life Ins. Co.*, 929 F.2d at 1223; *Vareka Invs., N.V. v. Am. Inv. Props., Inc.*, 724 F.2d 907, 910 (11th Cir. 1984); *Lugo-Vina v. Pueblo Int’l, Inc.*, 574 F.2d 41, 43 (1st Cir. 1978); *Scot Typewriter Co. v. Underwood Corp.*, 170 F. Supp. 862, 865 (S.D.N.Y. 1959).

25. *Wis. Knife Works v. Nat’l Metal Crafters*, 781 F.2d 1280, 1282 (7th Cir. 1986).

26. *Id.* (“[W]e look for the corporation’s brain, and ordinarily find it where the corporation has its headquarters.” (emphasis added)). But, in *Metropolitan*

For example, the defendant corporation in *Scot Typewriter Co. v. Underwood Corp.* manufactured typewriters in Connecticut, supplies in New Jersey, and missile components in California, and then shipped the products to over one hundred United States cities.<sup>27</sup> Most of the corporation's tangible property and the majority of its employees were located in Connecticut, but the corporation's executive offices were in New York.<sup>28</sup> The New York offices handled policy making and coordinated all of the personnel, public relations, purchasing, advertising, and sales-promotion activities.<sup>29</sup> Taking this evidence into consideration under the nerve center test, the district court found that the corporation's principal place of business was New York.<sup>30</sup>

The Seventh Circuit only applies the nerve center test.<sup>31</sup> It has explained that “[s]ome courts prefer a vaguer standard. They look not just to where the corporation has its headquarters but also to the distribution of the corporation's assets and employees. We prefer the simpler test. Jurisdiction ought to be readily determinable.”<sup>32</sup>

#### B. THE CORPORATE ACTIVITIES TEST

Under the corporate activities test, a corporation is a citizen of the state where the majority of the corporation's produc-

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*Life Insurance Co.*, the same court was more definitive and stated that “a corporation has a single principal place of business where its executive headquarters are located,” rather than “ordinarily” finding it where the executive headquarters are located. 929 F.2d at 1223.

27. *Scot Typewriter*, 170 F. Supp. at 864.

28. *See id.*

29. *See id.*

30. *See id.* at 865.

31. *See, e.g., Metro. Life Ins. Co.*, 929 F.2d at 1223 (“This court follows the ‘nerve center’ approach to corporate citizenship . . . .”); *Dimmitt & Owens Fin., Inc. v. United States*, 787 F.2d 1186, 1191 (7th Cir. 1986).

32. *Wis. Knife Works v. Nat'l Metal Crafters*, 781 F.2d 1280, 1282 (7th Cir. 1986); *see also Dimmitt & Owens Fin., Inc.*, 787 F.2d at 1191 (“Since certainty of jurisdiction is a desideratum too—the parties ought to know definitely what court they belong in, and not face the prospect that their litigation may be set at naught because they made a wrong guess about jurisdiction—this circuit has long used a simple ‘nerve center’ test for principal place of business.”). However, the Seventh Circuit has also stated that “[t]here are cases where a corporation's headquarters may be divided between states and cases where the nominal headquarters isn't really the directing intelligence of the corporation, and those cases could give trouble even under a simple ‘nerve center’ test.” *Wis. Knife Works*, 781 F.2d at 1282–83.

tion and service activities are located.<sup>33</sup> Courts look to the location of manufacturing, production, and sales centers, as well as the location of employees and officers.<sup>34</sup> Furthermore, courts may consider the location of tangible property, but such an element is “of lesser importance.”<sup>35</sup>

For example, in *Kelly v. United States Steel Corp.*, the defendant corporation’s officers were located in New York, its board of directors met there, and financial decisions were made in that state.<sup>36</sup> But the committee in charge of manufacturing, transportation, and general operations was located in Pennsylvania, along with a greater majority of the employees and tangible property than in any other state of corporate operations.<sup>37</sup> Thus, under the corporate activities test, the Third Circuit found that Pennsylvania was the corporation’s principal place of business.<sup>38</sup>

In adopting the corporate activities test, the Third Circuit held that “it is the activities rather than the occasional meeting of policy-making Directors which indicate the principal place of business.”<sup>39</sup> The Third Circuit has even gone so far as to state that an inactive corporation does not have dual citizenship.<sup>40</sup> Because business activities are determinative of the corporation’s principal place of business, a corporation that does not conduct business activities cannot have a principal place of business.<sup>41</sup>

### C. THE TOTAL ACTIVITY TEST

The total activity test is a combination of the nerve center and corporate activities tests—it takes into consideration all of the relevant factors regarding the location of both the corporation’s managerial and production- and service-related activities.<sup>42</sup> This test is used in the Fifth,<sup>43</sup> Sixth,<sup>44</sup> Eighth,<sup>45</sup> Tenth,<sup>46</sup>

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33. See, e.g., *Capitol Indem. Corp. v. Russellville Steel Co.*, 367 F.3d 831, 836 (8th Cir. 2004); *Tosco Corp. v. Cmty. for a Better Env’t*, 236 F.3d 495, 500 (9th Cir. 2001); *Kelly v. U.S. Steel Corp.*, 284 F.2d 850, 854 (3d Cir. 1960).

34. See *Tosco Corp.*, 236 F.3d at 500; *Kelly*, 284 F.2d at 854.

35. *Kelly*, 284 F.2d at 854.

36. See *id.* at 853–54.

37. See *id.* at 854.

38. See *id.*

39. See *id.*

40. See *Midlantic Nat’l Bank v. Hansen*, 48 F.3d 693, 696 (3d Cir. 1995).

41. See *id.*

42. See *Gafford v. Gen. Elec. Co.*, 997 F.2d 150, 163 (6th Cir. 1993) (stating that courts are to “tak[e] into consideration all relevant factors and [weigh]



and Eleventh<sup>47</sup> Circuits. Some of these courts, like the Fifth Circuit, have created presumptions that apply in certain fact scenarios:

(1) [W]hen considering a corporation whose operations are far flung, the sole nerve center of that corporation is more significant in determining [the] principal place of business; (2) when a corporation has its sole operation in one state and executive offices in another, the place of activity is regarded as more significant; but (3) when the activity of a corporation is passive and the 'brain' of the corporation is in another state, the situs of the corporation's 'brain' is given greater significance.<sup>48</sup>

The circuits that have adopted the total activity test look at all corporate activities because they have "recognize[d] that the nature of a corporation's activities will impact the relative importance of production activities, service activities, and corporate decision making."<sup>49</sup> Also, they find that this test is more flexible and is better suited to a modern business environment where corporations have complex and varied configurations.<sup>50</sup>

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them in light of the facts of each case"); *Harris v. Black Clawson Co.*, 961 F.2d 547, 549 (5th Cir. 1992); *Vareka Invs., N.V. v. Am. Inv. Proprs., Inc.*, 724 F.2d 907, 910 (11th Cir. 1984).

43. See, e.g., *Teal Energy USA, Inc. v. GT, Inc.*, 369 F.3d 873, 877 (5th Cir. 2004); *Harris*, 961 F.2d at 549; *J.A. Olson Co. v. City of Winona*, 818 F.2d 401, 404 (5th Cir. 1987).

