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Posted at 11:09 AM on January 15, 2010 by Sheppard Mullin

The Fourth Circuit Bounces Express Check Class Action Back to State Court Based on Lack of Diversity Jurisdiction

By [Christopher Loveland](#)

The United States Court of Appeals for the Fourth Circuit in *Ferrell v. Express Check Advance of South Carolina, LLC* (No. 09-2401) examined the citizenship of limited liability companies for purposes of diversity jurisdiction in a class action. The Plaintiff in *Ferrell*, a citizen of South Carolina, commenced a class action lawsuit on behalf of “other South Carolina citizens” against four “payday loan” businesses in South Carolina state court. The lawsuit alleged that defendants’ payday loans violated various South Carolina laws. One of the defendants, Express Check Advance of South Carolina, LLC (“Express Check”), removed the case to the United States District Court for the District of South Carolina on diversity grounds, contending that it was a citizen of Missouri and Kansas, and not a citizen of South Carolina.

The Plaintiff filed a motion to remand the case back to state court. In its motion, the plaintiff asserted that Express Check was a South Carolina citizen and there was thus no diversity jurisdiction. The District Court determined that Express Check was an “unincorporated association” whose citizenship should be determined by “the State where it has its principal place of business and the State under whose laws it is organized” pursuant to 28 U.S.C. § 1332(d)(10). Because Express Check had its principal place of business in South Carolina, the District Court concluded that it did not have jurisdiction over the matter and granted Plaintiff’s motion to remand.

Express Check appealed to the Fourth Circuit and argued that its citizenship should be determined “under traditional rules” and not 28 U.S.C. § 1332(d)(10) because a limited liability company is not an “unincorporated association.” Under traditional rules, Express Check’s citizenship should be based on the citizenship of its sole member, QC Financial Services. Because QC Financial Services is a Missouri corporation with a principal place of business in Kansas, Express Check claimed it is not a resident of South Carolina and that the District Court erred in granting the motion to remand.

The Plaintiff countered with the argument that the term “unincorporated association” in 28 U.S.C. § 1332(d)(10) is extremely “broad and encompasses all non-corporate entities, including limited liability companies.” Because Express Check makes payday loans solely from stores in South Carolina, and all employees but its top four officers are located in South Carolina, it should be considered a South Carolina company and the District Court correctly found that there was no diversity jurisdiction.

In considering the meaning of the term “unincorporated association,” the Fourth Circuit held that “the specific language of § 1332(d)(10) indicates that a limited liability company if *not a corporation*, is an *unincorporated* association, employing ‘unincorporated’ as the counterpart to ‘incorporated.’” (emphasis in original). The language of § 1332(d)(10) “suggest[s] two mutually exclusive classes of business enterprises – those that are incorporated, *i.e.*, corporations, and those that are not.” Thus, the term “unincorporated association” refers to *all* non-corporate business entities, including limited liability companies such as Express Check.

The Fourth Circuit next examined whether it should apply the “nerve center” test or the “place of operations” test to determine where Express Check has its principal place of business. The nature of the business involved determines which test applies. The nerve center test applies when a company “is not really geographically bound,” while the place of operations test applies “when a company has multiple centers of manufacturing, purchasing, or sales.” Because Express Check operates to make payday loans from its locations in South Carolina, and all but four of its employees are located in that State, the Court applied the place of operations test and concluded that Express Check’s principal place of business is South Carolina. Notably, the Fourth Circuit admonished Express Check’s corporate parent for, in essence, complaining about its business decision to maintain Express Check as a legally separate entity; an arrangement by which it “undoubtedly benefited.”

The Fourth Circuit held that because Express Check is a citizen of South Carolina, it did not carry its burden of showing diversity jurisdiction, and affirmed the order remanding the case back to state court.