

DIGGING UP THE CORP(SES): *HOLSTON INVESTMENTS V. LANLOGISTICS CORP.* AND THE CONTINUING STRUGGLE TO DETERMINE THE CITIZENSHIP OF DISSOLVED AND INACTIVE CORPORATIONS FOR THE PURPOSES OF DIVERSITY JURISDICTION

Nicholas W. Roosevelt

ABSTRACT—Since the early 1990s, the U.S. Circuit Courts of Appeals have been divided on how to determine the citizenship of dissolved or inactive corporations for the purposes of diversity jurisdiction. By the beginning of the twenty-first century, courts of appeals addressing the issue had settled on one of three conclusions: (1) citizenship should be determined only by the corporation’s state of incorporation; (2) citizenship should be determined both by the corporation’s state of incorporation and its last principal place of business; or (3) citizenship should always be determined by the corporation’s state of incorporation, but only be determined by principal place of business on a case-by-case basis. In 2010, the U.S. Supreme Court in *Hertz Corp. v. Friend* clarified the standard for determining an active corporation’s principal place of business. Two years later, the Eleventh Circuit Court of Appeals in *Holston Investments, Inc. B.V.I. v. LanLogistics Corp.* ruled that the reasoning of *Hertz* settled the debate over the citizenship of dissolved or inactive corporations: only the inactive or dissolved corporation’s state of incorporation determines citizenship. This Note argues that although *Hertz* provided useful guidance to the courts of appeals on how to determine the citizenship of dissolved and inactive corporations, the Eleventh Circuit misinterpreted that guidance. The Eleventh Circuit should have adopted a modified version of an existing rule, which always factors both an inactive or dissolved corporation’s state of incorporation and its last principal place of business when determining citizenship. This test better accords with the Court’s reasoning in *Hertz*, the intent behind the statutory definition of corporate citizenship, and broader principles of diversity of citizenship jurisdiction.

AUTHOR—J.D., Northwestern University School of Law, 2015; B.A., University of Pennsylvania, 2008. Many thanks to Professor Eugene Kontorovich for his thoughtful assistance. All views and remaining errors are my own.

NORTHWESTERN UNIVERSITY LAW REVIEW

INTRODUCTION244

I. EXPLAINING THE SPLIT.....247

 A. *Early Diversity Jurisdiction*.....247

 B. *Congress Speaks on the Citizenship of Corporations*249

 C. *A Circuit Split Emerges*251

 D. *Assessing the Split*.....255

II. *HERTZ AND HOLSTON*257

 A. *Hertz’s Nerve Center Test & Bright-Line Reasoning*257

 B. *Holston Harnesses Hertz*.....260

III. A MODIFIED SECOND CIRCUIT NERVE CENTER TEST.....261

 A. *Hertz Prong One: Text of § 1332(c)(1)*.....263

 B. *Hertz Prong Two: Administrative Simplicity*.....264

 C. *Hertz Prong Three: Legislative History*.....265

CONCLUSION267

INTRODUCTION

In May 2007, shipping and aviation entrepreneur Paul Gartlan closed a deal with LanLogistics Corporation to purchase subsidiary companies of LanLogistics, including one called LanBox.¹ LanLogistics was a Delaware-chartered corporation that had its corporate headquarters in Florida.² According to Holston Investments, Inc., B.V.I.—a British Virgin Islands company with a Florida business affiliate—this violated a contract between Holston and LanLogistics.³ Holston had previously purchased a separate subsidiary from LanLogistics and it now argued the deal between Gartlan and LanLogistics violated Holston’s contractual right of first refusal to purchase LanBox.⁴ In the aftermath of the deal with Gartlan, LanLogistics formally dissolved and forfeited its authority to conduct business in Florida at the end of 2007.⁵ Five months later, Holston Investments and its Florida affiliate sued LanLogistics in the U.S. District Court for the Southern

¹ *Holston Invs. Inc. B.V.I. v. LanLogistics, Corp. (Holston I)*, 664 F. Supp. 2d 1258, 1260–61 (S.D. Fla. 2009); see also *About Us*, SKYWORLD AIR CARGO, <http://www.skyworldaircargo.com/about-us.html> [<http://perma.cc/38YS-M9UJ>] (background detail on Paul Gartlan).

² *Holston Invs., Inc. B.V.I. v. LanLogistics Corp. (Holston III)*, 677 F.3d 1068, 1069 (11th Cir. 2012) (per curiam).

³ *Holston I*, 664 F. Supp. 2d at 1260.

⁴ *Id.*; see also *Albert P. Hernandez*, WIKINVEST, [http://www.wikininvest.com/stock/Skypostal_Networks_Inc_\(SKPN\)/Albert_Hernandez_Chairman_Chief_Executive_Officer](http://www.wikininvest.com/stock/Skypostal_Networks_Inc_(SKPN)/Albert_Hernandez_Chairman_Chief_Executive_Officer) [<http://perma.cc/345A-P7DL>] (summary of Holston Investments’ past dealings with LanLogistics).

⁵ *Holston III*, 677 F.3d at 1070 n.1.

District of Florida under diversity jurisdiction for breach of contract.⁶ At the time of the lawsuit, all parties seemingly agreed that the federal court had the requisite diversity jurisdiction to hear the case: LanLogistics's supposed Delaware citizenship was diverse from the plaintiffs' Florida and British Virgin Islands citizenship.⁷

Over two years after the action in federal court commenced, the federal district court issued judgment for the plaintiffs on the breach of contract claim.⁸ Only after the supposed disposition of this straightforward state law claim did the case transform into the latest battle over the citizenship of inactive or dissolved corporations for federal diversity jurisdiction.

Soon after receiving an adverse judgment, LanLogistics moved to vacate the judgment for lack of subject matter jurisdiction, arguing that the two parties' citizenships were not truly diverse at the time the lawsuit was filed.⁹ For the first time, LanLogistics brought to the trial court's attention that Florida had been its principal place of business at the time of the deal with Gartlan that gave rise to Holston's claim.¹⁰ LanLogistics now argued that its late-2007 dissolution did not change the fact that, at the time the suit was filed, LanLogistics was a citizen of both Delaware *and* Florida.¹¹ Because there had been Florida citizens on both sides of the suit, LanLogistics now argued that diversity jurisdiction had never existed and the federal district court had no authority to enter or enforce its judgment on the breach of contract claim.¹²

The federal district court faced clearly suspect circumstances: how convenient that a defendant with an adverse judgment hanging over its head coincidentally remembered that it was also a Florida citizen. Nonetheless, the court also faced the unwavering obligation under the Federal Rules of Civil Procedure to dismiss a case if the court "at any time" determines that it lacks subject matter jurisdiction.¹³ Had the trial court, from beginning to end, presided over a case without ever having subject matter jurisdiction, or were these newly revealed facts irrelevant to the court's jurisdiction?

Congress is constitutionally permitted to give federal courts jurisdiction over state law cases when the case involves citizens of different

⁶ *Holston Invs. Inc. B.V.I. v. LanLogistics, Corp. (Holston II)*, 766 F. Supp. 2d 1327, 1328 (S.D. Fla. 2011).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 1328–29.

¹⁰ *Id.* at 1329.

¹¹ *Id.*

¹² *Id.*

¹³ FED. R. CIV. P. 12(h)(3).

states.¹⁴ Since 1958, Congress has bestowed upon corporations a sort of dual citizenship when it comes to diversity jurisdiction. To determine whether a case involving a corporation may properly be heard in federal court under diversity jurisdiction, a corporation is considered to be a citizen both of the state in which it incorporated and the state in which it has its “principal place of business.”¹⁵ Determining an active corporation’s principal place of business has proven to be a difficult task,¹⁶ but the meaning of “principal place of business” becomes particularly cryptic in the case of dissolved or inactive corporations.

