

# Michigan Law Review

---

Volume 53 | Issue 7

---

1955

## Suits Against Unincorporated Associations Under the Federal Rules of Civil Procedure

John Kaplan

*Member, District of Columbia and New York Bars*

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Business Organizations Law Commons](#), [Civil Procedure Commons](#), [Constitutional Law Commons](#), [Jurisdiction Commons](#), and the [Supreme Court of the United States Commons](#)

---

### Recommended Citation

John Kaplan, *Suits Against Unincorporated Associations Under the Federal Rules of Civil Procedure*, 53 MICH. L. REV. 945 (1955).

Available at: <https://repository.law.umich.edu/mlr/vol53/iss7/3>

This Article is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact [mlaw.repository@umich.edu](mailto:mlaw.repository@umich.edu).

SUITS AGAINST UNINCORPORATED ASSOCIATIONS  
UNDER THE FEDERAL RULES OF CIVIL PROCEDURE

*John Kaplan\**

CONCEPTS, Benjamin Cardozo has said, "are useful, indeed indispensable, if kept within their place. We will press them quite a distance. . . . A time comes, however, when the concepts carry us too far, or farther than we are ready to go with them, and behold, some other concept, with capacity to serve our needs is waiting at the gate. 'It is a peculiar virtue of our system of law that the process of inclusion and exclusion, so often employed in developing a rule, is not allowed to end with its enunciation, and that an expression in an opinion yields later to the impact of facts unforeseen.'"<sup>1</sup>

If Justice Cardozo was here setting forth more than a description of how the "philosophical" or "logical" method<sup>2</sup> ideally should reach its conclusions, he was guilty of overoptimism. That the law has not yet escaped the "tyranny of concepts" is nowhere more clear than in its treatment of the unincorporated association. On the one hand the unincorporated association can be conceived of as an entity, a legal unit as distinct from the members who make it up as a corporation is from its stockholders. On the other hand the association can be regarded as a mere aggregate, a group of individuals similar to a family or a crowd and having no independent legal existence. For years the entity and the aggregate concepts struggled for supremacy while many questions of policy depended upon the outcome. Judges too often neglected to weigh the practical consequences of a decision, and instead deduced the outcome from their resolution of the philosophic controversy.<sup>3</sup>

Despite this, a long process of judicial evolution had determined for the most part where each concept applied and had given us a relatively definite, though arbitrary and inconsistent treatment of the unincorporated association. In recent years, however, the class action concept, brought into prominence by rule 23(a) of the Federal Rules of Civil Procedure<sup>4</sup> and applied mechanically, without analysis or com-

\* Member, District of Columbia and New York Bars.—Ed.

<sup>1</sup> CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 62, 63 (1928), quoting Brandeis, J., dissenting in *Jaybird Mining Co. v. Weir*, 271 U.S. 609 at 619, 46 S.Ct. 592 (1926).

<sup>2</sup> CARDOZO, *NATURE OF THE JUDICIAL PROCESS* 43 (1921).

<sup>3</sup> *Hanley v. American Ry. Express Co.*, 244 Mass. 248, 138 N.E. 323 (1923). The court there held that an automobile registered in the name of a labor union became an "outlaw on the highways" when there was a change in the membership of the union on the theory that the ownership of the car had changed thus voiding its registration.

<sup>4</sup> CHAFFE, *SOME PROBLEMS OF EQUITY* 199 (1950).

parison with prior decisions, appears to be remaking completely the federal procedural law respecting the unincorporated association. After surveying the law existing prior to the current use of the class action, this article will attempt briefly to point out the changes wrought by the application of that concept.

## BEFORE THE FEDERAL RULES OF CIVIL PROCEDURE

### *Suability in the Association Name*

Many commentators have advocated allowing the unincorporated association to be sued in its common name as an entity despite the common law rule that the suit is merely one against all the members who must be joined.<sup>5</sup> Since the association can now own property, use a common name and seal, achieve an unlimited life and a limited liability, and act through a fixed management just like a corporate entity, the commentators argue that the association should be treated like a corporation in the courts. However, even though adherence to the aggregate theory effectively shields many large associations from suit,<sup>6</sup> the great majority of state courts<sup>7</sup> confronted with the problem have held that the common law aggregate concept must prevail unless changed by statute. The ground for most of these decisions was that an unincorporated association is not a "jural person"<sup>8</sup> though this cliché appears only to restate its conclusion. Another justification, which appeals to more sophisticated writers,<sup>9</sup> is that the privilege of suing and being sued in a common name is one granted by the sovereign only to corporations. Though this makes some sense as applied to suits by the association, it appears somewhat Pickwickian to speak of the "privilege" of being sued by a procedure which expedites the imposition of liability.

<sup>5</sup> Comment, 37 ILL. L. REV. 70 at 79 (1942); Dodd, "Dogma and Practice in the Law of Associations," 42 HARV. L. REV. 977 (1929); Sturges, "Unincorporated Associations as Parties to Actions," 33 YALE L.J. 383 (1924); note, 30 N.C.L. REV. 465 (1952).

<sup>6</sup> United Mine Workers v. Coronado Coal Co., 259 U.S. 344 at 389, 42 S.Ct. 570 (1922): "To remand persons injured to a suit against each of the 400,000 members [of the United Mine Workers] to recover damages . . . would be to leave them remediless."

<sup>7</sup> St. Paul Typothetae v. St. Paul Bookbinders' Union No. 37, 94 Minn. 351, 102 N.W. 725 (1905); Karges Furniture Co. v. Amalgamated Woodworkers Local Union No. 131, 165 Ind. 421, 75 N.E. 877 (1905); District No. 21 United Mine Workers of America v. Bourland, 169 Ark. 796, 277 S.W. 546 (1925); Walker v. Grand Intl. Brotherhood of Locomotive Engineers, 186 Ga. 811, 199 S.E. 146 (1938).