44. See, e.g., *Gafford*, 997 F.2d at 163.

45. See, e.g., *Capitol Indem. Corp. v. Russellville Steel Co.*, 367 F.3d 831, 836 (8th Cir. 2004). The dissent also recognized "the newly adopted 'total activities' test for determining a principal place of business." *Id.* at 838 (Colloton, J., dissenting).

46. See, e.g., *Gadlin v. Sybron Int'l Corp.*, 222 F.3d 797, 799 (10th Cir. 2000); *Amoco Rocmount Co. v. Anschutz Corp.*, 7 F.3d 909, 915 (10th Cir. 1993).

47. See, e.g., *MacGinnitie v. Hobbs Group, LLC*, 420 F.3d 1234, 1239 (11th Cir. 2005); *Bel-Bel Int'l Corp. v. Cmty. Bank of Homestead*, 162 F.3d 1101, 1106 (11th Cir. 1998).

48. *J.A. Olson Co.*, 818 F.2d at 411 (citations omitted); see also *Sweet Pea Marine, Ltd. v. APJ Marine, Inc.*, 411 F.3d 1242, 1248 (11th Cir. 2005) (noting that where a company's activities are not concentrated in one place, "[a] district court [is] entitled to give these 'nerve-center'-related facts greater significance in determining [the principal place of business]"); *Riggs v. Island Creek Coal Co.*, 542 F.2d 339, 342 (6th Cir. 1976) (stating that where a corporation conducts the majority of its business nationally, "the corporation's headquarters assumes more significance as the compelling factor in the principal place of business test").

49. *Capitol Indem. Corp.*, 367 F.3d at 836.

50. See *id.* (stating that the court "find[s] [the total activity] test to be the most appropriate and least limiting of the tests other circuits have applied"); *Amoco Rocmount Co.*, 7 F.3d at 915 ("This totality of the circumstances approach avoids the difficult choice between the two other tests, and also provides the needed flexibility to address the myriad incarnations of corporate

For example, in *Village Fair Shopping Center Co. v. Sam Broadhead Trust*, a real estate company had its only office in New York but had invested in a shopping center in Mississippi, a shopping center in California, and commercial paper and bank accounts in New York.<sup>51</sup> All corporate decisions were made in New York, and two of the three stockholders resided in that state.<sup>52</sup> In applying the total activity test, the Fifth Circuit determined that New York was the corporation's principal place of business because the activity in that state was the most significant: New York was home to the management activities and the most tangible assets.<sup>53</sup>

Another example is *Teal Energy USA, Inc. v. GT, Inc.*, in which the plaintiff corporation engaged in oil and gas investment activities in the United States and had its only domestic office in Texas.<sup>54</sup> Its executive offices were located in Calgary, Canada.<sup>55</sup> The company's shareholder meetings were held in Calgary, where most major officers lived, and all major decisions relating to corporate operations were made at that location.<sup>56</sup> However, since Texas was the only state in which the company engaged in operations, the court found that the "nerve center" did not predominate in determining its principal place of business.<sup>57</sup> It upheld the lower court's determination that, "[u]nder the total activity test, a corporation . . . with significant administrative authority and activity in one state and lesser executive offices but principal operations in another state has its principal place of business in the latter."<sup>58</sup> Because the company conducted its daily business in Texas and earned all revenue through those operations, all business assets and records were located in Texas, and some of the officers resided there, the Fifth Circuit determined that Texas was the corporation's principal place of business.<sup>59</sup>

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form and operations.").

51. See 588 F.2d 431, 433 (5th Cir. 1979).

52. See *id.*

53. See *id.* at 433–34.

54. See 369 F.3d 873, 875 (5th Cir. 2004).

55. See *id.* at 876.

56. See *id.*

57. *Id.*

58. *Id.* at 877 (alteration in original).

59. See *id.* at 876–77.

#### D. USING THE NERVE CENTER AND CORPORATE ACTIVITIES TESTS SEPARATELY

Although courts commonly combine the nerve center and corporate activities tests, some circuits choose to retain them individually. The nerve center test used to be the First Circuit's primary test.<sup>60</sup> Now, however, the First Circuit requires district courts to "use either the nerve center test or the [corporate activities test],<sup>61</sup> depending on the characteristics of the corporation."<sup>62</sup> That circuit has determined that the nerve center test was created only for cases involving a "large corporate enterprise with complex and farflung activities."<sup>63</sup> So, courts apply the corporate activities test to determine a corporation's principal place of business when most of that corporation's physical operations are located in one state, even if the corporate headquarters are located in another state.<sup>64</sup>

The Second Circuit and the U.S. District Court for the District of Columbia recognize both tests by creating presumptions. For instance, both courts give the corporate headquarters more weight in determining the principal place of business of a corporation that has operations spread across multiple states.<sup>65</sup> But, when corporate operations are centralized, the Second Circuit attributes less weight to the nerve center and instead focuses on the state where the corporation has the most public interaction.<sup>66</sup>

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60. See, e.g., *Lugo-Vina v. Pueblo Int'l, Inc.*, 574 F.2d 41, 43 (1st Cir. 1978). The First Circuit had looked to a line of cases following *Scot Typewriter Co. v. Underwood Corp.*, in which the court stated that the principal place of business, or "nerve center," was the place from which the corporation's "officers direct, control, and coordinate all activities without regard to locale, in the furtherance of the corporate objective." 170 F. Supp. 862, 865 (S.D.N.Y. 1959). That line of cases has determined the "nerve center" to be "only in the locale where a substantial degree of direction of the enterprise, if not all important decision-making, occurs." *Lugo-Vina*, 574 F.2d at 43-44.

61. The First Circuit has chosen to use the term "locus of operations," but notes that it often "is largely indistinguishable" from the "corporate activities test." *Diaz-Rodriguez v. Pep Boys Corp.*, 410 F.3d 56, 61 (1st Cir. 2005).

62. *Id.* The First Circuit concedes that the framework it sets forth is very similar to the "total activity" test. *Id.* at 61 n.4.

63. *De Walker v. Pueblo Int'l, Inc.*, 569 F.2d 1169, 1172 (1st Cir. 1978) (quoting *Epstein v. Guilford Indus., Inc.*, 218 F. Supp. 286, 288 (S.D.N.Y. 1963)).

64. See *Diaz-Rodriguez*, 410 F.3d at 61.

65. See *R.G. Barry Corp. v. Mushroom Makers, Inc.*, 612 F.2d 651, 655 (2d Cir. 1979); *Masterson-Cook v. Criss Bros. Iron Works, Inc.*, 722 F. Supp. 810, 812 (D.D.C. 1989).