The trial court in *Holston Investments Inc. B.V.I. v. LanLogistics, Corp.* had no precedent from its own Eleventh Circuit to address the meaning of principal place of business in this context, but instead faced a three-way circuit split. The Second Circuit determined the citizenship of inactive corporations by looking to the corporation’s state of incorporation, as well as its last principal place of business activity.¹⁷ The Third Circuit only recognized the corporation’s state of incorporation, reasoning that a dissolved or inactive corporation can have no principal place of business.¹⁸ The Fifth and Fourth Circuits have always looked to the corporation’s state of incorporation, but then conduct a “totality of the circumstances” analysis to determine if the corporation’s last principal place of business should be considered.¹⁹ Since the emergence of the three-way circuit split, the Supreme Court, in *Hertz Corp. v. Friend*, settled how federal courts determine an active corporation’s principal place of business, which is by a “nerve center” test.²⁰

Analyzing the split, as well as *Hertz*, the *Holston* trial court joined the Third Circuit: LanLogistics was only a citizen of Delaware at the time the lawsuit was filed.²¹ Therefore, the trial court had diversity jurisdiction and could leave the judgment against LanLogistics undisturbed. A year later, the Eleventh Circuit affirmed the trial court’s ruling on the jurisdiction

¹⁴ U.S. CONST. art. III, § 2, cl. 1.

¹⁵ 28 U.S.C. § 1332(e)(1) (2012). For a district court to exercise diversity jurisdiction, it must also conclude that the amount in controversy in the given lawsuit is over \$75,000. *Id.* § 1332(a); *see also* 13E CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3602 (3d ed. 2009 & Supp. 2014) (for a general description of diversity jurisdiction).

¹⁶ *See* discussion *infra* Part II.A.

¹⁷ *Wm. Passalacqua Builders, Inc. v. Resnick Developers S., Inc.*, 933 F.2d 131, 141 (2d Cir. 1991).

¹⁸ *Midlantic Nat’l Bank v. Hansen*, 48 F.3d 693, 696 (3d Cir. 1995).

¹⁹ *See* *Athena Auto., Inc. v. DiGregorio*, 166 F.3d 288, 291 (4th Cir. 1999); *Harris v. Black Clawson Co.*, 961 F.2d 547, 550–51 (5th Cir. 1992).

²⁰ 559 U.S. 77 (2010) (adopting the “nerve center” test for determining a corporation’s principal place of business).

²¹ *Holston II*, 766 F. Supp. 2d 1327, 1330–33 (S.D. Fla. 2011).

question,²² making it the most recent court of appeals to enter the circuit split and the first to do so since the Supreme Court's ruling in *Hertz*.

This Note argues that the *Holston* court should have resolved the ambiguity over dissolved or inactive corporate citizenship by adopting a slightly modified version of the Second Circuit's rule, which would make dissolved and inactive corporations citizens of both their state of incorporation *and* their last "nerve center." Unlike the *Holston* court's adopted framework, this rule would more clearly accord with relevant statutory text, administrative efficiency concerns, and relevant legislative history; the three factors considered in *Hertz*.

Part I of this Note provides an overview of federal diversity jurisdiction as it relates to corporations and the emergence of a circuit split over how to determine the citizenship of inactive and dissolved corporations. Part II examines the Supreme Court's ruling in *Hertz*, and its relation to *Holston* and the current three-way circuit split. Part III argues that the Eleventh Circuit erred in siding with the Third Circuit and should have instead adopted a modified version of the Second Circuit's rule. There is no clear justification for a dissolved or inactive corporation to receive a forum option that Congress would not have allowed were the corporation active. The argument that the Eleventh Circuit's approach is favorable due to its ease of application fails, both because the approach bucks the intent of Congress by allowing for a blanket expansion of diversity jurisdiction and because little supports the proposition that a modified Second Circuit approach would be particularly burdensome administratively.

I. EXPLAINING THE SPLIT

A cursory review of the origins of diversity jurisdiction and the evolving manner in which courts and Congress have understood how diversity jurisdiction is properly exercised over corporations will help contextualize the circuit split over dissolved and inactive corporations.

A. Early Diversity Jurisdiction

The Constitution extends the judicial power of federal courts to "[c]ontroversies . . . between [c]itizens of different [s]tates."²³ Congress is not obligated to grant the federal courts this type of jurisdiction. Rather, Article I, Section 8 of the Constitution allows Congress to define the scope of lower federal court diversity jurisdiction as long as that scope does not exceed the jurisdictional grant in Article III.²⁴

²² *Holston III*, 677 F.3d 1068, 1071–72 (11th Cir. 2012) (per curiam) (affirming as to the subject matter jurisdiction issue but reversing as to the trial court's calculation of damages).

²³ U.S. CONST. art. III, § 1.

²⁴ *Id.* art. I, § 8; *Turner v. Bank of N. Am.*, 4 U.S. (4 Dall.) 8, 10 (1799).

The purpose of diversity jurisdiction centers around the Framers' distrust of state courts or, at least, concern over the possibility that state courts might not fairly adjudicate claims involving citizens of different states.²⁵ Whatever the exact purpose or purposes behind diversity jurisdiction, the first Congress took action to grant the authority to the newly created lower federal courts.²⁶

Congress's grant of diversity jurisdiction did not, however, direct how a court should handle suits involving corporations. Without the aid of Congress, the Supreme Court developed its own doctrine for dealing with corporate citizenship. Chief Justice John Marshall penned the Court's first statement on the matter, reasoning that corporations were "invisible, intangible, and artificial" and "certainly not a citizen."²⁷ Accordingly, a court assessed the citizenship of each member of the corporation, rather than the corporation as a standalone citizen.²⁸ The Court overruled this approach in 1844, holding that a corporation is a citizen of its state of incorporation for jurisdictional purposes.²⁹ For a number of decades after, however, the Court struggled to settle whether or not this was always the case.³⁰

The Supreme Court's doctrine eventually led to public discontent. In the infamous *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.* case, a company intentionally obtained its charter in a different state from the state in which it conducted its business so that it would have the option of litigating all of its claims in federal court.³¹ The Court found that diversity jurisdiction existed, even though all but the company's incorporation papers indicated it was a citizen of the same state

²⁵ See, e.g., *Bank of the U.S. v. Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809) (Chief Justice Marshall discussing suspicions of state courts contemplated by the Constitution); see also James Madison, Address at the Virginia Convention (June 20, 1788), in 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1412, 1414 (John P. Kaminski & Gaspare J. Saladino eds., 1993) (arguing that diversity jurisdiction provides relief to out-of-state litigants from the administrative deficiencies and delays of many state courts); Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 495 (1928) (reviewing primary documents from the time of the Constitutional Conventions indicating the Framers were primarily concerned with hostile state legislatures, rather than impartial state courts).

²⁶ Even with diversity of citizenship, lower federal courts were unable to hear cases with an amount in controversy not exceeding \$500. Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 73, 78.

²⁷ *Deveaux*, 9 U.S. (5 Cranch) at 86.

²⁸ *Id.* at 86–88.

²⁹ *Louisville, Cincinnati & Charleston R.R. v. Letson*, 43 U.S. (2 How.) 497, 555, 559 (1844).

³⁰ *Compare* *Marshall v. Balt. & Ohio R.R.*, 57 U.S. (16 How.) 314, 328–29 (1853) (establishing a rebuttable presumption that a corporation is a citizen of its state of incorporation), *with* *St. Louis & S.F. Ry. v. James*, 161 U.S. 545 (1896) (confirming that a corporation is a citizen of its state of incorporation by irrebuttable presumption that its members are citizens of the same state).