<sup>8</sup> Pickett v. Walsh, 192 Mass. 572, 589, 78 N.E. 753 (1906): "There is no such entity known to law as an unincorporated association and consequently it cannot be made a party defendant."

<sup>9</sup> Sturges, "Unincorporated Associations as Parties to Actions," 33 YALE L.J. 383 at 398 (1924).

The Supreme Court seems to have adopted the minority rule, for in *United Mine Workers v. Coronado Coal Co.*<sup>10</sup> it held that in an action to enforce liability under the Sherman Act, a union could be sued in its common name. Professor Edward Warren devoted an entire chapter in his treatise<sup>11</sup> to an attempt to limit the *Coronado* case to a mere construction of the Sherman Act, arguing that the case did not hold on common law principles that the unincorporated association could always be sued as an entity in the federal courts.<sup>12</sup> Professor E. Merrick Dodd,<sup>13</sup> on the other hand, saw the decision as finally recognizing that an unincorporated association acted as an entity and therefore should be treated as one in the federal courts regardless of the common law conception. Rule 17(b) Federal Rules of Civil Procedure<sup>14</sup> which provides that an unincorporated association may be sued in its common name for the enforcement of federal substantive rights, has been called a victory for Professor Warren's approach.<sup>15</sup> Actually, it appears that while neither side completely impressed its views on the advisory committee, Professor Dodd's viewpoint is the one preferred in the rule. Although the rule purports to restate the *Coronado* result, the inclusion of all federal rights goes much farther than that decision as Professor Warren was willing to read it. And one possible reason for rejecting Professor Dodd's view that the association should also be suable as an entity in diversity actions regardless of state law was that such a rule might be regarded as too great an interference with the right of a state to establish unincorporated associations.<sup>16</sup>

Even where federal rights alone are concerned, the adoption of the entity theory raises difficult though non-constitutional problems. Since before the federal rules the inconvenience of joining all the members of a large unincorporated association would render it virtually immune

<sup>10</sup> 259 U.S. 344, 42 S.Ct. 570 (1922).

<sup>11</sup> WARREN, *CORPORATE ADVANTAGES WITHOUT INCORPORATION* 648-669 (1929).

<sup>12</sup> *United States & Cuban Allied Works Engineering Corp. v. Lloyds*, (D.C. N.Y. 1923) 291 F. 889; *Ex parte Edelstein*, (2d Cir. 1929) 30 F. (2d) 636 at 638.

<sup>13</sup> Dodd, "Dogma and Practice in the Law of Associations," 42 HARV. L. REV. 977 (1929).

<sup>14</sup> ". . . capacity to sue or be sued shall be determined by the law of the state in which the district court is held, except (1) that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States. . . ."

<sup>15</sup> Witner, "Trade Union Liability: The Problem of the Unincorporated Corporation," 51 YALE L.J. 40 at 42 (1941): "The controversy within the Harvard faculty between Professor Warren . . . and Professor Dodd . . . has for the most part been won by the narrow-construction proponent."

<sup>16</sup> *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817 (1938), decided after the rules had been drafted but before they become effective, would have cast some doubt on the validity of such a rule.

from suit, rule 17(b) may violate the enabling act's prohibition against altering the substantive rights of any litigant.<sup>17</sup> Furthermore, serious conceptual difficulties arise in fitting the rule into a federal system where federal law builds upon the foundations of legal relationships created by the states. For instance, in a state following the aggregate theory, the law does not recognize the existence of the association as such; what we would call the association is merely a group of individuals with certain rights and duties among themselves. By state law its contracts are those of all its members as individuals and its torts are joint torts. But when a federal right is called into question, the association as such springs into existence and the federal law will then grant a judgment against the entity which by state law is incapable of owning property. The execution against the "association's" assets will then be satisfied from property owned by trustees for the members.<sup>18</sup>

It must be admitted, however, that these anomalies are not peculiar to the federal system. Very much the same process must occur where a state, though following the aggregate theory, holds that failure to object to the non-joinder of all the members waives the defect and permits suit against the association as an entity.<sup>19</sup>

### *Jurisdiction Over the Association*

Even the question of jurisdiction over the person of the association is usually held to turn on whether the entity or the aggregate theory is adopted. Under the aggregate theory, jurisdiction over the association merely means personal jurisdiction over all its members at one time. The entity theory, strictly speaking, does not require the presence of any member within the jurisdiction to provide a basis for service of process upon the association since all that is required is the doing of business within the jurisdiction.<sup>20</sup> In cases where the entity concept always applies, such as federal question cases, section 4(d)(3) of the Federal Rules of Civil Procedure provides that service must be made on an officer, a managing or general agent, or any other agent authorized to receive service of process for the association.

<sup>17</sup> "The Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States . . . the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant." 48 Stat. L. 1064 (1934), 28 U.S.C. (1940) §723b (now in §2072).

<sup>18</sup> Cf. WARREN, CORPORATE ADVANTAGES WITHOUT INCORPORATION 256, 587, 667 (1929).

<sup>19</sup> *United Mine Workers v. Cromer*, 159 Ky. 605, 167 S.W. 891 (1914); *Barnes v. Chicago Typographical Union No. 16*, 232 Ill. 402, 83 N.E. 932 (1908). But see *Proprietors of the Mexican Mill v. Yellow Jacket Silver Mining Co.*, 4 Nev. 40 (1868).

<sup>20</sup> Cf. *Intl. Shoe Co. v. Washington*, 326 U.S. 310 at 318, 66 S.Ct. 154 (1945).