66. See *R.G. Barry Corp.*, 612 F.2d at 655.

The Fourth Circuit also recognizes both the nerve center and corporate activities tests, but has not combined them into the total activity test.<sup>67</sup> Instead, this circuit has found that the corporate activities test “presumes the existence of physical operations by which a corporation’s presence in different states can be measured. As a result, the test is applied when a company has multiple centers of manufacturing, purchasing, or sales.”<sup>68</sup> On the other hand, “a corporation engaged primarily in the ownership and management of investment assets . . . is not really geographically bound, . . . [and] a jurisdictional test focusing on the location of operations makes little sense” because those corporations can easily move their assets.<sup>69</sup>

The Ninth Circuit applies the corporate activities test “unless the plaintiff shows that its activities do not substantially predominate in any one state.”<sup>70</sup> This determination requires the plaintiff to compare the corporation’s activities in the particular state with its activity in other individual states.<sup>71</sup> The factors to consider are “the location of employees, tangible property, production activities, sources of income, and where sales take place.”<sup>72</sup> In *Breitman v. May Co. California*, where the defendant corporation had operations in over thirty states, the Ninth Circuit decided that the corporate activities test was inappropriate because the business activities did not substantially predominate in a single state.<sup>73</sup> Thus, it applied the nerve center test.<sup>74</sup>

The Ninth Circuit adopted this approach after determining that “courts generally assign greater importance to the corpo-

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67. See *Long v. Silver*, 248 F.3d 309, 314 (4th Cir. 2001); *Athena Auto., Inc. v. DiGregorio*, 166 F.3d 288, 290 (4th Cir. 1999); *Peterson v. Cooley*, 142 F.3d 181, 184 (4th Cir. 1998).

68. *Peterson*, 142 F.3d at 184; see also *Athena Auto.*, 166 F.3d at 290.

69. *Peterson*, 142 F.3d at 184.

70. *Tosco Corp. v. Cmtys. for a Better Env’t*, 236 F.3d 495, 500 (9th Cir. 2001); see *United Computer Sys., Inc. v. AT&T Corp.*, 298 F.3d 756, 763 (9th Cir. 2002); *Montrose Chem. Corp. of Cal. v. Am. Motorists Ins. Co.*, 117 F.3d 1128, 1134 (9th Cir. 1997); *Indus. Tectonics, Inc. v. Aero Alloy*, 912 F.2d 1090, 1094 (9th Cir. 1990) (“We hold that, where a majority of a corporation’s business activity takes place in one state, that state is the corporation’s principal place of business, even if the corporate headquarters are located in a different state. The ‘nerve center’ test should be used only when no state contains a substantial predominance of the corporation’s business activities.”).

71. See *Tosco Corp.*, 236 F.3d at 500.

72. *Id.*; *Indus. Tectonics, Inc.*, 912 F.2d at 1094.

73. See 37 F.3d 562, 564 (9th Cir. 1994).

74. See *id.*

rate headquarters when no state is clearly the center of corporate activity, and assign greater importance to the location of the corporate business when substantially all business operations take place in a single state.”<sup>75</sup> And, the Ninth Circuit has defended its application of § 1332: First, corporations tend to have more contact with the public in the state in which they conduct the majority of their business—not the location where policy making occurs—thus, there should not be local prejudice in that state.<sup>76</sup> Second, litigation in the corporate context usually results from the corporation’s public interaction.<sup>77</sup> Therefore, the state in which the corporation has the most public contact is also the state in which it is most likely to be subject to litigation.<sup>78</sup> If that state is considered the corporation’s principal place of business, it will help reduce the federal caseload.<sup>79</sup>

### III. THE IMPORTANCE OF CREATING A UNIFORM TEST TO DETERMINE A CORPORATION’S PRINCIPAL PLACE OF BUSINESS

The lack of uniformity in determining a corporation’s principal place of business for purposes of diversity jurisdiction is problematic. For one thing, there is a desire for uniformity that is inherent in the federal court system.<sup>80</sup> Without it, the abusive practice of forum shopping will be prevalent at the federal level. Furthermore, the recently-enacted CAFA is meant to reduce the amount of adversity faced by corporate defendants.<sup>81</sup>

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75. *Indus. Tectonics, Inc.*, 912 F.2d at 1093; see *Bialac v. Harsh Bldg. Co.*, 463 F.2d 1185, 1186 (9th Cir. 1972) (“[W]here a corporation is engaged in only one business activity, substantially all of whose operations occur in one state, even though policy and administrative decisions are made elsewhere, the state of operations is the corporation’s principal place of business.”).

76. See *Indus. Tectonics, Inc.*, 912 F.2d at 1094 (“Activities such as employment of personnel, purchasing of materials, and sales of goods and services increase local familiarity with the corporation. This local contact alleviates problems with local prejudice against outsiders and justifies consideration of the corporation as a citizen of that state.”).

77. See *id.*

78. See *id.*

79. See *id.* Reducing the federal caseload was one of the goals in adding the principal place of business citizenship requirement. See S. REP. NO. 85-1830, at 3 (1958), as reprinted in 1958 U.S.C.C.A.N. 3099, 3101.

80. See *Hanna v. Plumer*, 380 U.S. 460, 472 (1965); *Bank of the U.S. v. Deveaux*, 9 U.S. (5 Cranch) 61, 83 (1809).

81. See S. REP. NO. 109-14, at 5 (2005), as reprinted in 2005 U.S.C.C.A.N. 3, 6.

Until all circuit courts apply one test, however, Congress's intent will not be served.

#### A. FORUM SHOPPING AT THE FEDERAL LEVEL

One reason that federal courts exist is to provide uniformity in the law,<sup>82</sup> and one function of a uniform system is to eliminate the incentive to forum shop.<sup>83</sup> Forum shopping is the practice by which a litigant attempts to “choos[e] the most favorable jurisdiction or court in which a claim might be heard.”<sup>84</sup> Although some argue that forum shopping is a litigation tool to be employed when necessary to adequately represent a client,<sup>85</sup> both the courts and Congress strongly disfavor the practice.<sup>86</sup>

Forum shopping is often thought of in the context of deciding whether to file suit in a state court versus a federal court.<sup>87</sup> In this case, however, it is a matter of filing in one federal court or another.<sup>88</sup> Because the federal courts lack a uniform test, the

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82. *Deveaux*, 9 U.S. (5 Cranch) at 83 (“One great object in allowing citizens of different states to sue in the federal courts, was to obtain a uniformity of decision in cases of a commercial nature.”); see *Hanna*, 380 U.S. at 472 (“One of the shaping purposes of the Federal Rules is to bring about uniformity in the federal courts by getting away from local rules. This is especially true of matters which relate to the administration of legal proceedings . . . .” (quoting *Lumbermen’s Mut. Cas. Co. v. Wright*, 322 F.2d 759, 764 (5th Cir. 1963))). Although that case refers to the Federal Rules of Civil Procedure, it seems that the same concept would be true of the federal diversity statute—because a case may be dismissed under the uniform Federal Rules for lack of diversity, see FED. R. CIV. P. 12(b)(1), a uniform test for determining whether diversity exists should be used rather than a particular circuit’s local rule.

83. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (attempting to limit state-federal forum shopping by holding that “[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the state”).

84. BLACK’S LAW DICTIONARY 681 (8th ed. 2004). Forum shopping has also been defined as “the practice of plaintiffs’ attorneys seeking out the least defendant-friendly judicial jurisdictions in which to file lawsuits.” *Forum Shopping Under Fire*, BUS. INS., Jan. 31, 2005, at 8.

85. See Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677, 1691 (1990) (“[T]he adversarial role of the lawyer demands forum shopping when necessary to protect the legitimate interests of the client.”).

