MANUFACTURED DIVERSITY

Article III, section 2 of the Constitution of the United States provides that "The judicial Power shall extend . . . to Controversies . . . between Citizens of different States," and Congress has vested in the federal district courts jurisdiction of civil suits between citizens of different states where the amount in controversy exceeds $10,000.[1] Typically, a citizen of one state sues a citizen of another for injuries sustained by the former and caused by the latter. There is no doubt that diversity jurisdiction exists in such a case. But because judgments are often higher in federal courts,[2] and because judges, juries, and procedures may be superior to those of the available state courts,[3] injured plaintiffs and their lawyers often use every artifice at their disposal to create federal jurisdiction where it would not otherwise exist. The most frequently used device is the appointment of a representative party whose citizenship differs from that of the defendant. Although suit is then ostensibly between the representative and the defendant, in reality the representative may be nothing more than a nominal party with neither duties nor interest. Thus, if one citizen kills another citizen of the same state and a citizen of a different state is appointed to administer the estate, there may or may not be sufficient diversity of citizenship between the parties to sustain federal jurisdiction.[4] Similarly, when a minor and an adult, citizens of the same state, run into each other on the highway the minor may have a guardian from a different state appointed to sue on his behalf. As their workload increases, federal courts are looking with a new perspective at cases where diversity is "manufactured," hoping to relieve the federal judiciary of the burden of hearing cases which, beyond their mere form, are essentially local actions that should be tried in state tribunals.

A. Diversity Jurisdiction and Its Historical Limitations

During the struggle for ratification of the Federal Constitution, the Federalists supported the diversity clause out of fear that foreign[5]

[1] 28 U.S.C. § 1332 (1964).

[2] An orphans' court judge in Philadelphia appointed a fact-finding commission to determine the advantages offered by federal courts before appointing an out-of-state guardian. The findings were that there is a better chance of obtaining and sustaining a higher verdict in the federal courts than in state tribunals. Kaufmann Estate, 87 Pa. D. & C. 401, 404 (Phila. Orphans' Ct. 1954).

[3] ALI STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS, PART I, at 48 (Official Draft 1965).

[4] The discussion throughout this paper assumes that the issue presented is one of statutory construction, and not of congressional power in a situation where Congress deemed it advisable to reach the constitutional limits of diversity jurisdiction.

[5] As used in this Comment, the word "foreign" means a litigant not a citizen of the forum state.

litigants would be subjected to discrimination by the courts, juries,[6] and legislatures of forum states.[7] Anti-Federalists feared that unbridled access to federal courts might result in less competent decisions on state law,[8] and, furthermore, might emasculate the state judiciary[9] in cases where there was no danger of prejudice. Congress reacted to these latter fears in the Judiciary Act of 1789 by limiting federal diversity jurisdiction,[10] particularly in the anti-assignment provision:

> No district court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made.[11]

This provision worked effectively as a limitation on federal jurisdiction, since jurisdiction in suits by assignees was narrowly confined,

[6] *See* Yntema & Jaffin, *Preliminary Analysis of Concurrent Jurisdiction*, 79 U. PA. L. REV. 869, 876 n.13, 870 n.1, 871 n.1 (1931).

[7] *See* Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483 (1928). As James Wilson brooded in the Pennsylvania Convention:

> [H]ow a merchant must feel to have his property lay at the mercy of the laws of Rhode Island? I ask further, how will a creditor feel who has debts at the mercy of tender laws in other states?

THE DEBATES, RESOLUTIONS, AND OTHER PROCEEDINGS IN CONVENTION ON THE ADOPTION OF THE FEDERAL CONSTITUTION 282 (J. Elliot ed. 1830). Alexander Hamilton believed that diversity jurisdiction was necessary to preserve the privileges and immunities guaranteed by the Constitution. THE FEDERALIST No. 80 at 588-90 (John C. Hamilton ed. 1875). *Contra*, Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 82 (1923).

[8] The ablest expression of the belief that diversity jurisdiction was unnecessary came from Richard Henry Lee in his LETTERS OF A FEDERAL FARMER:

> [E]xcept paper money and tender laws, which are wisely guarded against in the proposed constitution; justice may be obtained in these [state] courts on reasonable terms; they must be more competent to proper decisions on the law of their respective states, than the federal courts can possibly be. I do not, in any point of view, see the need of opening a new jurisdiction in these causes . . . .

PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 277, 307 (P. Ford ed. 1888).