³¹ 276 U.S. 518, 523–24 (1928).

as its opposition.³² The Court reasoned that existing jurisdictional law did not require an inquiry into the intent behind a company's choice to incorporate in a particular state.³³

Soon after *Black & White Taxicab*, members of Congress and scholars began debating the most appropriate means for determining a corporation's citizenship.³⁴ Mixed with a growing concern about the caseloads facing federal courts, Congress took action to address the citizenship of corporations in the late 1950s.

B. Congress Speaks on the Citizenship of Corporations

In 1958, Congress amended its diversity jurisdiction law to increase the requisite amount in controversy and to define a corporation's citizenship as being both "any State by which it has been incorporated and of the State where it has its principal place of business."³⁵ Congress had a number of goals in passing this amendment. Perhaps most significantly, Congress meant for the revisions to reduce the federal district courts' caseloads.³⁶ Using identical statements of purpose, the Senate and House reports recommending the bill's passage note that the number of civil cases coming before federal district courts had "increased tremendously" in the years leading up to 1958.³⁷ The reports state that the changes increasing the amount in controversy and addressing the citizenship of corporations would ease the workload of the federal courts.³⁸

Congress's choice to address the citizenship of corporations in the 1958 amendment was driven by at least one other motive. The House and Senate reports on the bill address a concern over the "fictional premise" under which corporations had been permitted to utilize the federal courts.³⁹ The reports note that the Court-crafted doctrine on the citizenship of corporations "has given rise to the evil whereby a local institution, engaged in a local business and in many cases locally owned, is enabled to bring its litigation into the Federal courts simply because it has obtained a corporate

³² *Id.* at 524.

³³ *Id.*

³⁴ See Chi. Univ. Law Faculty, Comment, *Limiting Jurisdiction of Federal Courts—Pending Bills*, 31 MICH. L. REV. 59, 65–67 (1932) (discussing and assessing various bills in the Senate and House regarding changes to diversity jurisdiction law in response to *Black & White Taxicab*).

³⁵ Act of July 25, 1958, Pub. L. No. 85-554, § 2, 72 Stat. 415.

³⁶ For a detailed review of the hearings and reports of both the House and the Senate leading up to the passage of the amendment, see Jack H. Friedenthal, *New Limitations on Federal Jurisdiction*, 11 STAN. L. REV. 213, 213–19 (1959).

³⁷ S. REP. NO. 85-1830, at 2–3 (1958); H.R. REP. NO. 85-1706, at 2–3 (1958).

³⁸ S. REP. NO. 85-1830, at 3; H.R. REP. NO. 85-1706, at 3.

³⁹ S. REP. NO. 85-1830, at 3; H.R. REP. NO. 85-1706, at 3.

charter from another State.⁴⁰ The reports describe the unfairness that arises when two local corporations are not provided the same choice of courts, only because one of the corporations elected to obtain its charter from a different state.⁴¹

Congress was also aware that a state charter's grant of incorporation, and thereby fictive citizenship, did not necessarily mean the purpose behind the protections of diversity jurisdiction would be served when applied to corporations. Concluding its remarks on the problem of the existing judge-made corporate citizenship law, the reports state, "It appears neither fair nor proper for such a corporation to avoid trial in the State where it has its principal place of business by resorting to a legal device not available to the individual citizen."⁴²

The reports also reveal that bankruptcy law played a role in Congress's choice of "principal place of business" as the factor for determining a corporation's possible second state of citizenship, stating that the "principal place of business" analysis would parallel with jurisdictional tests employed by courts under the then-existing Bankruptcy Act.⁴³ In relevant part, the Bankruptcy Act granted jurisdiction over "persons bankrupt who have had their principal place of business, resided or had their domicile within their respective territorial jurisdictions for the preceding six months."⁴⁴

One early scholarly review of the 1958 amendment noted, "Ample [bankruptcy] precedent there was, but consistent precedent there was not."⁴⁵ Indeed, the precedent established under Bankruptcy Act cases did not provide federal courts with sufficient guidance on the principal place of business test for active corporations.⁴⁶ As for inactive or dissolved corporations, however, a couple of pre-1958 Second Circuit bankruptcy decisions stand for two noteworthy principles.

First, debtors no longer engaging in business but instead only "winding up" their business activity still have a principal place of business.⁴⁷ Second, debtor inactivity should not be an obstacle to

⁴⁰ S. REP. NO. 85-1830, at 4; H.R. REP. NO. 85-1706, at 4. Both reports cite the *Black & White Taxicab* case immediately following the description of this evil.

⁴¹ S. REP. NO. 85-1830, at 4; H.R. REP. NO. 85-1706, at 4.

⁴² S. REP. NO. 85-1830, at 4; H.R. REP. NO. 85-1706, at 4.

⁴³ S. REP. NO. 85-1830, at 5; H.R. REP. NO. 85-1706, at 4.

⁴⁴ 11 U.S.C. § 11(a)(1) (1952).

⁴⁵ James W. Moore & Donald T. Weckstein, *Corporations and Diversity of Citizenship Jurisdiction: A Supreme Court Fiction Revisited*, 77 HARV. L. REV. 1426, 1439 (1964).

⁴⁶ As will be discussed later in this Note, the Supreme Court did not issue a definitive statement on the test until 2010. See *Hertz Corp. v. Friend*, 559 U.S. 77 (2010).

⁴⁷ See *In re Evans*, 85 F.2d 92 (2d Cir. 1936) (Western District of New York court had principal place of business bankruptcy jurisdiction over an individual debtor who had no active business concerns).

bankruptcy jurisdiction where it effectively removes one of the two forums Congress intended to create for bankruptcy proceedings.⁴⁸ Neither principle clearly resolves the issue of whether an inactive or dissolved corporation can have a principal place of business; however, the Second Circuit principles arguably serve as the closest indicator of how Congress intended for the dissolved and inactive corporation issue to be resolved. Pre-1958 bankruptcy courts used a functional interpretation of “principal place of business” that gave effect to the intent of Congress.

Following the 1958 amendments, various federal district courts began to pass on the issue of what impact inactivity should have on the corporation’s citizenship.⁴⁹ Almost forty years after the 1958 amendment, circuit courts of appeals began to take up the issue.

C. A Circuit Split Emerges

A three-way circuit split emerged in the 1990s over how trial courts should assess the citizenship of inactive or dissolved corporations. To better understand the 2012 *Holston* court’s reasoning, it is worth taking a closer look at the defining cases that led to the current three-way split.

The Second Circuit was the first circuit court to make a statement on the citizenship of inactive or dissolved corporations for diversity jurisdiction purposes.⁵⁰ In *Wm. Passalacqua Builders, Inc. v. Resnick Developers South, Inc.*, a construction company and its insurers sought to pierce the corporate veil of a closely held Florida real estate developer and recover a judgment rendered fifteen years earlier.⁵¹ The construction company was an inactive corporation that had incorporated in Ohio, but whose principal place of business when it had been active was Florida.⁵² The district court ruled that it was obligated to consider both the

but had conducted business in the Western District three years earlier and still maintained correspondence with his attorney who interacted with the debtor’s creditors in the Western District).

⁴⁸ *Fada of N.Y., Inc. v. Org. Serv. Co.*, 125 F.2d 120, 121 (2d Cir. 1942) (per curiam) (New York corporation that had been inactive over the months leading up to the involuntary bankruptcy proceeding remained a citizen of New York).