86. See, e.g., *Semtek Int’l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508–09 (2001); *Erie*, 304 U.S. at 78; *House Again Takes Lead in Meaningful Tort Reform*, BUS. INS. May 30, 2005, at 8 (discussing a bill “which would require mandatory sanctions on attorneys who bring frivolous lawsuits and which would curb the abusive practice of so-called ‘forum shopping’”).

87. It is widely believed that federal courts are more defendant-friendly forums than are state courts. See Heather R. Barber, *Removal and Remand*, 37 LOY. L.A. L. REV. 1555, 1555 (2004).

88. See Bruce V. Spiva & Jonathan K. Tycko, *Indirect Purchaser Litiga-*

incentive remains to find the most favorable forum. This becomes an issue where, for example, a corporation is sued in three separate circuits, each applying a different test. It may be the case that each circuit will find the corporation's principal place of business to be in a different state. The savvy plaintiff's attorney will attempt to sue the corporation in the circuit where the test used will favor the plaintiff's position.<sup>89</sup> Such differential treatment provides no stability or predictability for those corporate parties whose business activities make them prone to suit in more than one circuit.

#### B. THE CLASS ACTION FAIRNESS ACT OF 2005

Congress enacted the Class Action Fairness Act of 2005 in order to "assure fair and prompt recoveries for class members with legitimate claims" and to provide for expanded federal jurisdiction.<sup>90</sup> Congress also intended to prevent forum shopping.<sup>91</sup> In a legal system devoid of a uniform principal place of business test, however, forum shopping may simply be replaced by "defendant- and plaintiff-shopping."

CAFA makes it easier for corporate defendants to get into federal court. It does this by allowing a case filed as a class action in state court to be removed to federal court regardless of whether the defendant is a citizen of that state.<sup>92</sup> In fact, if the defendant properly removes the class action, there is a "strong preference" that it be heard in federal court.<sup>93</sup>

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*tion on Behalf of Consumers After CAFA*, 20 ANTITRUST, Fall 2005, at 12, 12 ("To the extent outcome is determined by forum, the outcome of any particular case is likely to be determined less by whether it is decided in a federal or state court than by the particular federal court that ultimately decides it, just as is the case now with respect to both state and federal courts.").

89. *Forum Shopping Under Fire*, *supra* note 84 ("It doesn't matter that, in many cases, the plaintiffs' and defendants' ties to the jurisdiction are tenuous at best. The result can be something considerably less than justice for the defendants.").

90. Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(b)(1), 119 Stat. 4, 5 (to be codified at 28 U.S.C. § 1453).

91. See GEORGENE M. VAIRO, THE CLASS ACTION FAIRNESS ACT OF 2005, at 1 (2005). "The purpose of the Act . . . is 'to prevent judge shopping to States and even counties where courts and judges have a prejudicial predisposition on cases.'" *Id.* (quoting 151 CONG. REC. S999 (daily ed. Feb. 7, 2005) (statement of Sen. Arlen Specter, Chair of the Senate Judiciary Committee)).

92. See Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 5, 119 Stat. 4, 12 (to be codified at 28 U.S.C. § 1453).

93. See S. REP. NO. 109-14, at 43 (2005), as reprinted in 2005 U.S.C.C.A.N. 3, 41.

The Act also makes it easier for defendants to get into federal court by eliminating the requirement of complete diversity in the class action context. Instead of requiring every single member of a class of plaintiffs to be from a different state than every named defendant, as is necessary for federal jurisdiction over other types of lawsuits,<sup>94</sup> this provision enforces a much looser requirement:

The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs, and is a class action in which—

(A) *any* member of a class of plaintiffs is a citizen of a State different from *any* defendant;

(B) *any* member of a class of plaintiffs is a foreign state or a citizen subject of a foreign state and *any* defendant is a citizen of a State; or

(C) *any* member of a class of plaintiffs is a citizen of a State and *any* defendant is a foreign state or a citizen or subject of a foreign state.<sup>95</sup>

Thus, it is only necessary that a single member of the plaintiff's class be of diverse citizenship from any named defendant. The Act does, however, afford federal district courts the discretion to decline jurisdiction in certain situations,<sup>96</sup> and it even requires them to decline jurisdiction in others.<sup>97</sup>

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94. See 28 U.S.C. § 1332(a).

95. Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 4, 119 Stat. 4, 9 (to be codified at 28 U.S.C. § 1332(d)(2)) (emphasis added).

96. See *id.* (to be codified at 28 U.S.C. § 1332(d)). This section of the Class Action Fairness Act of 2005 amends 28 U.S.C. § 1332 (2000) to provide as follows:

A district court *may*, in the interests of justice and looking at the totality of the circumstances, decline to exercise jurisdiction . . . over a class action in which greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed based on consideration of—

(A) whether the claims asserted involve matters of national or interstate interest;

(B) whether the claims asserted will be governed by laws of the State in which the action was originally filed or by the laws of other States;

(C) whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction;

(D) whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants . . . .

*Id.* (amending 28 U.S.C. § 1332(d)(3)) (emphasis added).

97. See *id.* (to be codified at 28 U.S.C. § 1332(d)(4)).



The situations in which a federal court *must* decline jurisdiction require a determination of which defendant is the “primary” defendant and which defendants are “significant”:

A district court *shall decline* to exercise jurisdiction . . .

(A)(i) over a class action in which—

(I) greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed; [and]

(II) at least [one] defendant is a defendant—

(aa) from whom *significant* relief is sought by members of the plaintiff class;

(bb) whose alleged conduct forms a *significant* basis for the claims asserted by the proposed plaintiff class; and

(cc) who is a citizen of the State in which the action was originally filed . . . or

(B) two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the *primary* defendants, are citizens of the State in which the action was originally filed.<sup>98</sup>

As is evident, one of the criteria that the court considers in declining jurisdiction is whether more than two-thirds of the plaintiffs, *and* a defendant whose conduct is a *significant* source of the complaint, are “citizen[s] of the State in which the action was originally filed.”<sup>99</sup> Or, if at least two-thirds of all proposed plaintiffs, *and* the *primary* defendants, are citizens of that state, then the court must decline to exercise jurisdiction, and the plaintiffs will succeed in remaining in a local state court.<sup>100</sup> One commentator has noted that the courts will make these determinations based upon the defendants named in the plaintiffs’ cause of action.<sup>101</sup> Because the plaintiffs will likely want to remain in state court, CAFA creates an incentive to avoid naming out-of-state defendants in their complaint.<sup>102</sup>

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98. *Id.* (emphasis added). The portion laid out in the text has been selected for purposes of highlighting the difference between “primary” and “significant” defendants, but there are additional requirements that have been omitted which are nevertheless necessary for a court to decline jurisdiction under this provision. *See id.*

99. *Id.* (to be codified at 28 U.S.C. § 1332(d)(4)(A)(i)(II)(cc)). In conjunction with the necessary citizenship of that defendant and class of plaintiffs, the main injuries caused by that defendant must have occurred in the state where the action was originally filed. *Id.* (to be codified at 28 U.S.C. § 1332(d)(4)(A)(i)).