[9] Patrick Henry foresaw the doom of state courts:

> I see arising out of that paper, a tribunal, that is to be recurred to in all cases, when the destruction of the state judiciaries shall happen; and from the extensive jurisdiction of these paramount courts, the state courts will soon be annihilated.

3 THE DEBATES, RESOLUTIONS, AND OTHER PROCEEDINGS IN CONVENTION ON THE ADOPTION OF THE FEDERAL CONSTITUTION 397 (J. Elliot ed. 1830).

[10] Congress imposed a monetary jurisdictional limitation as a safeguard against forcing a party to travel great distances over a trivial claim. *See* 3 THE DEBATES, RESOLUTIONS, AND OTHER PROCEEDINGS IN CONVENTION ON THE ADOPTION OF THE FEDERAL CONSTITUTION 131 (J. Elliot ed. 1830).

[11] Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 73. The impetus behind the anti-assignment clause was the states' interest in protecting their legal tender laws as much as their interest in protecting their judiciary. Friendly, *Diversity Jurisdiction, supra* note 3, at 495-97, 503 n.102.

and if the owner of the claim could sue in his own name, there was no motive for transferring it to another to bring the action.[12]

The assignee clause, because of its birth in protection of state tender laws,[13] was not merely a limitation on manufactured diversity, but rather operated without regard to the legitimacy of the transfer or the assignee's need for the protection of a federal court. The problem of colorable transfers with the intention of creating a case cognizable in federal court was still presented, though, in suits concerning transfers not covered by the statute,[14] such as actions for the recovery of real property.[15] The courts, however, created their own standards to determine the validity of the claimed diversity:

> [I]t was equally well settled that if the transfer was fictitious, the assignor or grantor continuing to be the real party in interest, and the plaintiff on record but a nominal or colorable party, his name being used only for the purpose of jurisdiction, the suit would be essentially a controversy between the assignor or grantor and the defendant, . . . and that the jurisdiction of the court would be determined by their citizenship rather than that of the nominal plaintiff.[16]

In 1875, Congress acted again to limit the diversity jurisdiction. With existing statutory law preventing the use of assignments of notes or choses in action to create federal jurisdiction, and with judicially-created criteria insuring that only legitimate assignees in areas not covered by the statute would be recognized for purposes of diversity, Congress directed the circuit courts to dismiss any suit

> at any time . . . that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or the parties to said suit

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[12] Farmington v. Pillsbury, 114 U.S. 138, 142 (1885). *Contra,* Cohen & Tate, *Federal Diversity Jurisdiction by the Appointment of Representatives: Its Legality and Propriety,* 1 VILL. L. REV. 201, 208 (1956), where the authors call the act of 1789 a "wooden rule" that was ineffective, requiring a new statute.

[13] *See* note 11 *supra.*

[14] *See* B. R. CURTIS, JURISDICTION, PRACTICE, AND PECULIAR JURISPRUDENCE OF THE COURTS OF THE UNITED STATES 155-59 (1896).

[15] The exclusion of real estate assignments from the statute was greatly criticized:

> This temporary prohibition which may be repealed at any time extends only to prevent the assignment of "les choses en action," or in plain English, to demands of a personal nature such as money due on bonds . . . and . . . therefore suits may be immediately instituted in the Federal Court for all the uncontroverted land in Pennsylvania, or any other State, by merely borrowing the name of a friend in another State, to bring the suit, which as above observed, may be done by a mock assignment of the claim.

Independent Gazeteer (Phila.), Sept. 9, 1789, cited in Warren, *New Light on the History of the Federal Judiciary Act of 1789,* 37 HARV. L. REV. 49, 80 & n.73 (1924).

[16] Farmington v. Pillsbury, 114 U.S. 138, 143 (1885) (summary of pre-1875 law). *See* Maxwell's Lessee v. Levy, 2 U.S. (2 Dall.) 380 (C.C.D.Pa. 1797).

> have been improperly or collusively made or joined, . . . for the purpose of creating a case cognizable or removable . . . .[17]

Congress thus included in its test for dismissal the same standard that had been judicially created: if the plaintiff is a nominal, rather than an interested party, the court will dismiss for lack of diversity if the real party in interest is a citizen of the same state as the defendant.