⁴⁹ *Compare* *Gavin v. Read Corp.*, 356 F. Supp. 483, 486 (E.D. Pa. 1973) (arguing that even where it failed to formally dissolve itself, a corporation is inactive and has no principal place of business once it has sold all its assets, has no payroll, and is only “winding up its business affairs”), *and* *Kreger v. Ryan Bros.*, 308 F. Supp. 727, 729 (W.D. Pa. 1970) (arguing that a corporation’s principal place of business cannot be a state where “only a flicker of corporate activity remains”), *with* *Comtec, Inc. v. Nat’l Technical Sch.*, 711 F. Supp. 522, 523–25 (D. Ariz. 1989) (arguing that the clear intent of Congress, bankruptcy precedent, and use of conjunctive in § 1332(c) all support finding that a corporation’s last principal place of business is determinative of a corporation’s citizenship).

⁵⁰ *Wm. Passalacqua Builders, Inc. v. Resnick Developers S., Inc.*, 933 F.2d 131 (2d Cir. 1991).

⁵¹ *Id.* at 133–34.

⁵² *Id.* at 134.

corporation's state of incorporation and its last principal place of business.⁵³ Moreover, the district court concluded that an inactive corporation's principal place of business was the state in which the corporation conducted its last business activity—in this case, Florida.⁵⁴

The Second Circuit affirmed.⁵⁵ Reviewing the policy and legislative history behind the 1958 amendment in detail, the *Passalacqua* court reasoned that allowing the citizenship of an inactive corporation to be determined solely by its state of incorporation “would give [the corporation] a benefit Congress never planned for them.”⁵⁶ The court supported its reasoning in part by reference to the Second Circuit bankruptcy principle that a corporation's inactivity does not alter its citizenship.⁵⁷ Although the Second Circuit did not address the “business activity” test that the district court used to determine the inactive corporation's last principal place of business, it adopted the test a few years later.⁵⁸ This test would be used for determining the principal place of business of both active and inactive or dissolved corporations and would prove to be significant in the development of the circuit split.

Soon after, the Fifth Circuit ruled on the issue in a case, *Harris v. Black Clawson Co.*, which involved the allegedly wrongful death or severe injury of three Louisiana workers.⁵⁹ The case was originally brought in Louisiana state court, then was removed to federal court.⁶⁰ After the federal court granted the plaintiffs leave to add new defendants, the plaintiffs moved to remand the case back to state court. The plaintiffs argued that one of the new defendants had had its principal place of business in Louisiana at the time of the dispute, despite having been inactive for over five years and incorporated in New York.⁶¹

The Fifth Circuit adopted the reasoning of two Pennsylvania federal district court cases and ruled that the construction company did not have its principal place of business in Louisiana; therefore, diversity existed.⁶² The court used what is commonly referred to as the “total activity” test.⁶³ Under

⁵³ *Wm. Passalacqua Builders, Inc. v. Resnick Developers S., Inc.*, 608 F. Supp. 1261, 1263 (S.D.N.Y. 1985).

⁵⁴ *Id.*

⁵⁵ *Passalacqua*, 933 F.2d at 141 (citing *Fada of N.Y., Inc. v. Org. Serv. Co.*, 125 F.2d 120, 121 (2d Cir. 1942)).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Pinnacle Consultants, Ltd. v. Leucadia Nat'l Corp.*, 101 F.3d 900, 907 (2d Cir. 1996).

⁵⁹ 961 F.2d 547, 548–49 (5th Cir. 1992).

⁶⁰ *Id.* at 549.

⁶¹ *Id.* at 549–50.

⁶² *Id.* at 550–51 (citing *Gavin v. Read Corp.*, 356 F. Supp. 483 (E.D. Pa. 1973) and *Kreger v. Ryan Bros.*, 308 F. Supp. 727 (W.D. Pa. 1970)).

⁶³ *Id.* at 549.

this approach, a court balances the results of two tests: (1) the “nerve center” test that assesses the location of the corporation’s headquarters and primary decisionmakers; and (2) what is basically the Second Circuit’s “business activities” test, which assesses the primary location of the corporation’s business activities.⁶⁴

The *Harris* court surveyed, but did not explicitly rebut, *Passalacqua*’s discussion of the policy behind the 1958 amendment and how Congress intended courts to look to bankruptcy law when addressing “principal place of business” issues.⁶⁵ Instead, the court reasoned that the Second Circuit’s use of the business activities test did not comport with the Fifth Circuit’s total activity test.⁶⁶ By focusing solely on the inactive corporation’s last business activity and not on other facts about the makeup of the corporation, the Second Circuit’s approach could lead a court to find that an inactive corporation had a principal place of business that, under the Fifth Circuit’s total activity test, it would not have had while the corporation was active.⁶⁷ The *Harris* court therefore ruled that its total activity test requires a court to *consider* an inactive corporation’s last business activity, but not necessarily conclude that such activity is dispositive in establishing the corporation’s principal place of business.⁶⁸

The *Harris* court’s rejection of the Second Circuit’s approach therefore had more to do with an underlying clash between tests used to determine a principal place of business than it did with a reasoned rejection of *Passalacqua*’s review of the policy and legislative history of the 1958 amendment. The Fifth Circuit may not have rejected the Second Circuit’s rule had it known that the Supreme Court would eventually reject the total activity test.

Three years later, the Third Circuit entered the fray in *Midlantic National Bank v. Hansen*.⁶⁹ The case dealt with a Pennsylvania couple that defaulted on loans from a New Jersey lender used to purchase and start a Delaware savings corporation.⁷⁰ When the couple defaulted on their loans, the then-existing federal Resolution Trust Corporation seized all of the wholly owned savings corporation’s assets.⁷¹ According to the defendant couple, the savings corporation became completely inactive following the seizure, except for being a party to ongoing litigation.⁷² Six months after

⁶⁴ *Id.*

⁶⁵ *See id.* at 550–51.

⁶⁶ *Id.* at 551.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ 48 F.3d 693 (3d Cir. 1995).

⁷⁰ *Id.* at 694–95.

⁷¹ *Id.* at 695.

⁷² *Id.*

the seizure, the New Jersey lender sued both the couple and the allegedly inactive savings corporation in federal court.⁷³

The defendants sought to dismiss the case for lack of subject matter jurisdiction, arguing that although the savings corporation had been inactive for six months leading up to the lawsuit, its principal place of business had been in New Jersey.⁷⁴ The district court denied the motion, and, on appeal, a Third Circuit panel affirmed.⁷⁵ The Third Circuit, which used a “corporate activities” test to determine an *active* corporation’s principal place of business, reasoned that an *inactive* corporation has no activity and therefore no principal place of business.⁷⁶ The *Midlantic* court surveyed circuit court case law and noted that its holding conflicted with *Passalacqua* and *Harris*, as well as a number of district court decisions from the Ninth Circuit.⁷⁷

In adopting a test that categorically excludes the possibility that a dissolved or inactive corporation could have a principal place of business, the *Midlantic* court conceded that its holding could “result in the subversion of the intent of Congress” in some cases.⁷⁸ The court reasoned that this possibility was outweighed by the plain meaning of § 1332(c)(1), and emphasized that the provision’s use of the present tense “has” in “has its principal place of business.”⁷⁹ If Congress had wanted § 1332 to cover inactive corporations, the court argued, it could have simply included “‘has or has had’ its principal place of business.”⁸⁰ Ultimately, the *Midlantic* court reasoned that “the benefits of certainty and clarity [obtained] from the ‘bright line’ approach we adopt outweigh the potential for the harm identified by the Second Circuit.”⁸¹ By the *Midlantic* court’s calculus, an inactive or dissolved corporation getting undeserved access to federal courts was less harmful than federal courts struggling to assess the corporation’s principal place of business.

⁷³ *Id.*

⁷⁴ *Id.* at 695–96.

⁷⁵ *Id.* at 695.

⁷⁶ *Id.* at 696.