There is some authority that the person served must merely bear such a relation to the association that it is reasonable to expect that he will notify it of the action.<sup>21</sup> It is generally held, however, that service on an official of a local union will not subject the parent body to the jurisdiction of the court.<sup>22</sup> In one case this result was reached through a curious reverse twist on the *Coronado* case.<sup>23</sup> The court reasoned that since *Coronado* stood for the proposition that an international labor union is an entity, separate and distinct from both its members and its locals, service upon either members or locals can not bring the international body into court. If the court had analyzed the relationship between the individual locals and the parent body instead of focusing its attention on whether the entity or aggregate concept should apply, it might have come to a different conclusion. Regardless of which concept applies, the association may act through the locals which compose it and these activities may often constitute the only business done in the state. Since this doing of business by the local may constitute the basis for the assertion of jurisdiction over the association it seems unreasonable to hold that service upon the local will not bring the association into court. While this rule will not work too great a hardship on one suing the association where he can serve the agent of the international who enters the state to inspect the local's records, it is highly artificial to require such service when the international may be held liable for a tort committed long before the agent had arrived. Nevertheless, most courts hold that process must be served on the association itself.

### *Venue in Non-Diversity Cases*

At least in actions based on federal rights, where rule 17(b) allows jurisdiction in personam to be based on the entity concept, that concept also appears to control as to venue. Numerous lower federal courts have rejected arguments attempting to fix the inhabitancy of the association for venue purposes as the inhabitancy of any of its members or as the inhabitancy of all of its members.<sup>24</sup> For example, in the leading case of *Sperry Products, Inc. v. Association of American*

<sup>21</sup> *Operative Plasterers' and Cement Finishers' Intl. Assn. v. Case*, (D.C. Cir. 1937) 93 F. (2d) 56 at 65 (secretary-treasurer of union local).

<sup>22</sup> *Singleton v. Order of Railway Conductors of America*, (D.C. Ill. 1935) 9 F. Supp. 417; *Christian v. Intl. Assn. of Machinists*, (D.C. Ky. 1925) 7 F. (2d) 481, both cited in advisory committee's notes to rule 4(c)(3), 2 MOORE, FEDERAL PRACTICE, 2d ed., § 4.01, p. 906 (1948).

<sup>23</sup> *Dean v. Intl. Longshoremen's Assn.*, (D.C. La. 1936) 17 F. Supp. 748.

<sup>24</sup> *Darby v. Philadelphia Transp. Co.*, (D.C. Pa. 1947) 73 F. Supp. 522; *McNutt v. Gas, Coke, and Chemical Workers*, (D.C. Ark. 1952) 108 F. Supp. 871.

*Railroads*,<sup>25</sup> the Second Circuit unanimously reversed a district court's ruling in a patent infringement suit that inhabitancy of the association meant the residence of all its members. The applicable venue statute<sup>26</sup> required the action to be brought in the district of which the defendant is an inhabitant or in any district where it has committed acts of infringement and has a regular and established place of business. Judge Learned Hand held that the *Coronado* case and rule 17(b) laid down the proposition that for the purposes of this type of suit the unincorporated association is to be regarded as a jural entity distinct from its members. He then concluded, on the analogy to a corporation, that the association was found wherever any substantial part of its activities were carried on. On the other hand, he reasoned that to equate this to a finding of inhabitancy would violate the spirit of the venue statute which distinguished between inhabitancy and having a regular and established place of business. Therefore, since the inhabitancy of the association involves something more than merely a regular place of business, it should be held to mean the principal place of business. Numerous decisions subsequent to *Sperry* have extended its holding to other venue statutes<sup>27</sup> so that now it is pretty much black letter law that the inhabitancy of an unincorporated association is its principal place of business.

### *Diversity Jurisdiction*

In a diversity case the requirements of rule 17(b) prevent a federal court from allowing suit in the association name unless the state law so provides. Even where the state law adopts the entity concept for all purposes, however, the federal courts cannot adopt it to determine whether diversity does in fact exist.<sup>28</sup> It is well settled that the citizenship of an unincorporated association for diversity purposes is the citizenship of all its members.<sup>29</sup> Thus diversity suits against unincorporated associations are subject to the great limitations of the rule of *Strawbridge v. Curtiss*,<sup>30</sup> requiring complete diversity between all plaintiffs

<sup>25</sup> (2d Cir. 1942) 132 F. (2d) 408.

<sup>26</sup> 36 Stat. L. 1100 (1911), 28 U.S.C. (1940) §109 (now in §1400).

<sup>27</sup> *Griffin v. Illinois Cent. R.R.*, (D.C. Ill. 1949) 88 F. Supp. 552 (Civil Rights Act); *McNutt v. United Gas, Coke, and Chemical Workers*, (D.C. Ark. 1952) 108 F. Supp. 871 (general venue).

<sup>28</sup> Cf. *Fred Macey Co. v. Macey*, (6th Cir. 1905) 195 F. 725; *Empire Rice Mill Co. v. K. & E. Neumond*, (D.C. La. 1912) 199 F. 800. But see *Van Sant v. American Express Co.*, (3d Cir. 1948) 169 F. (2d) 355, criticized in 34 *IOWA L. REV.* 356 (1949).

<sup>29</sup> *Lafayette Ins. Co. v. French*, 18 How. (59 U.S.) 404 at 405 (1855); *Levering & Garrigues Co. v. Morrin*, (2d Cir. 1932) 61 F. (2d) 115.

<sup>30</sup> 3 Cranch (7 U.S.) 267 (1806).

and all defendants. In other words, an individual can not sue in the diversity jurisdiction any association having members who are citizens of his own state, and as a result diversity can never be the basis of federal jurisdiction over a nationwide association such as an international labor union which often will have members from every state.