100. *See id.* (to be codified at 28 U.S.C. §§ 1332(d)(4)(A)–(B)).

101. *See VAIRO, supra* note 91, at 30.

102. *See id.* One class action defense lawyer has already noticed suspicious behavior on behalf of plaintiffs’ attorneys. *See* Correy E. Stephenson, *Class Ac-*

This means that plaintiffs who have a choice of defendants will engage in “defendant-shopping.” They will sue the corporation whose principal place of business under the relevant circuit test will be the state in which the plaintiffs are also citizens.<sup>103</sup> Thus, the defendant corporations will be prejudiced in certain jurisdictions depending upon which test the circuit applies.

The lack of uniformity also encourages “plaintiff-shopping” under CAFA. Parties involved in litigation in federal court have the ability to transfer to a different federal court for convenience purposes.<sup>104</sup> Although the transferred case will not be subject to the transferee court’s choice of law,<sup>105</sup> and thus the plaintiff’s attorney will not fear losing control over the substantive law to be applied, she will still fear losing the ability to litigate in her chosen venue. This provides yet another reason to avoid the federal system where the defendant may seek a change of venue. So, where the attorney has the ability to represent numerous plaintiffs, she will engage in “plaintiff-shopping” to form a class from those individuals who will destroy diversity under CAFA.

In the end, CAFA may cause as much prejudice as Congress intended for it to reduce. The goal is no longer to find a local court in which the judge and jury will treat the party’s cause of action more favorably, as the defendant will have an easier time removing the case to a federal court in any jurisdiction. Rather, the goal is to choose a defendant or class of plaintiffs based on satisfying those limited instances in which diver-

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*tion Reform Law Is Slow to Impact System*, MINN. LAW., Oct. 24, 2005, at 5 (“What I’ve seen in some complaints is plaintiffs’ counsel attempting to track the language of the exceptions as closely as possible, and frame their allegations to the statutory exceptions.” (quoting Donald R. Frederico, a Boston class action defense lawyer)).

103. See Andrée Sophia Blumstein, *A New Road to Resolution: The Class Action Fairness Act of 2005*, 41 TENN. B.J., Apr. 2005, at 16, 23 (2005) (“[P]laintiffs’ counsel will have an incentive to fit the [exceptions] in order to avoid removal . . . . A carefully pled state court case is especially likely to remain in state court when the defendants are companies with their principal places of business in the forum state.”).

104. See 28 U.S.C. § 1404(a) (2000) (“For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.”).

105. See *Ferens v. John Deere Co.*, 494 U.S. 516, 523 (1990) (“[A] transferee forum [must] apply the law of the transferor court, regardless of who initiates the transfer.”); *Van Dusen v. Barrack*, 376 U.S. 612, 639 (1964) (“[W]here defendants seek transfer, the transferee district court must be obligated to apply the state law that would have been applied if there had been no change of venue.”).

sity can be destroyed and the defendant prevented from removing to federal court. Therefore, in a system with no uniform principal place of business test, CAFA may lessen forum shopping only to encourage “defendant- and plaintiff-shopping.”

### C. CASE IN POINT: AN EXAMPLE OF THE DISPARITY

To illustrate the problem, consider a hypothetical corporation.<sup>106</sup> *D* is an oil company incorporated in Delaware. Its main corporate headquarters are in Wisconsin; however, it also has refining and lubricant company headquarters in Texas and marketing headquarters in Arizona. *D*'s New Jersey refinery comprises roughly 40 percent of *D*'s total refining capacity, and *D*'s Texas refinery comprises roughly 30 percent. *D* has two lubricant blending and packaging facilities in New Jersey and two in separate states. *D* operates 37 percent of its retail locations in Texas with others scattered in various states, including Wisconsin and New Jersey. *D* has convenience stores located in numerous states, including Wisconsin and Texas, with the most stores located in New Jersey. *D* generates roughly 30 percent of its sales from its New Jersey operations and 25 percent from its Texas operations. Finally, 24 percent of *D*'s employees are located in New Jersey and 21 percent in Texas.

Assume that *D* is sued under state law for product liability in excess of \$75,000 in Wisconsin by a Wisconsin citizen, in New Jersey by a New Jersey citizen, and in Texas by a Texas citizen. For various reasons, *D* prefers to enter federal court in each case. Each of those states is part of a different federal circuit and applies a different principal place of business test.

Wisconsin is part of the Seventh Circuit and therefore applies the nerve center test. The important consideration is the location of the executive headquarters. In this scenario, the analysis is rather straightforward—Wisconsin is the site of the main corporate headquarters, and therefore, Wisconsin is the corporation's principal place of business.

New Jersey is part of the Third Circuit, which applies the corporate activities test. The important factors to consider are the location of any manufacturing and production centers, as well as the location of sales outlets and employees. Wisconsin is home to none of *D*'s corporate activities, so it is not the princi-

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106. The facts used in this example are loosely based upon those of the plaintiff corporation in *Tosco Corp. v. Communities for a Better Environment*. See 236 F.3d 495, 501–02 (9th Cir. 2001).

pal place of business under this test. New Jersey and Texas, however, are both home to some of *D*'s corporate activities. New Jersey houses 40 percent of *D*'s refinery capacity, while Texas only holds 30 percent. Likewise, New Jersey has two packaging facilities, while Texas has none. New Jersey also has the greatest number of *D*'s convenience stores and employees, but Texas has the majority of *D*'s retail locations and comes in a close second in sales and number of employees. When weighing this information, the Third Circuit would likely determine that *D*'s principal place of business is New Jersey because that is the state in which most of *D*'s manufacturing, production, and sales occur.

Texas is part of the Fifth Circuit, which applies the total activity test and considers the location of the corporation's managerial, production, and service activities. Despite having the most significant managerial activities, Wisconsin is probably not *D*'s principal place of business under this test because it houses none of *D*'s corporate activities. Although New Jersey houses the majority of the corporate activities, it has no managerial offices. Texas, on the other hand, is the home of two of the miniheadquarters. Furthermore, Texas does have a majority of the retail operations and comes in a close second in every other corporate activity. Thus, the Fifth Circuit would likely find that Texas is *D*'s principal place of business because it has more executive offices and only slightly less principal operations.

*D*'s principal place of business is different under each of the available tests. This means that *D* has citizenship in four states (including Delaware, its state of incorporation), rather than the two provided for in § 1332,<sup>107</sup> and it will not be able to invoke diversity jurisdiction in any of the above cases. Furthermore, if these are all separate class-action claims, it is possible that CAFA provisions destroying diversity would be satisfied in all three cases.

Now, compare *D* to *X*, a corporation that collaborates with *D* to create numerous products and which has a factual situation very similar to *D*'s scenario. The only difference is that *X*'s miniheadquarters are in New Jersey rather than Texas. *X* will still have its principal place of business in Wisconsin under the Seventh Circuit's nerve center test and in New Jersey under the Third Circuit's corporate activities test. However, *X*'s prin-

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107. See 28 U.S.C. § 1332(c)(1) (2000).

principal place of business will also be in New Jersey under the Fifth Circuit's total activity test. New Jersey is home to some of *X*'s managerial activities and the majority of its corporate activities, while Texas houses none of *X*'s managerial activities. Therefore, *X* will be able to invoke diversity jurisdiction in Texas and get into federal court.