In 1948, Congress revised and recodified the Judicial Code, removing the anti-assignment clause and streamlining the phraseology of the 1875 statute:

> A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court.[18]

When the codifiers changed the wording of the prior statute, they had no intention of changing its meaning. As the revisers' note to section 1359 indicates:

> Provision . . . for . . . an action not really and substantially involving a dispute or controversy within the jurisdiction of a district court, [was] omitted as unnecessary.[19]

B. Judicial Interpretation of Section 1359

In *McSparran v. Weist*[20] and *Esposito v. Emery*,[21] the United States Court of Appeals for the Third Circuit focused sharply on the restrictive implications of section 1359 for diversity jurisdiction. In an abrupt reversal of its past decisions,[22] the court held that the appointment of out of state guardians for the admitted purpose of creating diversity to sue on behalf of their wards[23] in federal court was "col-

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17 Act of March 3, 1875, ch. 137, § 5, 18 Stat. 472. This was later incorporated as § 37 of the Judicial Code of 1911, 28 U.S.C. § 80 (1940 ed.).

18 28 U.S.C. § 1359 (1964). One of the major purposes of the revision was to rid the code of the assignee clause, or what was left of it. For a discussion of the reasons elimination was deemed necessary, see Comment, *Chaos of Jurisdiction in the Federal District Court*, 35 ILL. L. REV. 566, 569 (1941), arguing that "the assignee clause in its present form is a jumble of legislative jargon."

19 28 U.S.C. § 1359, at 5973-74 (1964).

20 402 F.2d 867 (3d Cir. 1968), *cert. denied*, 37 U.S.L.W. 3439 (U.S. May 20, 1969).

21 402 F.2d 878 (3d Cir. 1968) (en banc).

22 Corabi v. Auto Racing, Inc., 264 F.2d 784 (3d Cir. 1959) (minor child killed by racing car, mother appointed administratrix, but resigned in favor of foreign administrator after all functions of position completed except for bringing suit); Fallat v. Gouran, 220 F.2d 325 (3d Cir. 1955) (citizenship of guardian controlling for diversity purposes, when daughter sues as general guardian for her incompetent father); Jaffee v. Philadelphia Great W. Ry. Co., 180 F.2d 1010 (3d Cir. 1950) (stenographer in office of widow's attorneys appointed administratrix ad prosequendum of deceased's estate; motive of appointment held unimportant).

23 In *McSparran*, the child was injured in an automobile accident; in *Esposito*, the child was injured when a bank of school lockers fell on him.

lusive" and "improper" under section 1359 and ordered both cases dismissed.

Ten years earlier, in *Corabi v. Auto Racing, Inc.*,[24] Judge Biggs had written for the same court:

> The term "collusion" is a strong one. . . . [I]t indicates "A secret agreement and cooperation for a fraudulent or deceitful purpose; deceit; fraud." . . . Moreover, the word "collusion" generally is employed to indicate an illegal agreement or understanding between both sides of a litigation rather than to an arrangement effected by one side of the sort at bar. . . . The word "improperly" connotes clearly impropriety.[25]

According to Judge Biggs, there could be no "collusion" unless both parties were involved, and as long as there was a valid state court appointment, nothing was done "improperly." *Corabi* quickly became the authoritative interpretation of section 1359 in all jurisdictions which considered the problem.[26]

Many scholars felt that the intent of section 1359 had been negated by *Corabi* and the cases following it.[27] When the Third

[24] 264 F.2d 784 (3d Cir. 1959).

[25] *Id.* at 788. The 8th Circuit had previously established a similar definition of "collusive", holding that as long as the plaintiffs did that which is lawful, there is no collusion. Curb & Gutter Dist. No. 37 v. Parrish, 110 F.2d 902, 907-08 (8th Cir. 1940).

[26] *See* Lang v. Elm City Constr. Co., 324 F.2d 235 (2d Cir.), *aff'g* 217 F. Supp. 873 (D. Conn. 1963); Stephan v. Marlin Firearms Co., 325 F.2d 238 (2d Cir.), *aff'g per curiam* 217 F. Supp. 880 (D. Conn.), *cert. denied*, 384 U.S. 959 (1963); County of Todd v. Loegering, 297 F.2d 470 (8th Cir. 1961); Meehan v. Central R.R. Co. of New Jersey, 181 F. Supp. 594 (S.D.N.Y. 1960). *Cf.* Borror v. Sharon Steel Co., 327 F.2d 165 (3d Cir. 1964).