It is interesting to note that only a little more than one hundred years ago judges were debating whether to allow a corporation the benefit of the diversity jurisdiction. In *Bank of the United States v. Deveaux*,<sup>31</sup> John Marshall said, ". . . that mere legal entity, a corporation aggregate, is certainly not a citizen" and held that the citizenship of a corporation for diversity purposes was the citizenship of all its stockholders. Some thirty-five years later, however, in *Louisville Cincinnati & Charleston R. Co. v. Letson*,<sup>32</sup> the Court changed its mind and said, "A corporation . . . seems to us to be a person, though an artificial one, inhabiting and belonging to that state [of incorporation], and therefore entitled, for the purpose of suing and being sued, to be deemed a citizen of that state." Subsequently, the Court reached the same result through the use of a different fiction, holding that the stockholders of a corporation are irrebuttably presumed to be citizens of the state of incorporation.<sup>33</sup>

Some time ago it appeared as if the Supreme Court was beginning to repeat this ratiocination and allow an unincorporated association to be treated as an entity in determining whether diversity existed. In *Puerto Rico v. Russell*<sup>34</sup> the Court held that a *sociedad en comandita* "is so complete in contemplation of the law of Puerto Rico that we see no adequate reason for holding that the *sociedad* has a different status for purposes of federal jurisdiction than a corporation organized under that law." Despite the implication here that if the unincorporated association were an entity by state law it might be regarded as one for diversity purposes, subsequent decisions have not extended the holding and have limited it closely to its particular facts.<sup>35</sup>

### *Venue in Diversity Actions*

Unfortunately there has been no adequate discussion of the venue problems of the unincorporated association in diversity actions. If the federal courts adopt the aggregate theory for this purpose the venue statutes require that the action be brought in the plaintiff's district or,

<sup>31</sup> 5 Cranch (9 U.S.) 61 at 86 (1809).

<sup>32</sup> 2 How. (43 U.S.) 497 at 555 (1844).

<sup>33</sup> *Marshall v. Baltimore and Ohio R. Co.*, 16 How. (57 U.S.) 314 (1853).

<sup>34</sup> 288 U.S. 476 at 482, 53 S.Ct. 447 (1933).

<sup>35</sup> *Gaunt v. Lloyds America of San Antonio*, (D.C. Tex. 1935) 11 F. Supp. 787.



in the case of an association whose entire membership is drawn from one state, either in the plaintiff's district or in the district where any member resides.<sup>36</sup> Where the state follows the aggregate concept the federal courts would most probably do the same, thus restricting even further the diversity jurisdiction over unincorporated associations. Where the state follows the entity concept the problem becomes more complex.<sup>37</sup> The analogy to rule 17(b) which adopts the entity concept then in determining capacity to sue and be sued might lead the court to extend the holding of the *Sperry* case to diversity actions and treat the association as having one residence. On the other hand the fact that the aggregate concept must be applied in determining whether diversity does exist might lead a court to apply that concept to venue also. There are two cases directly on this point; one adopts the first view<sup>38</sup> citing the *Sperry* case without adverting to the problems created by the fact that unlike *Sperry* it is a diversity action, while the other reaches the second result<sup>39</sup> stressing the fact that although the association can be sued in its name, it is not a true entity by state law.

#### THE CLASS ACTION

With this discussion of "classical" law as background we now turn to examine the effects of the recent use of the class action.<sup>40</sup> Originally the class action or representative suit was a device of equity to prevent a failure of justice in a suit involving a large class of individuals who had very similar claims or defenses. If the class was so large that it would be impracticable to serve and bring all its members before the court, equity allowed some who had interests typical of all the members and who could be expected to litigate the common claims or defenses adequately to sue or defend with the result conclusive upon all. It should be noted that this device is useful in two

<sup>36</sup> This is the effect of 28 U.S.C. (1952) §1391, which provides that an action based only on diversity is restricted to the "Judicial district where all plaintiffs or all defendants reside," and 28 U.S.C. (1952) § 1392, which provides that where there are multiple defendants, the action must be brought in the district of residence of any one provided all reside in the same state. See *Camp v. Gress*, 250 U.S. 308, 39 S.Ct. 478 (1919).

<sup>37</sup> A corporation seeking to do business in a state may be required to waive any objection to improper venue in suits arising out of business done within the state. *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 60 S.Ct. 153 (1939). The Supreme Court has also held that an unincorporated association is entitled to no better treatment under the privileges and immunities clause. See *Hemphill v. Orloff*, 277 U.S. 537 at 550, 48 S.Ct. 577 (1928). It therefore appears that a state could similarly extract a waiver of venue from an unincorporated association.

<sup>38</sup> *Darby v. Philadelphia Transp. Co.*, (D.C. Pa. 1947) 73 F. Supp. 522.

<sup>39</sup> *Koons v. Kaiser*, (D.C. N.Y. 1950) 91 F. Supp. 511 at 516.

<sup>40</sup> For a general discussion of the history of the class action see CHAFFEE, *SOME PROBLEMS OF EQUITY* 199 et seq. (1950).

distinct situations. First, the class action can (if there is fair representation) avoid the social waste of many trials deciding the same questions, where each of the class members could be sued separately but only at great expense.<sup>41</sup> Second, where the requirements of joinder prevent each member from being sued alone, the class action will provide a means of suing the group. Where the group consists of the members of an unincorporated association under the aggregate theory it is not merely a question of saving great effort for with any reasonably large association the choice is between making the suit possible or impossible. Furthermore, there is no real problem of fairness of representation in this case for the officers of the association will always intervene to defend the suit.<sup>42</sup> The class action, then, is no more than a back door through which to proceed when compulsory joinder bars the front way. It is interesting to note that although the great majority of cases allowing the class action allow it against the unincorporated association, most writers have treated the device merely as a method of making litigation against a group less expensive.<sup>43</sup>

Nevertheless in both of these situations the same concepts are universally held to apply. In all procedural matters both are merely suits against a number of individuals, although there must be an allegation that they are also sued in their representative capacity. The result of this suit against relatively few individuals will bind the entire membership of the class and where the class consists of the members of an unincorporated association, the association itself will be bound just as if all its members had been joined under the aggregate theory or as if it had been sued in its name where the entity theory applied.<sup>44</sup>

<sup>41</sup> See *Sheffield Waterworks Co. v. Yeomans*, L.R. 2 Ch. App. 8 (1866). See note, 67 HARV. L. REV. 1059 (1955), for a penetrating discussion of the factors necessary before a class action should be held to bind those not before the court.