This exemplifies the prejudice that *D* will face in comparison to *X*. The corporations are similarly situated in terms of the amount of contact each has with the public and the possibility of being named as a defendant in a lawsuit. Due to the nonuniformity of the principal place of business test, Texas plaintiffs with a claim against both corporations will have an incentive to sue *D* rather than *X* to avoid diversity and remain in the state courts. If the lawsuit is a class action with *X* as the only possible defendant, a prospective plaintiff's attorney will have an incentive to select from its possible clients a class of plaintiffs that can sue in Wisconsin or New Jersey. This incentive will in turn negatively affect the Texas citizens, as the attorney will want to represent fewer of them in comparison to Wisconsin or New Jersey citizens.

Designating a uniform principal place of business test will help alleviate these inefficiencies and will avoid prejudicing corporate defendants. Corporations will no longer be adversely situated as compared to similar entities because of a legal fiction. A uniform test will also limit potential "party-shopping" under CAFA and will keep corporate defendants in local court only when the parties truly are not diverse.

#### IV. POSSIBLE SOLUTIONS

Because uniformity is desirable in the federal court system, and the "shopping" problems discussed above will only become more prevalent under CAFA, the courts should use one method to determine a corporation's principal place of business. There are several possible solutions, but three in particular are the strongest contenders: limit corporations' state of citizenship to the state in which they are incorporated; choose one of the three tests discussed above and require all federal courts to use that test; or, follow the First, Fourth, and Ninth Circuits in recognizing both tests and develop a uniform test that emphasizes certain factors depending upon the factual circumstances.

A. REMOVE THE DUAL CITIZENSHIP PROVISION AND LIMIT CORPORATIONS' CITIZENSHIP TO STATE OF INCORPORATION

The easiest solution to the principal place of business problem is to eliminate the provision altogether and simply maintain that corporations are only citizens of their state of incorporation. This would be an administrative dream because a simple glance at the corporation's charter papers would settle the issue. This method could potentially save all parties involved, including the courts, from expending resources on subject-matter-jurisdiction sub litigation.

First, determining a corporation's citizenship would not require lengthy and costly discovery proceedings.<sup>108</sup> Therefore, a party would not have "to weigh the difficulty and expense of proving the existence [or nonexistence] of diversity against the advantages to be gained from entering [or not entering] the federal courts."<sup>109</sup> Any bargaining power that a defendant corporation with deep pockets may have over a plaintiff by way of threatening to challenge jurisdiction would be removed.<sup>110</sup> This would be especially important to the plaintiff whose claim involves a matter in which time is of the essence.<sup>111</sup> Second, there would be reduced risk that, because a party may challenge subject matter jurisdiction at any point during the action,<sup>112</sup> newly-discovered data late in the litigation would result in a delayed dismissal due to lack of diversity.

The drafters of Uniform Commercial Code Revised Article 9 adopted this solution in making a similar determination of where state security interests should be filed in a multistate transaction. Article 9 provides that some security interest filings are to be made "where the debtor is located."<sup>113</sup> Prior to the 2001 revision, a debtor was "deemed located at his place of business if he ha[d] one," or "at his chief executive office if he ha[d] more than one place of business."<sup>114</sup> The term "chief ex-

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108. See Note, *supra* note 16, at 322.

109. *Id.* Because the information regarding citizenship likely "would not add anything to the *substantive* cause of action, . . . its utility might not be commensurate with the cost of discovering it." *Id.*

110. See *id.* at 323.

111. See *id.*

112. FED. R. CIV. P. 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.")

113. See U.C.C. § 9-301(1) (2001) (amended 2005); U.C.C. § 9-103(3) (1999) (amended 2001).

114. U.C.C. § 9-103(3)(d).

ecutive office” was not to mean the place where the corporation was organized, but rather the place where the business was managed.<sup>115</sup> Even then, the drafters recognized that “[d]oubt may arise as to which is the ‘chief executive office’ of a multi-state enterprise.”<sup>116</sup> One scholar noted the significant burden this uncertainty placed on parties in terms of time and money.<sup>117</sup>

Uniform Commercial Code Revised Article 9 addresses these problems. The security interest filing provisions now provide that a debtor corporation is located in its state of incorporation.<sup>118</sup> So, a business incorporated in Delaware is located in Delaware, despite the fact that its executive office is in Minnesota and it conducts most of its business in Wisconsin.<sup>119</sup> Thus, “all [of] the ambiguity about location [is] gone. The messy, practical question about where the CEO goes to work and whether that is the chief office [is not] relevant.”<sup>120</sup>

Although limiting the principal place of business to the state of incorporation is efficient, it is contrary to Congress’s intent to limit the federal caseload as discussed in Part I. Many corporations organized in Delaware conduct minimal business in that state.<sup>121</sup> Therefore, it would be a rare situation in which diversity of citizenship could be destroyed for those corporations. A Delaware citizen would have to sue the corporation, which would be unlikely since the corporation has such minimal contact with the public, and thus incurs minimal liability,

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115. See U.C.C. § 9-103 cmt. 5(c).

116. *Id.*

117. See Lynn M. Lopucki, *Why the Debtor’s State of Incorporation Should be the Proper Place for Article 9 Filing: A Systems Analysis*, 79 MINN. L. REV. 577, 581, 590, 597–98 (1995).

118. See U.C.C. § 9-307(e) (2005) (“A registered organization that is organized under the law of a State is located in that State.”).

119. See UNIFORM COMMERCIAL CODE SECURED TRANSACTIONS 800 (James J. White & Robert S. Summers eds., 5th ed. 2000).

120. *Id.*

121. As of 2003, half of all U.S. public companies were incorporated in Delaware. Guhan Subramanian, *The Disappearing Delaware Effect*, 20 J.L. ECON. & ORG. 32, 33 (2004). Delaware attracts these corporations because it has an advanced incorporation statute, a judiciary with expertise in the corporate realm, a state department devoted solely to its corporate citizens, and favorable tax laws. *E.g.*, Rodman Ward, Jr. & Erin Kelly, *Why Delaware Leads in the United States as a Corporate Domicile*, 9 DEL. LAW. 15, 16–17 (1991). However, simply because these companies are incorporated in Delaware does not mean they do business there. Rather, the corporation is only required to have one person or entity in that state: the corporation’s “registered agent.” *Id.* at 18.

in that state.<sup>122</sup> Therefore, by restoring § 1332 to its pre-1958 status, which provided that a corporation was only a citizen of its state of incorporation, the federal caseload would increase. Such a change, although providing for certainty, administrative ease, and conservation of resources, would thwart Congress's intent in amending the statute in the first place.

B. RETAIN THE DUAL CITIZENSHIP PROVISION AND CHOOSE ONE METHOD TO DETERMINE A CORPORATION'S PRINCIPAL PLACE OF BUSINESS

The more difficult solution is also the more appropriate choice. As Congress's intent in amending § 1332 was to further limit federal jurisdiction, it seems clear that corporations should retain dual citizenship in this context. Therefore, either Congress or the Supreme Court should choose one method for use by the federal courts in determining a corporation's principal place of business. The difficulty lies in choosing a method, and there are three main considerations: (1) Which test will produce a result that most accurately represents the nature of each individual corporation? (2) Which test best adheres to Congress's intent? (3) Which test will be most workable from an administrative standpoint?