Prior to 1968, only two cases had gone the other way. Cerri v. Akron-People's Telephone Co., 219 F. 285 (N.D. Ohio 1914), held that the citizenship of a widow, and not of the administrator of her husband's estate, was binding for determining diversity, but it was overruled *sub silentio* by Harrison v. Love, 81 F.2d 115 (6th Cir. 1936), in which the court upheld jurisdiction based on the citizenship of an administrator who was appointed solely to create diversity. Martineau v. City of St. Paul, 172 F.2d 777 (8th Cir. 1949), held that the citizenship of the ward, rather than the guardian was controlling. It has never been followed, however, and its authority has been eroded by McCoy v. Blakely, 217 F.2d 227 (8th Cir. 1954), and County of Todd v. Loegering, *supra*.

[27] *See, e.g.*, 3A J. MOORE, FEDERAL PRACTICE § 17.05, at 165-66 (2d ed. 1967); ALI STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS, PART I, at 62-3 (Official Draft 1965). As part of its program to restructure the jurisdiction of the federal courts, the American Law Institute has recommended:

> An executor, or an administrator, or any person representing the estate of a decedent or appointed pursuant to statute with authority to bring an action because of the death of a decedent shall be deemed to be a citizen only of the same state as the decedent; and a guardian, committee, or other like representative of an infant or incompetent shall be deemed to be a citizen only of the same state as the person represented.

Id., § 1301(b)(4), at 9.

The ALI proposal has met violent opposition from the American Trial Lawyers Association, *see* Resolution of Board of Governors, American Trial Lawyers Association, Sept. 29, 1968, and from the International Academy of Trial Lawyers, *see*

Circuit adopted its definitions in *Corabi*, it opened the floodgates to a multitude of manufactured diversity cases. An American Law Institute study showed that more than twenty per cent of the sample cases in the Eastern District of Pennsylvania in 1958-59 involved foreign representative plaintiffs.[28] At the same time in the Western District of Pennsylvania, thirty-three cases were brought by the same administrator.[29] In 1968, one foreign citizen was the guardian in sixty-one pending suits in the Eastern District.[30]

Under a narrow interpretation of section 1359, "collusively" could be taken to refer to conduct of opposing parties who collaborate to achieve results mutually desirable. Similarly, state court appointment of a guardian would not be "improper" if "improper" is read to mean impropriety. The legislative history and statutory development of section 1359, however, point to a more liberal construction. As was noted earlier,[31] the draftsmen of the statutes ancestral to section 1359 incorporated the judicial standard for determining what suits must be dismissed for lack of diversity. When it authorized the federal courts to dismiss suits "collusively" or "improperly" brought, or those not substantially within the jurisdiction of the court, Congress allowed the courts to continue the test that they had created with respect to assignments generally. Included within this test were the judicial definitions of "collusive."

Judicial definition and use of the standard "collusive" began in 1797, with *Maxfield's Lessee v. Levy*,[32] where Mr. Justice Iredell, sitting on circuit dismissed an action in ejectment because land had been transferred to the plaintiff in an attempt to lay a foundation for jurisdiction. Although only the plaintiff's side was involved in the transfer, Mr. Justice Iredell termed it "collusive" and dismissed the suit on the ground that it was in reality one between citizens of the same state. The court's opinion has been adopted and consistently followed by the Supreme Court.[33]

Resolution of Board of Directors, International Academy of Trial Lawyers, August 6, 1966. For a detailed criticism of the overall ALI proposal, see Currie, *The Federal Courts and the American Law Institute, Part I*, 36 U. CHI. L. REV. 1 (1968). Currie, however, approves this particular part of the proposal. *Id.* 15-18.

In his opinion in *McSparran*, Judge Freedman stated that there would be no need for such legislation but for the interpretation of section 1359 in *Corabi* and similar decisions. This may overemphasize the corrective power of the courts, but if the test advocated below is adopted, many cases to which the proposed legislation is directed would be covered.

[28] ALI STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS, PART I, at 170-77 (Official Draft 1965).

[29] Jamison v. Kammerer, 264 F.2d 789 (3d Cir. 1959).

[30] McSparran v. Weist, 402 F.2d 867, 871 (3d Cir. 1968).

[31] *See* text accompanying notes 16-19 *supra*.

[32] 4 U.S. (4 Dall.) 330 (C.C.D.Pa. 1797).

[33] Farmington v. Pillsbury, 114 U.S. 138 (1885); Williams v. Nottawa, 104 U.S. 209, 211 (1881); *see* Barney v. Baltimore, 73 U.S. (6 Wall.) 280 (1867); Jones v. League, 59 U.S. (18 How.) 76 (1855); Smith v. Kernochen, 48 U.S. (7 How.) 198, 216 (1849); McDonald v. Smalley, 26 U.S. (1 Pet.) 620, 624 (1828).