<sup>42</sup> For example in *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen*, (4th Cir. 1945) 148 F. (2d) 403 at 406, the court in holding that the representation was adequate pointed out, "This service, as a matter of fact, did bring the brotherhood in, fighting."

<sup>43</sup> Note, 46 COL. L. REV. 818 (1946); comment, 63 YALE L.J. 493 at 509 (1954).

<sup>44</sup> It should be noted that there may be an important substantive difference in the recovery, depending on whether the association is successfully sued as an entity or as an aggregate. In the former case the recovery will run against the association's funds only, while if all the members are joined, they can be made individually liable for whatever cannot be recovered from the association's treasury. One reason for this denial of individual liability where the association is sued as an entity is that it is extremely unfair and possibly violative of due process to grant a judgment against a member when in fact he may have had no notice of the action and possibly not even been within the jurisdiction of the court. In addition it may be felt that if the plaintiff has the advantage of being able to bring suit without joining all the members he should pay for this by being held to the entity concept when recovery is to be had.

Despite the fact that the class action treats the association as an aggregate, the reasons for denying individual liability are just as valid in the class action situation as where the

.. Although the class action dates back over two hundred years, its recent importance in the federal courts begins with the adoption of rule 23(a), which made it applicable to legal as well as equitable causes of action.<sup>45</sup> This incorporation into the federal rules attracted attention to what had previously been a rather obscure equity rule, and as lawyers began to realize the immense changes the use of the class action was making in the law respecting unincorporated associations, the device became more and more popular.

#### USE OF THE CLASS ACTION RULE IN SUITS AGAINST UNINCORPORATED ASSOCIATIONS

Federal rule 23(a) provides, "If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is (1) joint, or common, or secondary . . . ."

Although there is a great deal of confusion<sup>46</sup> over exactly what rights are joint, common, or secondary it is almost universally agreed that a right is one of these if, but for the class action device, all members of the plaintiff class exerting the right would have to be joined.<sup>47</sup> And while the rule does not mention liabilities as well as rights, it is generally assumed that this is a mere error of draftmanship<sup>48</sup> and that, where the members of the class would otherwise have to be joined as defendants, rule 23(a) applies. It would therefore appear that rule 23(a) provides a method of bringing suit against an unincorporated association.

Nevertheless, before turning to a consideration of the uses to which the class action has been put, we must examine certain general arguments which have been advanced against its availability in suing unincorporated associations. The first is that the fundamental incon-

association is sued as an entity. Most courts have agreed and denied individual liability in the class action situation. See Witmer, "Trade Union Liability: The Problem of the Unincorporated Corporation," 51 *YALE L.J.* 40 (1941).

<sup>45</sup> See *Montgomery Ward & Co. v. Langer*, (8th Cir. 1948) 168 F. (2d) 182.

<sup>46</sup> See Keeffe, Levy, & Donovan, "Lee Defeats Ben Hur," 33 *CORN. L.Q.* 327 at 335, n. 22 (1948).

<sup>47</sup> 3 *MOORE, FEDERAL PRACTICE*, 2d ed., 3435 (1948): "The 'true class suit' is one wherein, but for the class action device the joinder of all interested persons would be essential. . . . A good illustration of an action involving a joint right is a suit by or against representatives of an unincorporated association."

<sup>48</sup> Cf. Lesar, "Class Suits and the Federal Rules," 22 *MINN. L. REV.* 34 at 55 (1937); 46 *COL. L. REV.* 818 at 827 (1946).

sistency between the entity and the aggregate theories prevents the class action which treats the association as an aggregate of individual members from being used in a jurisdiction which adopts the entity theory.<sup>49</sup> From this it would follow that the class action could not be used where rule 17(b) of the Federal Rules of Civil Procedure requires the entity theory, i.e., in actions to enforce federal rights or in diversity suits brought in states which allow suits against associations as entities. This argument appears unpersuasive, however, for the entity and aggregate theories are not mutually exclusive although they represent different ways of looking at the association. Even states which provide for suits against the entity will also allow suit if all the members are joined.<sup>50</sup> A similar though less conceptual argument is that in providing one way of suing the association, rule 17(b) implies that there should be no other way. This contention was presented in *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen*<sup>51</sup> but was rejected on the ground that "the manifest purpose of the provision of rule 17(b) relating to suits against partnerships and unincorporated associations is to add to, not to detract from, the existing facilities for obtaining jurisdiction over them. The language of rule 17(b) relating to suits against partnerships and unincorporated associations is permissive. So also is the language of rule 23(a). Together they provide alternative methods of bringing unincorporated associations into court." It should be added that the notes of the advisory committee make it quite clear that the class action of rule 23(a) was intended to provide a means of suing unincorporated associations.<sup>52</sup>

A third argument, closely related to the other two, was accepted in the *Sperry* case, where Judge Learned Hand wrote, "The rule [23(a)] itself limits such [class] actions to situations in which the parties 'are so numerous as to make it impracticable to bring them all before the court.' Here it is entirely practicable to do so by suing the Association as such."<sup>53</sup> While this argument might not be objectionable as an original proposition, it is foreclosed by a long line of decisions allowing class actions under similar statutes even though the association might have been sued as an entity.<sup>54</sup> Furthermore it

<sup>49</sup> Cf. *Lloyd v. Loaring*, 6 Ves. Jr. 773, 31 Eng. Rep. 1302 (1802).