⁷⁷ *Id.* at 696–98. The Ninth Circuit district court decisions have noted that the use of the conjunctive in § 1332(c)(1)—state of incorporation *and* principal place of business—indicates that Congress wanted both citizenships to always be factored in. *See* *China Basin Props., Ltd. v. Allendale Mut. Ins. Co.*, 818 F. Supp. 1301, 1304–05 (N.D. Cal. 1992).

⁷⁸ 48 F.3d at 698.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

D. Assessing the Split

To summarize, the divergent approaches to inactive or dissolved corporations can roughly be characterized as follows:

TABLE 1:

	Test Used to Determine a Corporation's Principal Place of Business at the Time the Decision Was Rendered	Rule For Inactive/Dissolved Corporate Citizenship
Second Circuit	Business Activities	Both state of incorporation and last principal place of business
Fifth Circuit	Total Activity (weigh both business activities and corporate headquarters "nerve center")	Always state of incorporation and court should conduct case-by-case analysis of corporation's total activities to determine if it is appropriate for corporation to have principal place of business citizenship
Third Circuit	Corporate Activities	Categorically excludes consideration of principal place of business citizenship; a dissolved or inactive corporation is the only state of incorporation

These varying interpretations of § 1332(c)(1) stemmed more from the varying types of pre-*Hertz* principal place of business tests than from a dispute over the contextual construction of § 1332(c)(1) and its legislative history. The business activities, total activity, and corporate activities tests used to determine the principal place of business of active corporations allowed for different outcomes when dealing with a dissolved or inactive corporation.

Soon after the *Midlantic* decision, the scant scholarly attention to the issue of inactive and dissolved corporation citizenship emerged. One notable review found all three circuit approaches to be unsatisfactory: each was either over- or underinclusive so as to clash with Congress's intent

behind § 1332(c)(1).⁸² The Second Circuit's business activities test, which uses a corporation's place of "last activity" for determining its principal place of business, improperly allows a failing corporation to take its winding-up activities to its state of incorporation, meaning that certain circumstances would allow the corporation to insulate itself from state court actions, even where the state court action could be entirely local in nature.⁸³ The Third Circuit's approach flatly conflicts with Congress's intent by allowing for inactive or dissolved corporations to get undeserved access to federal courts, and the Fifth Circuit's approach provides too vague a standard for courts to practically apply.⁸⁴

Timothy Yuncker argues that suits involving inactive corporations will become more commonplace, citing U.S. Department of Commerce statistics indicating that more and more corporations fail each year.⁸⁵ For this reason, Yuncker argues that Congress should intervene and clarify § 1332(c) by adding a provision specifically covering inactive corporations.⁸⁶ Yuncker's proposed statute would make an inactive corporation a citizen of its last principal place of business, so long as the cause of action before the court relates to conduct of the inactive corporation that occurred within 180 days of the corporation becoming inactive.⁸⁷ If Congress were not to act, Yuncker advocates a modified version of the Fifth Circuit's approach, which would require a court to factor in an inactive corporation's last principal place of business unless the law of the state under which the plaintiff seeks relief provides that a defunct corporation can no longer be sued.⁸⁸

Following the development of the circuit split in the mid-1990s, only one other circuit court of appeals assessed the split before 2012, while district courts continued to struggle over how best to address the issue.⁸⁹ The Fourth Circuit in *Athena Automotive, Inc. v. DiGregorio* joined the Fifth Circuit in 1999.⁹⁰ The court reasoned that the Fifth Circuit's total

⁸² Timothy J. Yuncker, *Inactive Corporations and Diversity Jurisdiction Under 28 U.S.C. § 1332(c): The Search for a Principal Place of Business*, 28 U. TOL. L. REV. 815, 829–34 (1997).

⁸³ *Id.* at 829–30.

⁸⁴ *Id.* at 831–34.

⁸⁵ *Id.* at 816–17.

⁸⁶ *Id.* at 834.

⁸⁷ *Id.* at 834–35.

⁸⁸ *Id.* at 836–38.

⁸⁹ *See, e.g.*, *Parker v. Moore*, No. C 08-1896 PJH, 2008 WL 2220613 (N.D. Cal. May 27, 2008) (district court in Ninth Circuit applying Fifth Circuit's approach); *see also* *Ball v. Dynamic Details Inc.*, Ariz., No. CV-06-1661-PHX-FJM, 2007 WL 778410 (D. Ariz. Mar. 12, 2007) (district court in Ninth Circuit applying the Second Circuit's approach); *Hogwood v. Hearthstone Mgmt. Grp.*, No. Civ.A. 99-5208, 2001 WL 34387931 (E.D. Pa. Nov. 5, 2001) (district court in Third Circuit applying the Second Circuit's approach).

⁹⁰ 166 F.3d 288 (4th Cir. 1999).

activity test would best distinguish those inactive corporations that no longer had any impact on their former locale and those whose winding-down activity was still significant at the time the suit was filed.⁹¹ The Fourth Circuit rejected the Second Circuit's categorical conclusion that an inactive corporation must be a citizen of its last place of business.⁹² The Fourth Circuit also rejected the Third Circuit's approach because it would lead to results "demonstrably at odds with the statute."⁹³

In assessing the split, Yuncker and the Fourth Circuit clearly sought a rule soundly based in the text and legislative history of § 1332(c)(1). Unfortunately, they did so at a time when much of the doctrine about how to determine the principal place of business for both active and inactive corporations was broadly open to question. Only the Supreme Court's recent clarification of the doctrine made it possible to push the issue of dissolved and inactive corporation citizenship towards resolution.

II. *HERTZ AND HOLSTON*

The Supreme Court's decision in *Hertz* settled how courts should determine an active corporation's principal place of business. The Court's reasoning also provides more general guidance on how courts should handle issues involving diversity jurisdiction. Reviewing the *Hertz* decision in detail therefore lays the groundwork for assessing the Eleventh Circuit's reasoning in *Holston*, which adopted the Third Circuit's approach and rejected the Second and Fifth Circuits' approaches largely by reference to *Hertz*.

A. *Hertz's Nerve Center Test & Bright-Line Reasoning*

A corollary and much more robust circuit split over how to determine an active corporation's principal place of business arose soon after the 1958 enactment of § 1332(c)(1). Struggling to give meaning to the phrase "principal place of business," some circuits determined a corporation's principal place of business by focusing solely on the location of the corporation's headquarters or nerve center,⁹⁴ some focused on the

⁹¹ *Id.* at 291.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *See, e.g.,* Wis. Knife Works v. Nat'l Metal Crafters, 781 F.2d 1280, 1282 (7th Cir. 1986) (stating that the Seventh Circuit uses the nerve center test and searches for the corporation's headquarters to determine the principal place of business).

corporation's principal place of business activity,⁹⁵ and others balanced the two considerations⁹⁶ to come to a case-by-case determination.

In *Hertz Corp. v. Friend*, former employees of the Hertz Corporation brought a class action in California state court alleging violations of wage and hours laws.⁹⁷ Hertz removed to federal court, asserting that it was neither incorporated nor had its principal place of business in California.⁹⁸ By raw numbers, California represented the plurality of Hertz's business operations, sales figures, and payroll.⁹⁹ Hertz argued, however, that its corporate leadership and administration were centered in New Jersey and that this should be the determinative factor for the location of its principal place of business.¹⁰⁰

After the Ninth Circuit affirmed the trial court's conclusion that it lacked diversity jurisdiction over the case, the Supreme Court entered the fray.¹⁰¹ The Court began by noting the purpose of diversity jurisdiction—reducing prejudice against out-of-state parties.¹⁰² It observed that many of the factors that might indicate a concern over prejudice against corporations, such as the corporation's image, history, and advertising practices, cannot easily be quantified.¹⁰³ The Court openly questioned whether any possible principal place of business test could consistently protect a corporation against the biases it might or might not face in a state court.¹⁰⁴ The Supreme Court concluded, however, that the nerve center approach of looking to where the corporation had its corporate headquarters was the most preferable test, meaning Hertz's principal place of business was New Jersey.¹⁰⁵ It rejected the business activities and balancing tests because they were too unwieldy and contained so many factors that even circuits purporting to follow the same test produced different results.¹⁰⁶

⁹⁵ See, e.g., *Tosco Corp. v. Cmty. for a Better Env't*, 236 F.3d 495, 500 (9th Cir. 2001) (per curiam) (stating that the Ninth Circuit only uses the nerve center test when the place of operations test does not reveal the state in which a corporation's business activity predominates).