Viewed with this historical perspective, Judge Freedman's broadened definition of "collusive" in *McSparran* and *Esposito* is correct:

> [A] nominal party designated simply for the purpose of creating diversity of citizenship, who has no real or substantial interest in the dispute or controversy is improperly or collusively named.[34]

Contrary interpretations of section 1359 emasculate it, depriving the restriction of most of its utility. As the Fifth Circuit has stated,

> Indeed, when litigants can achieve diversity by such simple devices as assignment to a nonresident administrator, it is hard to imagine why they would ever resort to fraud or deceit, actual impropriety, or collusion with the other side.[35]

This distinction between "nominal parties" and those with "substantial interest in the dispute" is critical not only in the application of the definition of "collusive," but also in distinguishing these cases from a long line of strong precedents holding that the citizenship of the representative party is controlling for diversity purposes:[36]

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[34] McSparran v. Weist, 402 F.2d 867, 873 (3d Cir. 1968) (en banc).

[35] Caribbean Mills, Inc., v. Kramer, 392 F.2d 387, 393 (5th Cir. 1968), *aff'd*, 37 U.S.L.W. 4391 (U.S. May 5, 1969). Caribbean Mills, a Haitian corporation, agreed to buy stock from a finance company. The installments were not paid, and the finance company sold its interest under the contract to Kramer, a Texas attorney, for $1. Kramer then reassigned 95% of his interest back to the finance company. The court held this "collusive" and "improper" under § 1359. In many ways this is an easier case than *McSparran* and *Esposito:* because this type of assignment has been prohibited since 1789, *see* text accompanying note 11 *supra*, and § 1359 specifically alludes to fraudulent assignments, whereas it makes no specific mention of guardians.

[36] The courts have looked to the citizenship of executors, rather than testators, Childress v. Emory, 21 U.S. (8 Wheat.) 642 (1823); Chappedelaine v. Dechenaux, 8 U.S. (4 Cranch) 306, 308 (1808); administrators, rather than decedents, Rice v. Houston, 80 U.S. (13 Wall.) 66 (1871); Kerrigon's Estate v. Joseph Seagram & Sons, 199 F.2d 694 (3d Cir. 1952); and trustees, rather than beneficiaries, Dodge v. Tulleys, 144 U.S. 451, 455-56 (1892); Coal Co. v. Blatchford, 78 U.S. (11 Wall.) 172 (1870). *Cf.* Bullard v. City of Cisco, 290 U.S. 179 (1933). An exception to the general rule was developed where the trustee's name is required to be used, but he has no interest in the suit. McNutt v. Bland, 43 U.S. (2 How.) 9 (1844). In similar cases, the courts looked to the citizenship of subrogees, New Orleans v. Gaines Adm'r, 138 U.S. 595 (1891) and receivers, ignoring the citizenship of the corporation under receivership, Brisenden v. Chamberlain, 53 F. 307, 310 (D. S.C. 1892).

As Judge Freedman points out, the issue in these cases was simply whose citizenship is controlling for purposes of diversity. Section 1359 was not involved, nor were there allegations of "collusive" or "improper" action by the plaintiff. McSparran v. Weist, 402 F.2d 867, 871 (3d Cir. 1968).

In his dissenting opinion in *Esposito*, Judge Biggs was disturbed by the language of the Supreme Court in Mecom v. Fitzsimmons Drilling Co., 284 U.S. 183, 189 (1931):

> [I]t is clear that the motive or purpose that actuated any or all of these parties in procuring a lawful and valid appointment is immaterial upon the question of identity in diversity of citizenship. To go behind the decree of the probate court would be collaterally to attack it . . . .

Mecom is inapposite, however, since it involved an attempt to avoid diversity rather than to create it and § 1359 was not applicable.