<sup>50</sup> The statutes providing for suit against the association as an entity are invariably permissive. See WARREN, *CORPORATE ADVANTAGES WITHOUT INCORPORATION* 547 (1929).

<sup>51</sup> (4th Cir. 1945) 148 F. (2d) 403 at 405.

<sup>52</sup> 3 MOORE, *FEDERAL PRACTICE*, 2d ed., §23.01, p. 3405 (1948).

<sup>53</sup> (2d Cir. 1942) 132 F. (2d) 408 at 412.

<sup>54</sup> WARREN, *CORPORATE ADVANTAGES WITHOUT INCORPORATION* (1929), lists on p. 543 the states allowing suit against an unincorporated association by a class action, and on p. 547 lists those which allow suit against the association in its name. Colorado, Connecticut, Georgia, Idaho, Indiana and Wyoming appear on both lists.

is difficult to conceive how all the individual members may be considered to be brought before the court by a suit against the entity.

In any event it is well established that the class action will not be barred by the mere existence of an alternative method of enforcing the same claim.<sup>55</sup> It remains, however, to consider exactly how the class action changes the results reached under the simple applications of the entity or aggregate theories.

### *Jurisdiction Over the Association*

The leading case considering the jurisdiction of the court over an unincorporated association in an action brought under rule 23(a) is *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen*.<sup>56</sup> In that case a group of Negro firemen brought suit against the Brotherhood alleging discriminatory practices in violation of the Railway Labor Act. The principal place of business of the Brotherhood was in the Northern District of Ohio, and hence if sued as an entity the *Sperry* case would require it to be sued there. On the other hand, the railroad, an indispensable party, could not be served in that district since it was doing no business there. Therefore the firemen served the railroad at a place of business in the Eastern District of Virginia and, using rule 23(a), also served two subordinate lodges of the brotherhood and the president of one of them for themselves and as representatives of the union.

Writing for a unanimous court, Judge Parker first decided that the class action was available here for a suit against the unincorporated association. Then, after examining the allegations made by the plaintiff and concluding that the action was indeed a class action, he dealt with the question of whether the service on the representatives was sufficient to bring the association within the jurisdiction of the court. First of all he held that the requirements of service prescribed by rule 4(d)(3), where the union is to be sued as an entity, did not apply to the class action. Further, he intimated that some lesser degree of service on the union should be required to bring it into court under rule 23(a). Here the two locals were agencies of the Brotherhood and the officer of one of them was also a fair representative of the association. Thus since the court had jurisdiction over both officer and locals, Judge Parker concluded that the class action could proceed.

<sup>55</sup> *Tisa v. Potofsky*, (D.C. N.Y. 1950) 90 F. Supp. 175 at 180, holds that §301(b) of the Labor Management Relations Act does not displace the class action. But cf. *Schatte v. Intl. Alliance of Theatrical Stage Employees*, (D.C. Cal. 1949) 84 F. Supp. 569.

<sup>56</sup> (4th Cir. 1945) 148 F. (2d) 403.

Note carefully the full implication of the *Tunstall* decision with respect to acquiring jurisdiction over the association. The aggregate theory which requires no association activity but merely the presence of all members is combined with the class action concept which requires only the presence of one or more "representatives," thus making the association far more vulnerable to suit than any corporation. A state can not acquire jurisdiction over a corporation merely by serving the vacationing president, but the class action gives it jurisdiction over the association whose "representative" is caught.

The *Tunstall* decision was somewhat qualified by the case of *Brotherhood of Locomotive Firemen and Enginemen v. Graham*,<sup>57</sup> where in a similar action by Negro firemen the District of Columbia Circuit refused to allow the class action on the grounds that the representatives of the union were not truly representative. The court based its reasoning on the theory that since the action was for a declaratory judgment and an injunction against discrimination, the locals and officers served who had no part in the discrimination could not be truly representative of those who were actually practicing the discrimination. The court did not mention the fact that the plaintiffs also sought damages with respect to which the defendants presumably would be representative since they could litigate the case to defend their share in the association's funds. Moreover, any distinction between suits for declaratory judgments or injunctions and suits for damages can be attacked on both the practical and conceptual levels. First of all, if jurisdiction over the representatives is allowed they will not merely be litigating the case as individuals since the association itself will come in to protect its interests. Secondly, every right of the association is its property owned jointly by all its members and therefore a member would appear to have an interest sufficient to satisfy the requirements for being a representative even if he is not a direct beneficiary of the right. Indeed, most courts have been satisfied, without any further showing, that the officers of local lodges of a union will adequately represent the national association<sup>58</sup> even though in a non class action they could not receive process for it.

### Venue

The concept that the class action is still only a suit against individual representatives and not against the association would indicate that

<sup>57</sup> (D.C. Cir. 1948) 175 F. (2d) 802, revd. on other grounds 338 U.S. 232, 70 S.Ct. 14 (1949).