⁹⁶ See, e.g., *Teal Energy USA, Inc. v. GT, Inc.*, 369 F.3d 873, 876 (5th Cir. 2004) (stating that the Fifth Circuit focuses on both the nerve center and the place of activities in determining a corporation's principal place of business); see also *Amoco Rocmount Co. v. Anschutz Corp.*, 7 F.3d 909, 915 (10th Cir. 1993).

⁹⁷ 559 U.S. 77, 81 (2010).

⁹⁸ *Id.* at 81–82.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 82.

¹⁰² *Id.* at 92.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 92–97.

¹⁰⁶ *Id.* at 90–92.

The Court laid out three considerations that, “taken together,” led to the uniform adoption of the nerve center test.¹⁰⁷ First, the Court looked to the text of § 1332(c)(1). The Court focused on the statute’s phrase: “State where it has its principal place of business.”¹⁰⁸ The Court viewed the use of “place” in the singular rather than “places” as an indication that Congress wanted courts to pick the most prominent place within a state that the corporation did its business.¹⁰⁹ Whereas business activity usually occurs in many different places—and possibly in more than one state—the Court reasoned that a corporation’s nerve center, such as a headquarters, is typically perceived by the public as being one, particular place that is the corporation’s “main place of business.”¹¹⁰

Second, the Court stated that “administrative simplicity is a major virtue in a jurisdictional statute.”¹¹¹ Adopting a complicated jurisdictional test would waste time on nonmerit issues, encourage gamesmanship, and lead to more appeals and reversals.¹¹² A simple rule, in contrast, would promote predictability in aid of a corporation’s business decisions and increase the likelihood that a verdict or settlement will be based on the substantive merits of the case.¹¹³

Third, the Court looked to legislative history. It noted that early iterations of what eventually would become the 1958 amendments contained a numerical test that would make a corporation a citizen of the state in which it took in over half of its gross income.¹¹⁴ Because Congress rejected this test as too difficult to apply, and because a business activity test involved the same difficult application, the Court reasoned the nerve center test best accorded with Congress’s intent.¹¹⁵

The Court acknowledged that the nerve center test could lead to results that would conflict with the purpose of § 1332, such as a corporation whose public face and activities are centered in New Jersey but whose corporate headquarters are just across the border in New York.¹¹⁶ These situations, the Court reasoned, were effectively collateral damage to a clear rule that supports simpler jurisdictional administration and a more uniform legal system.¹¹⁷ One scholar has interpreted *Hertz* as the latest signal of a recently

¹⁰⁷ *Id.* at 93.

¹⁰⁸ *Id.* (quoting 28 U.S.C. § 1332(c)(1) (2012)).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* at 94.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at 95.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 96.

¹¹⁷ *See id.*

developed principle of statutory construction: the “anti-messiness” principle.¹¹⁸ The anti-messiness principle favors tests that do not require complicated factual inquiries.¹¹⁹ The merits of the principle and the arguments of those who argue for the principle’s broad application to federal jurisdiction is a matter of ongoing debate.¹²⁰

B. *Holston Harnesses Hertz*

In the wake of *Hertz*’s adoption of the nerve center test, the Eleventh Circuit *Holston* court leaned heavily on what it deemed to be *Hertz*’s broad directive on how to analyze diversity jurisdiction issues. The *Holston* court faced a Florida corporation suing a Delaware-chartered corporation that clearly, under *Hertz*’s nerve center test, had once had its principal place of business in Florida.¹²¹ Nonetheless, the *Holston* court found that LanLogistics’s formal dissolution just months before broke off the district court’s ability to factor LanLogistics’s principal place of business in a diversity jurisdiction analysis.¹²²

To determine the citizenship of the dissolved corporation before it, the Eleventh Circuit in *Holston* clearly structured its analysis of the law by assessing how the circuit split tests accorded with *Hertz*.¹²³ The *Holston* court, however, did not clearly go through all three of the *Hertz* considerations. Instead, the court focused its attention on the benefit of clear-cut rules, even those that conflict with the rationale behind § 1332.¹²⁴ Similar to the Fifth Circuit’s decision in *Harris*, the *Holston* court quickly disposed of the Second Circuit’s approach to the issue, focusing on the fact that *Hertz* rejected the Second Circuit’s use of the business activity test for determining the citizenship of active corporations.¹²⁵ The court reasoned that because the Second Circuit used a business activity test, “a corporation

¹¹⁸ Anita S. Krishnakumar, *The Anti-Messiness Principle in Statutory Interpretation*, 87 NOTRE DAME L. REV. 1465 (2012).

¹¹⁹ *Id.* at 1505–07; see also Jonathan Remy Nash, *On the Efficient Deployment of Rules and Standards to Define Federal Jurisdiction*, 65 VAND. L. REV. 509, 511–13 (2012) (comparing preference for rules for determining diversity jurisdiction to other areas of jurisdictional law that employ standards).

¹²⁰ Compare Nash, *supra* note 119, at 512–13 (arguing for a rule-based approach to jurisdictional inquiries checked by a standard-based abstention doctrine), with Scott Dodson & Elizabeth McCuskey, Response, *Structuring Jurisdictional Rules and Standards*, 65 VAND. L. REV. EN BANC 31 (2012) (arguing that a rule-based approach to jurisdictional inquiries contains underlying ambiguities that call into question the purported benefits of the approach).

¹²¹ See *Holston III*, 677 F.3d 1068, 1069 (11th Cir. 2012) (per curiam).

¹²² *Id.* at 1071.

¹²³ *Id.* at 1070–71.

¹²⁴ *Id.* at 1071.

¹²⁵ *Id.*

could be considered a citizen of a state in which it was not a citizen before dissolution.¹²⁶

The *Holston* court did not address, however, how *Hertz* could be read to refute the broader rationale of the Second Circuit—to always factor an inactive and dissolved corporation’s last principal place of business, regardless of the specific test used to determine a corporation’s principal place of business. Nothing in *Holston* addresses whether the Second Circuit’s approach might be the most preferable if it used the nerve center test instead of a business activity test to assess an inactive or dissolved corporation’s last principal place of business.

Implicitly rejecting the Fifth and Fourth Circuits’ total activity approach, the *Holston* court adopted the Third Circuit’s bright-line approach of never considering a dissolved corporation’s principal place of business.¹²⁷ The court acknowledged that the Third Circuit’s test could lead to results that were inconsistent with the purpose of § 1332.¹²⁸ This was acceptable, however, because of *Hertz*’s allowance of collateral damage in the process of adopting a bright-line approach¹²⁹: “This bright-line rule may open federal courts to an occasional corporation with a lingering local presence, but undeserved access to a fair forum is a small price to pay for the clarity and predictability that a bright-line rule provides.”¹³⁰ The *Holston* court therefore ruled that a dissolved corporation has no principal place of business.¹³¹

III. A MODIFIED SECOND CIRCUIT NERVE CENTER TEST

Before going into detail on why the *Holston* bright-line approach is troublesome and a modified Second Circuit approach is preferable, I begin with a recitation of facts borrowed from a suit decided in the early 2000s that helps to show the real-world implications of the two approaches.