> [C]ases in which a straw or nominal fiduciary is appointed to create diversity stand on totally different ground than those in which the courts are simply concerned with the general question whether the citizenship of the personal representative or his ward or beneficiary should be the test of diversity jurisdiction. In cases of "manufactured" diversity jurisdiction there is brought into play the question of the applicability of 28 U.S.C. § 1359. . . . .[37]

C. A Proposed Standard

In neither *McSparran* nor *Esposito* did the court lay down specific guidelines to distinguish between "nominal parties" and those with a "substantial interest." Because the parties in both cases admitted that the sole purpose in the appointment of the guardian was to create diversity jurisdiction,[38] Judge Freedman was not forced to state general rules. This Comment proposes that a party be considered merely nominal and without a substantial interest when (1) there was no need for his appointment except for the "need" to create diversity of citizenship,[39] and (2) he has no substantial duties in his representative capacity other than bringing the suit and administering any proceeds from it.[40] If diversity is based on the citizenship of such a guardian or representative, the suit should be dismissed.[41] This standard is consistent with earlier Supreme Court cases that look to the citizenship of the representative who has substantial duties to perform.[42]

For example, if the parents of a minor child are killed in an automobile accident, a guardian will usually have to be appointed to care for the child. If the guardian sues on the child's behalf, the court should ignore the fact that part of the motivation behind his appoint-

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Judge Biggs infers that under Erie Railroad v. Tompkins, 304 U.S. 64 (1938), the federal courts might be bound to accept the state court appointment. But, as Judge Freedman explains, dismissal of a suit does not mean rejection of the appointment. It only means that the federal courts have their own test for jurisdiction. As the Supreme Court stated in Caribbean Mills, Inc. v. Kramer, 37 U.S.L.W. 4391, 4393 (U.S. May 5, 1969):

> The existence of federal jurisdiction is a matter of federal, not state, law. [citation omitted] Nothing in the language or legislative history of § 1359 suggests that an assignment cannot be "improperly or collusively made" even though binding under state law, and this court has several times held to the contrary . . . .

[37] McSparran v. Weist, 402 F.2d 867, 871 (3d Cir. 1968).

[38] *Id.* at 869.

[39] The burden of proof as to jurisdiction falls on the party claiming diversity. McNutt v. General Motors Acceptance Corp., 298 U.S. 178 (1936).

[40] Substantial duties will vary in meaning according to the type of representative involved. In *McSparran*, the court indicated it was looking to an active management of the property of the ward. 402 F. 2d at 873.

[41] Of course, any case which falls within the old restricted interpretation of "improper or collusive" should also be dismissed.

[42] *See* note 36 *supra*.

ment may have been that he was a citizen of a different state than the child and the prospective defendant. There was a need for the appointment and the desire to create diversity only affected the particular person chosen. On the other hand, if a child is injured in an automobile accident, his still-living parents should not be able to create diversity jurisdiction by the appointment of an out-of-state guardian with no other substantial duties.[43] They can sue on their child's behalf, and there is no need for the appointment but for the desire to manufacture diversity.

This standard should not be confined to guardianship cases. It can properly be applied to suits brought by executors, administrators, trustees, subrogees, and receivers.

An executor must be named for every testamentary disposition. Although a specific executor may be named in order to create a potential out-of-state litigant, there is nevertheless a need for the appointment in every case. Thus the executor is always a party with a substantial interest. The testator's purpose in selecting this particular executor is not relevant.

Similarly, adminstrators appointed to administer the entire estate of the deceased would not be disqualified by the proposed test from suing in federal court. On the other hand, if the administrator is appointed solely for the purpose of a particular litigation and has no other substantial duties—as was the case in *Corabi v. Auto Racing, Inc.*,[44] where the out-of-state administrator had been appointed only after all affairs of the estate were completed by the deceased child's mother—the suit should be dismissed. There would have been no need for the out-of-state appointment but for the desire to manufacture diversity.

Inter vivos trustees who have been appointed prior to suit, and whose functions include active management of a trust fund will not be prevented from suing in federal court by the proposed standard. Because state law will not recognize a trust without a corpus, it is unlikely that a trustee will not have substantial management duties to perform. Although the settlor may have included specific property in the corpus in order to transfer to the trustee a cause of action related to that property, as long as he is actively managing the trust, the courts should consider him a party with a substantial interest. In these rare cases, where there are no duties, and the state insists on recognizing the representative as a trustee, the court should dismiss.

Without dissent, diversity jurisdiction has been sustained when the citizenship of a plaintiff's subrogee and the defendant were diverse,

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[43] It appears that a state court will appoint a guardian merely to allow an injured youth and his parents to sue in federal court. *See* Kaufmann Estate, 87 Pa. D. & C. 401 (Phila. Orphans' Ct. 1954).