<sup>58</sup> See *Billier v. Egan*, 290 Ill. App. 219 at 229, 8 N.E. (2d) 205 (1937).

only venue with respect to the representatives would be considered. At least where federal rights are at issue the courts have assumed that such is the case without weighing the advantages and disadvantages of this result,<sup>59</sup> thus for all practical purposes overruling the principal place of business rule of the *Sperry* case. In the *Tunstall* case, for example, there apparently was no real contest over venue once the question of jurisdiction had been decided. Similarly, in the *Graham* case the court decided that the venue was wrongly chosen because the defendants were not truly representative assuming that had they actually been representative the venue would have been correct. It is easy to see that this line of reasoning disregards completely the rationale underlying the requirements of venue and goes from the one extreme of making it too difficult to sue an unincorporated association to the other of making it too easy. For once a member or officer of the association can be found residing in a district, that district can be made the basis for venue even though it bears no relationship to the business of the association.<sup>60</sup>

### *The Class Action Rule in Diversity Suits*

The concept of the class action as merely a suit against individuals who happen to be representatives is also extended into the question of diversity jurisdiction and it is there that the situation becomes most confused. It has been pointed out that even though a state adopts the entity theory, the citizenship of all the association's members must be considered in order to determine whether diversity exists. In the class action, however, it is well settled<sup>61</sup> that only the citizenship of the representatives need be considered, since the suit is technically only against them and not against the association. Furthermore the representatives may be selected with an eye to achieving diversity,<sup>62</sup> thus in effect bringing the large unincorporated association back into the diversity jurisdiction.<sup>63</sup>

<sup>59</sup> See *Salvant v. Louisville & Nashville R.*, (D.C. Ky. 1949) 83 F. Supp. 391.

<sup>60</sup> It is possible that the association may move under 28 U.S.C. (1952) §1404(a) for a transfer to a more convenient forum. It might have some difficulty since §1404(a) on its face applies only to parties and witnesses. If the association succeeded in having the forum changed it would be held to have waived all objections to the new venue. See *Paramount Pictures, Inc. v. Rodney*, (3d Cir. 1951) 186 F. (2d) 111.

<sup>61</sup> *Smith v. Swormstedt*, 16 How. (57 U.S.) 288 (1854).

<sup>62</sup> But see McGovney, "A Supreme Court Fiction," 56 HARV. L. REV. 1090 at 1112 (1943): "The ingenuity of lawyers in class suits in selecting the members of the class to be put forward as the parties of record should be condemned as a fraud on the courts, not sanctified."

<sup>63</sup> One case flatly holds that rule 82, providing that the federal rules are not to expand or contract the jurisdiction of the federal courts, prevents the use of rule 23(a)

This is not to imply that no valid reasons exist for extending the diversity jurisdiction to include suits by and against unincorporated associations. It would seem that the basic policies underlying the establishment of the diversity jurisdiction would favor including the large association.<sup>64</sup> For example, if a larger labor union has just begun to acquire membership in an area where labor has previously not been organized, there may be considerable hostility toward the union, and the federal courts should provide a forum where these local prejudices will be at a minimum.<sup>65</sup> In other areas of the nation those suing the union might have a legitimate claim to the diversity jurisdiction, since they are deprived of the efficient machinery of the federal courts and may be forced to encounter local pro-labor prejudice.

On the other hand, the strong arguments for restricting the diversity jurisdiction<sup>66</sup> might make such an extension unwise. It has been argued that the improvement in state judicial systems and the diminution of local prejudices have lessened the need for the diversity jurisdiction and that the heavy load of cases<sup>67</sup> in the federal courts only because of diversity of citizenship renders the courts less able to perform their primary task of protecting federal rights.<sup>68</sup>

In view of the powerful arguments on each side it would seem that the problem should be resolved only after thoughtful judicial or legislative study. In fact there has been no legislation on the subject and no court has actually analyzed the reasons for or against including the unincorporated association within the diversity jurisdiction.

to bring the unincorporated association within the diversity jurisdiction. *Shelvey v. Barto*, (D.C. N.Y. 1952) 16 Fed. Rules Serv. 23a-61, Case 1, p. 317. *Contra*: *Philadelphia Local 192 v. American Fed. of Teachers*, (D.C. Pa. 1942) 44 F. Supp. 345; *Malarney v. Upholsterers' Intl. Union*, (D.C. Pa. 1947) 7 F.R.D. 403; *White v. Quisenberry*, (D.C. Mo. 1953) 14 F.R.D. 348.

<sup>64</sup> Parker, "The Federal Jurisdiction and Recent Attacks Upon It," 18 A.B.A.J. 433 at 437 (1932); Howland, "Shall Federal Jurisdiction of Controversies Between Citizens of Different States be Preserved?" 18 A.B.A.J. 499 at 501 (1932). In the case of the labor union, there are other reasons why Congress might want to grant jurisdiction to the federal courts. See *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp.*, 348 U.S. 437 at 444, 75 S.Ct. 488 (1955).

<sup>65</sup> WENDELL, *RELATIONS BETWEEN THE FEDERAL AND STATE COURTS* 267 (1949). But see FRANKFURTER AND GREENE, *THE LABOR INJUNCTION* 5-17 (1930) for the proposition that while there were sectional differences in anti-labor feeling the federal courts in an area reflected the prejudice as much as the state courts.

<sup>66</sup> See S. Rep. 530, 72d Cong., 1st sess. (1932); S. Rep. 691, 71st Cong., 2d sess. (1930). See also *Lumbermen's Mut. Cas. Co. v. Elbert*, 348 U.S. 48 at 53, 75 S.Ct. 151 (1954) (concerning opinion of Justice Frankfurter).

<sup>67</sup> But see Yntema and Jaffin, "Preliminary Analysis of Concurrent Jurisdiction," 79 UNIV. PA. L. REV. 869 at 915 (1931).

<sup>68</sup> Wechsler, "Federal Jurisdiction and the Revision of the Judicial Code," 13 LAW AND CONTEMP. PROB. 216 at 234-240 (1948).