In 2001, a resident of California filed a complaint in California state court against his former employer, Bay Area Foods, and its holding company, Bay Area Holding.¹³² Up until roughly two years before the suit was filed, the defendant corporations had operated twelve stores and maintained their offices exclusively in California.¹³³ Despite the apparent

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Sellers v. Kohlberg & Co.*, No. C 01-01365 WHA, 2001 WL 761187, at *1 (N.D. Cal. June 29, 2001).

¹³³ *Id.*

lack of diversity between the plaintiff and his former employer, the defendants removed the case to federal court on the theory that Bay Area Foods had been incorporated in Delaware and had ceased business operations two years before the lawsuit.¹³⁴ It would be difficult to describe Bay Area Foods as anything other than the type of business Congress hoped to exclude from federal courts in 1958: “a local institution, engaged in a local business and in many cases locally owned.”¹³⁵ Based on the legislative history of § 1332(c)(1), it would seem Bay Area Foods should not be “enabled to bring its litigation into the Federal courts simply because it has obtained a corporate charter from another State.”¹³⁶ Employing the bright-line test adopted by the *Holston* court, however, Bay Area Foods would get access to the federal courts because any undeserved access is merely collateral damage to the benefits of the bright-line approach.

A more thorough look at the history of diversity jurisdiction and *Hertz* reveals that this is a problematic outcome. Congress affirmatively acted to restrict the ability of corporations to access federal courts in 1958.¹³⁷ Congress was motivated both by administrative concerns and by the unfairness of one local corporation getting federal court access that another local corporation would not get merely because it chose to incorporate in the state in which it conducts its business.¹³⁸ *Hertz* perhaps stands for courts adopting “non-messy” rules, but it does not instruct courts to ignore the intent of Congress.

A modified Second Circuit approach would satisfy *Hertz* and more closely align to the goal of § 1332(c)(1). Under this approach, a court would establish an inactive or dissolved corporation’s principal place of business by determining where it had its last nerve center (basically, its last corporate headquarters). Unlike the business activity test employed by the Second Circuit pre-*Hertz*, finding an inactive or dissolved corporation’s last corporate headquarters would not be particularly fact-intensive or administratively burdensome. For example, nothing in *Holston* or *Sellers* indicates that either trial court would have struggled to determine the inactive or dissolved corporation’s last corporate headquarters.¹³⁹ Indeed, it is hard to imagine different circumstances where it *would* be hard.

The *Holston* court claimed to be resolving the question of dissolved and inactive corporate citizenship by applying the analytical framework

¹³⁴ *Id.*

¹³⁵ *See id.* (quoting S. REP. NO. 85-1830, at 4 (1958)); S. REP. NO. 85-1830, at 4; H.R. REP. NO. 85-1706, at 4 (1958).

¹³⁶ S. REP. NO. 85-1830, at 4; H.R. REP. NO. 85-1706, at 4.

¹³⁷ *See Friedenthal, supra* note 36, at 213.

¹³⁸ *Id.* at 214.

¹³⁹ *See Holston II*, 766 F. Supp. 2d 1327, 1329 (S.D. Fla. 2011); *see also Sellers*, 2001 WL 761187, at *4.

used in *Hertz* to determine the appropriate principal place of business test. As discussed previously, there is reason to question the fidelity of that application.¹⁴⁰ The *Holston* court did not clearly conduct the three-prong *Hertz* analysis of statutory language, administrative simplicity, and legislative history.¹⁴¹ Instead, the *Holston* court focused almost exclusively on the administrative-simplicity prong.¹⁴² A thorough analysis of *Hertz*'s three considerations reveals that, with minimal changes, the Second Circuit has it right.

A. *Hertz* Prong One: Text of § 1332(c)(1)

The first prong involves an analysis of the statutory language of § 1332(c)(1). The Third Circuit in *Midlantic* arguably gave the most thoughtful attempt at the plain meaning of § 1332(c)(1) and concluded that the present tense use of “has” in “has its principal place of business” means a corporation has to be in existence in order to have a principal place of business.¹⁴³ The *Midlantic* court rejected the argument that the conjunctive use of “and” in § 1332(c)(1) was relevant in determining the citizenship of an inactive corporation.¹⁴⁴ While there could be endless arguments over the meaning of “and,” a closer look at the *Midlantic* court’s “has” argument indicates that its statutory language argument is lacking. Even a brief review of Delaware corporation law shows that just because a Delaware-chartered corporation has dissolved does not mean that it is by any means “dead” and therefore incapable of having things in the present.¹⁴⁵ A dissolved corporation often has assets and liabilities for some time after dissolution. Although it is perhaps more intuitive to think a dissolved or inactive corporation cannot have a principal place of business, legally there is no reason this is the case. This calls into question how the *Midlantic* and *Holston* courts could so easily assume that a corporation, by dissolving or becoming inactive, has totally ceased to exist and thereby lost its ability to possess things in the present tense, including statutorily conferred citizenship.

¹⁴⁰ See discussion *supra* Part II.B.

¹⁴¹ See *Holston III*, 677 F.3d 1068, 1070–71 (11th Cir. 2012) (per curiam); see also *Hertz Corp. v. Friend*, 559 U.S. 77, 93–95 (2010).

¹⁴² *Holston III*, 677 F.3d at 1070–71.

¹⁴³ 48 F.3d 693, 697–98 (3d Cir. 1995).

¹⁴⁴ *Id.* at 698.

¹⁴⁵ DEL. CODE ANN. tit. 8, § 278 (2011) (“All corporations, whether they expire by their own limitation or are otherwise dissolved, shall nevertheless be continued, for the term of 3 years from such expiration or dissolution or for such longer period as the Court of Chancery shall in its discretion direct, bodies corporate for the purpose of prosecuting and defending suits, whether civil, criminal or administrative, by or against them . . .”).

The battle over dissolved and inactive corporations' citizenship, however, cannot and need not be won or lost by statutory construction alone. This consideration proves to be inconclusive at best, meaning it is appropriate to move on to the other two prongs of the *Hertz* analysis.

B. Hertz Prong Two: Administrative Simplicity

The *Hertz* second-prong consideration of administrative simplicity dooms the Fourth and Fifth Circuits' total activity approach. *Hertz*'s rejection of the total activity and other fact-intensive tests clearly indicates the Court would not adopt a rule that allows for case-by-case considerations of a corporation's activities.¹⁴⁶

Both the Second Circuit and *Holston* applied bright-line tests. The *Holston* court, however, reasoned that the Third Circuit's bright-line test was easier to apply since it did not assess the last activity of the inactive or dissolved corporation in question.¹⁴⁷ The most apparent flaw in this reasoning is that, with only a minor adjustment to accord with *Hertz*'s nerve center test, the Second Circuit's *Passalacqua* rule would not be significantly burdensome to apply. Under a modified Second Circuit rule, a court would still always factor in a dissolved or inactive corporation's most recent principal place of business. The only difference would be that rather than determining the corporation's most recent principal place of business by assessing the corporation's business activity, the court would do so by looking for the corporation's last corporate headquarters.

There is no reason to think that determining a dissolved or inactive corporation's most recent corporate headquarters would be any more burdensome than doing so for an active corporation. While this issue has not widely been explored, one can more easily imagine a court struggling to assess whether a corporation is actually inactive or dissolved than a court struggling to assess a corporation's most recent corporate headquarters. A modified Second Circuit rule would accord with *Hertz*'s preference for administrative simplicity and would give litigants all of the predictability they could need: regardless of whether it is dissolved or inactive, a corporation would be a citizen of the state where it most recently had its corporate headquarters, as well as of the state where it incorporated.¹⁴⁸ With two out of the three *Hertz* considerations addressed, it remains unclear how

¹⁴⁶ See *Hertz*, 559 U.S. at 90–93.