[44] 264 F.2d 784 (3d Cir. 1959), discussed in text accompanying notes 24-26 *supra*.

although the citizenship of the primary claimant was identical to that of the defendant.[45] The proposed rule would not change this. The most familiar example of the subrogation problem arises in the context of liability insurance. An insurance company paying compensation for a claim is thereby subrogated to the rights of the insured against the wrongdoer. In such cases, courts have properly held that the insurance company had a substantial interest in suing to recover its money.[46] Although the citizenship of insurance companies for diversity purposes is now regulated by statute,[47] the traditional acceptance of the citizenship of the subrogee for diversity should be carried over to all cases of subrogation.

Finally, the citizenship of a receiver would continue to be determinative in diversity cases: there is a need for the appointment aside from obtaining a plaintiff who can sue in a federal forum. Of course, if one receiver were substituted for another solely for the purpose of creating jurisdiction and he were not given other substantial duties, the proposed test would require dismissal.[48]

D. An Alternative Test

A much broader standard for dismissal would be a but-for test standing alone, whether or not the representative had other substantial duties to perform. Before *McSparran* and *Esposito*, the Third Circuit had felt constricted in its definition of "improper" by *Mecom v. Fitzsimmons Drilling Co.*,[49] where the Supreme Court had indicated that a federal court could not challenge the validity of a state court appointment. But in *McSparran*, the Third Circuit recognized that refusal to recognize as controlling for diversity purposes the citizenship of a state-appointed guardian is not a collateral attack on the appointment itself.[50] Consequently, it is free to fashion a new definition of "improper." Under the but-for test standing alone, a court would dismiss

[45] New Orleans v. Gaines Adm'r, 138 U.S. 595 (1891); United States Fidelity & Guar. Co. v. City of Asheville, 85 F.2d 966, 971-72 (4th Cir. 1936); Staples v. Central Surety & Ins. Corp., 62 F.2d 650, 652 (10th Cir. 1932); American Surety Co. v. Lewis State Bank, 58 F.2d 559, 560 (5th Cir. 1932); Clairbourne Parish School Bd. v. Fidelity & Deposit Co., 40 F.2d 577, 578 (5th Cir. 1930); Fidelity & Deposit Co. v. Farmer's Bank, 44 F.2d 11, 15 (8th Cir. 1930); Palmer v. Oregon-Washington R.R. & Nav. Co., 208 F. 666, 669 (D.C. Cir. 1913).

[46] *See* cases cited note 45 *supra*.

[47] 28 U.S.C. § 1332(c) (1964).

[48] If one representative is substituted for another for the purpose of establishing diversity, but is also given substantial duties, the court could not dismiss. The existence of the earlier representative shows the need for appointment, and the existence of substantial duties shows the party is not nominal. If substantial duties were not given to the substituted representative, however, then he would be a nominal party whose appointment could not be characterized as necessary except to create diversity, and the suit should be dismissed.

[49] 284 U.S. 183 (1931).

[50] 402 F.2d at 874. *See* note 36 *supra*.

any suit where the plaintiff could not identify a reasonable purpose for the appointment other than to create diversity.

Under a reasonable purpose standard, a court might well decide that it is more reasonable to expect the appointment of an out-of-stater to be made in cases involving corporate receivers or trustees. When a corporation goes into bankruptcy, sound business judgment may dictate that a local receiver be appointed to administer local property. Thus, the citizenship of the corporation, which is deemed to be its state of incorporation and its principal place of business,[51] will not necessarily be the same as the citizenship of the receiver since the corporation may own property in other states. Similarly, it would not be strange to find an out-of-state trustee appointed to administer property located close to his domicile. As applied to executors, the reasonable purpose test would probably result in upholding the created diversity. In order to find that the decedent's purpose in choosing a specific executor was to create diversity, one would have to find that the decedent was contemplating a lawsuit that would be brought after his death and that he desired such a suit to be brought in federal court. In addition, one would have to find that the decedent had a specific defendant in mind; otherwise, he would not have known what executor to name. Cases where such findings could be made would indeed be rare.

On the other hand, when administrators or guardians are involved a court may scrutinize more closely the reasons for appointment. Absence of the appointee from the jurisdiction limits the appointing court's control over him. Since the primary beneficaries of a cause of action brought by an administrator will normally be the immediate family of the deceased, if they were living with him, the burden of showing a reasonable purpose for the appointment of a distant representative would be greater. An out-of-state guardian would also bear a heavier burden in showing why a citizen from a different state than the ward was chosen. Functionally, such an approach makes sense, since state courts and juries are less likely to view the plaintiff as an "outsider" when he represents persons who are, or were, citizens of the forum state. When receivers or trustees are plaintiffs, however, a state court or jury is more likely to envision an out-of-state entity, and the protection offered by diversity jurisdiction should be more accessible.