1. Providing a True Representation of the Corporation

The test that a court uses to determine a corporation's principal place of business should be representative of the corporation as a whole. As one court explained, "the issue is not the nerve center of a corporation or the place of activity of a corporation but, rather, the issue is the principal place of business of the corporation."<sup>123</sup> Defining the issue as such, it seems relatively clear that the total activity test will provide the best representation of the corporation's principal place of business. Unlike the nerve center test, which takes into account only the location of the corporate headquarters, or the corporate activity test, which considers only the site of the corporation's largest production facility, the total activity test considers factors relating to both. That test will help the court to determine in which state the corporation has made itself at home—where it con-

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122. See Note, *supra* note 16, at 311–12 (“[S]uits involving the corporation are not as likely to arise in the state of incorporation as they are in the state or states where the corporation has contact with the public.”).

123. J.A. Olson Co. v. City of Winona, 818 F.2d 401, 406 (5th Cir. 1987).



ducts most of its business and managerial activities.

Using an all-encompassing approach will ensure that the corporation cannot escape the local courts when the controversy is truly local. If the corporation merely needs one large executive office to satisfy the nerve center test, or one large factory to satisfy the corporate activities test, it can essentially choose its principal place of business just as it can choose its place of incorporation. In contrast, under the total activity test, the court can make its own determination and prevent the corporation from disguising its true form.

In the end, “the principal place of business is a fact question that follows no single inflexible test dependent solely upon the situs of the nerve center or upon the situs of activities of the corporation.”<sup>124</sup> It is a question of where the corporation has made its home. The total activity test, in focusing on the entire corporation rather than only one aspect, best answers this question as it is the most representative of the corporation as a whole.

## 2. Fulfilling Congress’s Intent

At the outset, it seems that Congress has expressed conflicting interests regarding this issue. As discussed in Part I, Congress sought to decrease the federal caseload when it amended the diversity statute in 1958. The federal courts have limited jurisdiction,<sup>125</sup> and Congress intended to further limit that jurisdiction by giving corporations dual citizenship.<sup>126</sup> On the other hand, as discussed in Part III.B, Congress intended CAFA to increase federal jurisdiction with respect to class actions.

The total activity test is the best choice for fulfilling Congress’s intent as expressed in the 1958 amendment because it provides the broadest definition of citizenship. As discussed in Part II.C, that test examines all of the corporation’s activities to determine which state is the source of most of its important behavior. This is also likely to be the state in which plaintiffs injured by the corporation’s activities are most likely to be found—either because executive officers issue corporate directives in that state, most of the employees work in that state, or

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124. *Id.*

125. See U.S. CONST. art. III, §§ 1, 2, cl. 1.

126. See S. REP. NO. 85-1830, at 4–5 (1958), as reprinted in 1958 U.S.C.C.A.N. 3099, 3101–02.

the most consumers are affected by the activities in that state.<sup>127</sup> Where there is a greater chance of a corporation being subject to suit in a particular state by employees or consumers who are also citizens of that state, jurisdiction will be limited if the corporation also has citizenship there.<sup>128</sup> As both parties would be citizens of the same state, that designation would destroy diversity jurisdiction, thereby decreasing the possible number of suits that could ultimately be brought in federal court.

Neither the nerve center test nor the corporate activities test will produce a comparably accurate result in every case. Under the nerve center test, the corporation's principal place of business will not necessarily be the state where individuals apt to sue the corporation are most likely to be citizens.<sup>129</sup> As discussed in Part II.A, the principal place of business will likely be the corporate headquarters. Although that may be an adequate designation for corporations that have relatively uniform facilities spread across the country,<sup>130</sup> it will not be representative of, for example, those corporations that have a small executive office in one state and a large manufacturing and distribution facility in another. The latter would be the state in which the corporation is most likely to injure plaintiffs, and so the nerve center test would not serve Congress's intent in this type of situation.

The corporate activities test would have a similarly inaccurate result. For example, consider a nationwide corporation with relatively uniform service activities and very low-level managerial officers in nine states, and a corporate headquarters located in a tenth state from which all control emanates. The corporate activities test would likely call the state with the largest service center the principal place of business. However, if that facility were only slightly larger than the rest, that re-

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127. *See* *Indus. Tectonics, Inc. v. Aero Alloy*, 912 F.2d 1090, 1094 (1990) (“[S]uits involving a corporation generally arise from its contacts with the public.”).

128. *See id.* (“[C]onsidering a corporation to be a citizen of the state where it has the most public contact and greatest potential for litigation helps reduce the federal court diversity case load . . .”).

129. *See* Note, *supra* note 16, at 319.

130. *But see id.* (“[I]f the home office test is used to determine the principal place of business of a nationwide corporation, it is unlikely that the number of diversity cases will be decreased to the extent hoped for by Congress. There is not necessarily a relationship between the location of the home office of such a corporation and the place where the most suits are likely to arise.”).

sult would not necessarily be representative of the place in which suits are most likely to arise. It may be that the corporate headquarters would be more responsible for suits arising at the various locations due to its control over policy and decision making. Therefore, this test would also produce results that defeat Congress's intent.

In order to best serve the 1958 amendment's goal to limit federal jurisdiction, courts should apply the total activity test to determine a corporation's principal place of business. That test will assess all of a corporation's activities to find the state in which it ultimately affects the most individuals and is truly a citizen. Thus, the test will serve to destroy diversity in the state where the particular corporation is most likely to be sued, thereby limiting federal jurisdiction in accordance with Congress's intent.

With regard to Congress's intent in passing CAFA, it seems that the nerve center test is more appropriate because it provides a narrower definition of citizenship. As discussed above, application of the nerve center test will not necessarily produce a result indicative of the state in which a corporation is most likely to be sued by any given batch of plaintiffs because that test does not depend upon the corporation's interaction with individuals to their detriment. Also, the nerve center test is less subject to construction by a court looking for ways to find that diversity does not exist. For these reasons, application of the nerve center test would increase federal jurisdiction as per Congress's intent because there would be a lesser chance of destroying diversity.

Although Congress intended to expand federal jurisdiction under CAFA, it intended to do so *only* with regard to class actions.<sup>131</sup> Setting the nerve center test as the rule would be detrimental in every other type of controversy with regard to Congress's overall intent to limit federal jurisdiction to those cases in which the parties are truly diverse. For these reasons, adoption of the total activity test would best serve Congress's intent.

### 3. Lessening the Administrative Burden

Determining a corporation's principal place of business may prove administratively difficult in some instances, depending upon the amount and complexity of the information re-

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131. See Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2, 119 Stat. 4, 4-5 (to be codified at 28 U.S.C. § 1711).

quired and the corporation's cooperation in providing such information. While none of the tests can account for the latter factor, it seems rather straightforward that the nerve center test would be an overall lesser burden on the courts and parties than the other tests. Although it may be the rare case in which the corporate activities test or total activity test would be *easier* to apply than the nerve center test, there may be instances in which they are *as easy* to apply.