¹⁴⁷ See *Holston III*, 677 F.3d at 1071.

¹⁴⁸ Any concern about how long an inactive or dissolved corporation should be subject to suit is irrelevant here. Section 1332(c)(1) citizenship does not create any cause of action, but instead only allows federal courts to hear state law cases. States are free to pass statutes of limitation that would bar suits, both in state and federal court, after the passage of a certain period of time.

the Third Circuit's bright-line rule is materially more favorable under *Hertz* than would be a modified Second Circuit approach.

C. *Hertz* Prong Three: Legislative History

The third *Hertz* consideration, legislative history, tips the scales in favor of the modified Second Circuit approach. Three aspects of the legislative history are relevant here: (1) the legislative history indicating Congress's primary concern behind enacting § 1332(c)(1) was to alleviate federal court dockets; (2) the legislative history indicating Congress was concerned about the evils of undeserved access to federal courts; and (3) the bankruptcy-like scheme Congress envisioned would guide the implementation of § 1332(c)(1).

As to the first aspect, neither rule is likely to practically address Congress's concern, at least by current trends in diversity suits coming before federal courts. Contrary to Timothy Yuncker's prediction,¹⁴⁹ no significant docket-load spike has occurred on account of inactive or dissolved corporations. An admittedly inexact search of cases involving disputes over an inactive or dissolved corporation's citizenship suggests that fewer than 100 such cases have come before the federal courts between 1990 and October 2013.¹⁵⁰ Even if these sorts of cases are not common, however, the fact remains that the adoption of the *Holston* rule across the federal courts would result in at least *some* increase in federal cases: the rule logically allows for more situations where a corporation can access federal courts.

The second legislative history consideration decisively disfavors the *Holston* court approach. Congress clearly expressed its desire to prevent the "evil" of local corporations receiving diversity jurisdiction access to the federal courts merely because they had made the decision to incorporate in a different state.¹⁵¹ Particularly in situations like the Bay Area Foods case, where there was no question that all actors and issues confronting the court were decisively local in nature,¹⁵² the *Holston* rule would not accord with

¹⁴⁹ Yuncker, *supra* note 82, at 816–17.

¹⁵⁰ The search was conducted on WestlawNext. WESTLAWNEXT, <http://next.westlaw.com> [<https://perma.cc/KET6-F43M>] (search "inactiv! OR dissol! /s corp! /s divers!"). A review of the roughly 150 results indicates that far fewer than 100 of the results actually dealt with citizenship definition disputes. While by no means a thorough empirical analysis, this author is convinced that Yuncker's prediction of burdensome caseloads has, at least until now, not occurred.

¹⁵¹ S. REP. NO. 85-1830, at 4 (1958) (noting that court-crafted doctrine on the citizenship of corporations "has given rise to the evil whereby a local institution, engaged in a local business and in many cases locally owned, is enabled to bring its litigation into the Federal courts simply because it has obtained a corporate charter from another State"); H.R. REP. NO. 85-1706, at 4 (1958) (same).

¹⁵² *Sellers v. Kohlberg & Co.*, No. C 01-01365 WHA, 2001 WL 761187, at *1, *4 (N.D. Cal. June 29, 2001).

the clearly expressed desire of Congress to keep local disputes out of the federal courts.

It is true that the nerve center test adopted in *Hertz* permits this same evil. The difference between *Hertz* and *Holston*, however, is that *Hertz* settled a dispute over many plausible principal place of business tests. None of the tests considered by the *Hertz* court categorically excluded the possibility of a corporation not having a principal place of business. Instead, the varying tests would occasionally lead to a corporation obtaining diversity jurisdiction under one test, but not the other, depending on the facts of the case. In contrast, the difference between a modified Second Circuit approach and the *Holston* approach is that one dictates that an inactive or dissolved corporation is *always* only a citizen of its state of incorporation, while the other at least allows the possibility of two states of citizenships. Particularly because only Congress, not the federal courts, has the authority to expand or contract diversity jurisdiction, federal courts should disfavor an approach that would categorically permit an expansion of diversity jurisdiction.

Rather than see how its rule would, on an institutional basis, make it more likely for inactive or dissolved corporations to receive underserved access to federal courts, it appears the *Holston* court might have been distracted by the other “evil” it faced. Because the lower court in *Holston* did not fully address subject matter jurisdiction concerns until after trial,¹⁵³ using a different rule would have meant that two years of federal court adjudication would have occurred for nothing: the judgment would have had to be vacated and the whole case would have had to go to state court for relitigation. Although nothing in the *Holston* opinions indicates the Eleventh Circuit was outcome-determinative in its reasoning, it is indisputable that a different outcome in the case would have been highly undesirable from a judicial resource and equity viewpoint. The opposite outcome would have meant that the *Holston* district court spent years adjudicating a case it did not have jurisdiction over.¹⁵⁴ Furthermore, the district court’s ruling in favor of the plaintiff would have been meaningless and the plaintiff’s claim would have had to be relitigated in state court.

Instead of its diversity of citizenship ruling, the clear takeaway from *Holston* should be that no federal court should proceed with adjudication until it is satisfied that jurisdiction exists.¹⁵⁵ A modified Second Circuit test,

¹⁵³ See *Holston II*, 766 F. Supp. 2d 1327 (S.D. Fla. 2011).

¹⁵⁴ *Holston I*, 664 F. Supp. 2d 1258 (S.D. Fla. 2009) (first reported district court decision in the *Holston* case); see also *Holston II*, 766 F. Supp. 2d at 1327 (final district court decision before appeal in the *Holston* case).

¹⁵⁵ Federal courts “have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party.” *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006).

applied at the start of litigation, would provide the same sort of bright-line rule used by the *Holston* court without allowing for the problematic results already discussed.

Finally, a look to pre-1958 bankruptcy principles, which the 1958 Congress expressly referenced when adopting § 1332(c)(1),¹⁵⁶ provides additional support for a modified Second Circuit approach. The Second Circuit's pre-1958 bankruptcy jurisdiction principles indicate that courts should interpret ambiguities in the meaning of "principal place of business" by looking to what forums Congress intended to make available.¹⁵⁷ The 1958 amendment's use of the term is clearly meant to limit, not expand, forum options.¹⁵⁸ Accordingly, a modified Second Circuit approach is the most appropriate.

Taken as a whole, the three *Hertz* considerations strongly support a modified Second Circuit test. The test provides a bright-line rule that reasonably resolves the ambiguity in the text of § 1332(c)(1) with the clear intent of Congress as shown through the legislative history.

CONCLUSION

The Eleventh Circuit in *Holston* faced two unsavory options. The court could have applied a thoroughly supported rule that would have determined a dissolved or inactive corporation's principal place of business by a nerve center test. This first option would have required the court to allow LanLogistics to escape an adverse judgment and render two years of federal court litigation useless. The *Holston* court instead chose the second unsavory option, which allowed it to preserve the trial court's judgment at the cost of applying a pre-existing, but insufficiently reasoned rule that categorically allows all dissolved and inactive corporations to have their citizenship determined only by their state of incorporation.

Courts should not follow the Eleventh Circuit's decision to go with the latter rule. Instead, a modified version of the Second Circuit's holding in *Passalacqua*—that a court must always determine a dissolved or inactive corporation's principal place of business by using a nerve center analysis—best accords with the directives of the Supreme Court in *Hertz* and the legislative history behind Congress's statutory definition of a corporation's citizenship.

¹⁵⁶ See discussion *supra* Part I.B.

¹⁵⁷ See discussion *supra* Part I.B.

¹⁵⁸ See discussion *supra* Part I.B.