Nevertheless, this alternative, reasonable purpose standard should be rejected. The administrative difficulties in determining intent would clearly seem to outweigh any advantages the alternative test may possess, especially because under the alternative test the courts would be forced to make the determination in every case in which a representative party had been appointed, even where there had been an obvious need for the appointment or where the appointee had sub-

[51] 28 U.S.C. § 1332(c) (1964).

stantial duties to perform.[52] Judge Biggs' criticism increases in force if one imagines the reasonable purpose standard being used alone:

> [W]ould not the United States district court in almost every case, at its peril and at the peril of the litigants, have to determine what the purpose, "naked", "primary", or otherwise, which caused or prompted someone on behalf of some kind of fiduciary to bring suit in the United States court? And would this not require in almost every instance the taking of evidence and an examination not of objective but of subjective criteria, *i.e.*, what was in the mind of the persons or person who moved in Orphans' Court or any probate tribunal to appoint an out-of-state executor or administrator. . . . While purporting to abolish the "manufacture" of diversity jurisdiction, the majority rule would elevate such manufacturing to an art difficult to define and even more difficult to combat.[53]

CONCLUSION

The standard proposed in this Comment goes beyond the restricted interpretation of section 1359 to distinguish between nominal representatives and representatives with a substantial interest. Its primary drawback is that it does not remove more suits from the diversity jurisdiction. But it does have an overriding advantage over the alternative test: difficult findings of fact needed to establish subjective intent directly will usually not be required. The duties of the appointee, and in some cases, the time of the appointment, would be the most important factors. Although the alternative test would, at least in theory, reach more suits, these could easily prove so difficult to flush out that the courts would in the long run save more time and effort using the test proposed.

This test is similar to that established by the Supreme Court where corporate or private parties move from one state to another to create diversity. Recognizing that a citizen can instantly transfer his citizenship from one state to another,[54] the Supreme Court has ruled that a diversity suit should be dismissed only if the plaintiff had no intention of acquiring a domicile or settled home in his new state, and moved with the sole objective of availing himself of federal diversity jurisdiction.[55] Similarly, if a corporation has formed a subsidiary or affiliated company in another state, transferring to it the property which was involved in a cause of action, courts are to dismiss if the arrange-

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[52] If the proposed standard proves ineffective in the face of the ingenuity of the bar, the but-for test standing alone or an entirely new statute may be the only answer.

[53] 402 F.2d at 882.

[54] Morris v. Gilmer, 129 U.S. 315, 328 (1889).

[55] *Id.*

ment was made for no other purpose than to establish diversity.[56] If the new residence or the transfer of property is real, however, then despite a motivation to create diversity, the court will not dismiss. Thus, in *Black and White Taxi and Transfer Co. v. Brown and Yellow Taxi and Transfer Co.*,[57] a Kentucky corporation organized a Tennessee corporation to which it transferred all its assets, and dissolved the Kentucky business. The new corporation brought a diversity suit in federal court, and jurisdiction was upheld. In other words, when the change of residence is real,[58] the corporation or individual has given up any protection that his citizenship in the state from which he came might have afforded him, and is subjecting himself to an entirely new complex of state laws. Fairness, the practical problems of a challenge to his motives, and possibly the Constitution itself command that he be treated like other citizens of his new state.

The treatment of representative parties in diversity cases should be along the same lines. The fact that diversity of citizenship did not exist between the underlying parties to the suit should not necessarily be a bar to federal jurisdiction; as with the cases involving transfer of residence, diversity may be created where it did not otherwise exist. But the mere fact, without more, that a representative party has been appointed with the requisite diversity of citizenship is not sufficient foundation for federal diversity jurisdiction. The test proposed here for continuing with or dismissing representative suits should lead to the proper results.

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[56] Miller & Lux, Inc. v. East Side Canal & Irrigation Co., 211 U.S. 293 (1908); Lehigh Mining & Mfg. Co. v. Kelly, 160 U.S. 327 (1895).

[57] 276 U.S. 518 (1928).

[58] As the court emphasized in *McSparran*, when it compared its dismissal to the Supreme Court's handling of these corporate citizenship cases:

> While the Court held that jurisdiction existed regardless of the motive of management and shareholders of the corporation, it did so in the context of a real transaction which had significance beyond establishment of diversity jurisdiction.

402 F.2d at 875.