Nevertheless the status quo has been changed silently and without discussion so that now by the use of the class action the unincorporated association can almost always be sued in a diversity action. A touch of irony was added to this by the serious split within the Supreme Court in *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corporation*.<sup>68a</sup> There three justices not only found a "serious constitutional problem" (p. 442) in any attempted grant of jurisdiction to the federal courts to apply state law in suits upon collective bargaining contracts but also adverted to the great burdens inherent in any such transfer of litigation from the state to the federal courts (p. 437). Yet in all probability the diversity necessary to support a class action could have been found in *Westinghouse* had the pleadings been framed in terms of a class action diversity suit instead of a suit under section 301 of the Taft-Hartley Act.

Allowing the unincorporated association to be sued on diversity grounds raises special problems where the state adopts the aggregate theory. In such a state it may be so difficult to join the membership of a large association that for all practical purposes it can not be sued in the state courts. This obstacle is not due merely to a common law technicality, for in some states it is based on a policy judgment that associations of workers should not be sued.<sup>69</sup> Or at least if the rule is not based overtly on this policy the active opposition of labor unions has prevented the common law rule from being changed by legislation. Nevertheless, the federal courts under rule 23(a) will entertain the action and give judgment against the association.<sup>70</sup> It would seem that if the common law rule is merely procedural there is a great deal of substance "secreted in the interstices of procedure."<sup>71</sup> If this is so does this application of rule 23(a) run afoul of the *Erie v. Tompkins*<sup>72</sup> doctrine requiring conformity between state and federal decisions?

<sup>68a</sup> 348 U.S. 437, 75 S.Ct. 488 (1955).

<sup>69</sup> Comment, 37 ILL. L. REV. 70 at 71 (1942).

<sup>70</sup> Most courts and commentators have ignored this problem in entertaining class actions against unincorporated associations. See *Montgomery Ward v. Langer*, (8th Cir. 1948) 168 F. (2d) 182. One commentator in 46 COL. L. REV. 818 at 836, n. 76 (1946), suggesting a revision of rule 23(a) writes, "It is conceded that *Erie R.R. v. Tompkins* . . . bears on the problem of broadening the scope of representative actions in the manner suggested. However, the impact of *Erie R. R. v. Tompkins* on federal procedure is beyond the scope of this Note. The problem has been ably discussed elsewhere." None of the able discussions cited, however, concern rule 23(a).

<sup>71</sup> But see *United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344 at 390, 42 S.Ct. 570 (1922): "Though such a conclusion as to the suability of trade unions is of primary importance . . . , it is after all in essence and principle merely a procedural matter."

<sup>72</sup> 304 U.S. 64, 58 S.Ct. 817 (1938).

Supreme Court decisions extending the *Erie* case seem to hold that where a state denies relief for any reason relief will similarly be withheld in the federal courts. Thus a state's general statute of limitations, if applicable to a given cause of action in a state court, will be applied in the federal forum.<sup>73</sup> Similarly, if the state courts are closed to a corporation which fails to qualify to do business within the state, federal courts sitting in that state must also close their doors to the corporation.<sup>74</sup> The inability to litigate these cases in the state courts is based on factors unrelated to the underlying rights and duties of the parties just as in the class action situation. Nevertheless, these results have been reached through a rigorous application of the "outcome" test propounded in *Guaranty Trust Co. v. York*, requiring that the outcome of a litigation in the federal courts be "substantially the same"<sup>75</sup> as that which would have been achieved in the state courts. An exception to this rule may exist here because of the express provision for class actions in the federal rules. Although the Supreme Court has not attempted to delimit the scope of the *York* test, it seems unlikely that the complete obliteration of distinctions between state and federal courts, which is the logical extreme of that test, will be allowed.

A stopping point may properly be where federal policy has been formulated to an extent sufficient to warrant inclusion in the federal rules.<sup>76</sup> This would clearly not be inconsistent with the *Erie* case itself, since underlying obligations created by the state would be enforced according to state law. No federal rule has ever been declared invalid by the Court because of inconsistency with the *Erie* doctrine,<sup>77</sup> the only direct challenge resulting in a judgment upholding the rule.<sup>78</sup> Since the problem with respect to the class action exists neither at the clearly procedural nor at the clearly substantive level but "in the twilight zone where rational classification could be made either way,"<sup>79</sup> it is difficult to predict the result should this application of the class action to unincorporated associations be questioned.

<sup>73</sup> *Guaranty Trust Co. v. York*, 326 U.S. 99, 65 S.Ct. 1464 (1945).

<sup>74</sup> *Woods v. Interstate Realty Co.*, 337 U.S. 535, 69 S.Ct. 1235 (1949).

<sup>75</sup> 326 U.S. 99 at 109, 65 S.Ct. 1464 (1945).

<sup>76</sup> Note, 66 HARV. L. REV. 1516 at 1519 (1953); Gavit, "States' Rights and Federal Procedure," 25 IND. L.J. 1 (1949).

<sup>77</sup> In *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 69 S.Ct. 1233 (1949), the Court held that rule 3 of the Federal Rules of Civil Procedure, which provides, "a civil action is commenced by filing a complaint with the court," does not stop the running of a state statute of limitations.

<sup>78</sup> *Sibbach v. Wilson & Co.*, 312 U.S. 1, 61 S.Ct. 422 (1941).

<sup>79</sup> *Sampson v. Channell*, (1st Cir. 1940) 110 F. (2d) 754 at 756.

*Conclusion*

We have seen how, by use of the class action device, the procedural law concerning suits against the unincorporated association has been completely remade. It is not the purpose of this article to point out which of the changes should have and which should not have been made. Indeed it is possible that on close examination all the changes will prove to have been improvements in the law. It should, however, be pointed out that each of the changes for better or worse has been made without any consideration of the basic policies involved and has proceeded solely from a logical and mechanical application of the class action concepts. It would appear that the time has come for some court to escape this "tyranny of concepts" and reintroduce policy considerations into the law of unincorporated associations.