The nerve center test would in all situations require a simple inquiry as to the corporate headquarters. In cases in which there is one executive office, that office will be the principal place of business. In cases in which there are multiple managerial offices, the one with the most authority and control will be the principal place of business. Information regarding those issues should not be too difficult to obtain. The only problem that may arise is in the unlikely scenario in which there are two seemingly equal centers of managerial control. Then, the inquiry may be more difficult and require an increased expenditure of resources.

The corporate activities test would require a substantially greater investment of resources than the nerve center test. There will be the simple cases in which a corporation has one office and one manufacturing plant, and the latter will be the obvious choice for the principal place of business. In today's business world, however, there will be many situations in which a corporation has several manufacturing plants, production facilities, and service centers throughout the country. In such cases, courts must gather and analyze company statistics and financial reports to determine the principal place of business. As compared to the nerve center test, this will consume substantially more time and money for all parties involved.

Finally, the total activity test would require the greatest investment of resources. Although the corporation's nerve center is one consideration, this test also inherits the burden of determining the center of the corporation's operations. And, to compound matters, the managerial and corporate activities must be balanced to determine which location best represents the corporation's total activities. There may rarely be a clear-cut answer as to the corporation's principal place of business. Rather, the process may be very lengthy as it requires gathering double the amount of information that each of the other tests require and then balancing that information. However, five circuits currently use this test, and five recognize some-

thing similar, so it seems that the courts have not been deterred by the administrative burden.

While the nerve center test would be a lesser administrative burden, administrative ease is not a satisfactory justification for mislabeling a corporation's principal whereabouts and thwarting Congress's intent. Rather, the total activity test, or a version thereof—although probably more time consuming and expensive overall—produces a more accurate and reliable result that fulfills Congress's intent.

#### V. THE PROPOSED TEST: A VERSION OF THE TOTAL ACTIVITY TEST

This Note has shown that Congress or the Supreme Court would best serve the interests of the federal court system and public at large by adopting a uniform test to determine a corporation's principal place of business. And this Note has proven that none of the existing tests is fully satisfactory. Thus, a new test is appropriate. The following proposed test is modeled upon the total activity test, setting forth some important factors for consideration and making one presumption that is to have effect only in limited circumstances:

A corporation's principal place of business is to be determined by a balancing of all relevant factors regarding the location of the corporation's managerial activities and production- and service-related activities.

The corporation's principal place of business is located in the state in which the corporation has its greatest presence based upon an analysis of factors including, but not limited to, the location of the corporation's:

- (a) executive headquarters and/or other managerial offices from which decision making, policy making, control, and direction emanate;
- (b) manufacturing, production, service, and sales centers;
- (c) income-producing activities;
- (d) officers and shareholders;
- (e) employees; and
- (f) tangible property.

Revenue generated in a given state, as determined by the corporation's federal tax statements, is a proxy for determining the location of income-producing activities.

When considering a corporation whose operations are far-flung and relatively evenly distributed, there shall be a rebuttable presumption that, absent clear and convincing evidence to the contrary, the sole nerve center of that corporation is its principal place of business.

A corporation's sole nerve center is the location of the corpora-

tion's main executive headquarters; those offices from which emanates the highest level of decision- and policy-making authority.

This proposed test addresses many of the concerns raised above: providing a true representation of each individual corporation, promoting administrative efficiency, and satisfying contradictory congressional intent. Although it is a balancing test, which inherently involves some subjectivity, a corporation's principal place of business is not a determination that is accurately made using a bright-line rule like the nerve center test. Rather, corporations in a modern business environment have complex and varied structures. Their principal place of business should therefore be determined by a flexible rule that places natural emphasis on certain of the corporation's characteristics such that its true place of citizenship is accurately represented.

Any test that deviates from a bright-line rule leaves room for acts of judicial discretion. However, this test provides the courts with objective criteria on which to base their determination. The six decision-making factors are readily quantifiable based on an analysis of the corporation's factual situation. This leaves less room for debate among the parties or subjective analysis by the decision maker. Thus, this test addresses the administrative efficiency concerns raised above about the total activity test.

The rebuttable presumption also addresses administrative efficiency concerns in the class action context. Class actions are often invoked against large corporations whose activities are spread over numerous states, so most class actions will probably fall under this presumption. The proposed test is fact-intensive, and a corporation with evenly distributed and far-flung activities will produce a significant amount of data for the court to analyze. Because class actions are already more expensive and time consuming than most types of litigation,<sup>132</sup> this presumption lessens the administrative burden inherent in a total activity test by eliminating the expenditure of judicial resources in this particular situation.

The proposed test addresses Congress's expressed intent both to broadly limit federal diversity jurisdiction and to narrowly increase it under CAFA. As discussed in Part IV.B.2, the total activity test helps to limit federal jurisdiction while the nerve center test helps to expand it. Thus, the proposed test

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132. See John Conyers, Jr., *Class Action "Fairness"—A Bad Deal for the States and Consumers*, 40 HARV. J. ON LEGIS. 493, 497 (2003).

provides results consistent with congressional intent: it applies the total activity test in the majority of cases, and it raises a presumption for the nerve center test in situations that will probably include most class action lawsuits.

The proposed test also promotes uniformity among the courts. For instance, the fact-intensive nature of the total activity test would normally raise concerns that three different circuits applying the same test would each determine a corporation's principal place of business to be in a different state. However, because each circuit would examine the same objective data, they would likely reach similar results. Furthermore, one circuit's finding of a corporation's principal place of business would serve as persuasive precedent to the next circuit to encounter the question.

Balancing tests inevitably have some pitfalls and drawbacks. But the proposed test is narrowly tailored to incorporate congressional intent in both limiting federal diversity jurisdiction on a broad level and expanding it in limited circumstances in light of CAFA. It leaves some analysis to the decision maker, but at least all of the federal courts would base their analysis on the same factors. Until Congress or the Supreme Court adopts a uniform test like the one proposed, uncertainty, prejudice, and "shopping" incentives will continue to plague corporate litigation.

## CONCLUSION

Congress amended the diversity jurisdiction statute in 1958 to provide that a corporation is a citizen of both its state of incorporation and the state where it has its principal place of business. Congress intended to decrease the federal courts' caseload, but it provided very little guidance to the federal courts as to the method by which they should determine a corporation's principal place of business. Rather, the circuits apply three different tests: the nerve center test, corporate activities test, and total activity test. This nonuniformity encourages forum shopping at the federal level and, with the introduction of the Class Action Fairness Act of 2005, it encourages "defendant- and plaintiff-shopping" in the class action context. It also breeds uncertainty and, in many cases, serves to thwart Congress's intent.

In order to address the problems raised by the nonuniform application of § 1332, Congress or the Supreme Court should adopt a uniform test for determining a corporation's principal

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place of business. This Note proposes a test based on the total activity test, which balances factors relating to all of a corporation's activities—managerial, production, and service related. Such a test is well suited to a modern business environment, and it reflects the true nature of each individual corporation while also producing results in accordance with congressional intent. Presumably, this is the type of consideration Congress intended the federal courts to make when determining the location of a corporation's principal place of business.