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FEDERAL COURTS—JURISDICTION—“MANUFACTURED” DIVERSITY OF CITIZENSHIP BY WHICH AN OUT-OF-STATE GUARDIAN WAS SELECTED TO PROSECUTE THE SUIT OF A RESIDENT MINOR, DID NOT CONSTITUTE AN ADEQUATE FOUNDATION FOR FEDERAL JURISDICTION. *McSparran v. Weist*, 401 F.2d 867 (3d Cir. 1968).

McSparran, a resident of New Jersey, was appointed guardian by the Orphans Court of Berks County, Pennsylvania, to prosecute a personal injury suit for a minor against the defendants. The sole purpose for the appointment of a non-resident guardian was to create diversity of citizenship and thus acquire jurisdiction in the federal court. This was necessary because both the minor and the defendants were Pennsylvania residents. The guardian instituted the claim in the federal district court which dismissed it for lack of jurisdiction.¹ Held—*Affirmed*. The district court did not have jurisdiction over the suit because “manufactured” diversity of citizenship does not constitute a proper foundation to invoke federal jurisdiction.²

The basis for the original grant of diversity jurisdiction to the federal courts was the assumption by the framers of the Constitution that state courts would be biased in controversies between local citizens and citizens of different states. It was assumed that they would favor the resident against the non-resident.³ This assumption was incorporated into the Constitution,⁴ which provides that the federal courts shall have original jurisdiction of suits between citizens of different states.

Problems have arisen in interpreting this area of federal jurisdiction. In 1875, an act was passed which required dismissal or remand for lack of jurisdiction because of improper or collusive joinder.⁵ The present statute, 28 U.S.C. § 1359, provides:

A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been made or joined to invoke the jurisdiction of such court.⁶

The purpose of denying collusive suits was to prevent the overcrowding of federal court dockets with suits which were not within the purview of the Constitution or Congressional acts.⁷ Appointment of guardians and administrators for the sole purpose of creating or manufacturing diversity jurisdiction, is of principle interest today.

Rule 17a of the Federal Rules of Civil Procedure states:

¹ *McSparran v. Weist*, 270 F. Supp. 421 (E.D. Pa. 1967).

² *McSparran v. Weist*, 402 F.2d 867 (3d Cir. 1968).

³ Doub, *An Old Problem: The Federal Diversity Jurisdiction*, 45 A.B.A.J. 1273 (1959).

⁴ U.S. CONST., art. III, § 2.

⁵ Act of March 3, 1875, ch. 137 § 5, 18 Stat. 470, 472.

⁶ 62 Stat. 935 (1948), 28 U.S.C. § 1359 (1952).

⁷ *Lehigh Mining and Manufacturing Co. v. Kelly*, 64 F. 401, *aff'd*, 160 U.S. 327, 16 S. Ct. 307, 40 L. Ed. 444 (1895).

Every action shall be prosecuted in the name of the real party in interest; but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name, without joining with him the party for whose benefit the action is brought.⁸

The Second and Third Circuits have led in allowing "manufactured" diversity suits. If the fiduciary is a real party in interest under state law, then diversity can be created by appointing a fiduciary of a citizenship other than the defendant's. The theory is that an appointment made in a state court cannot be "collusive" or "improper" within the meaning of section 1359, because the motive for appointment is irrelevant.⁹ It is not the citizenship of the incompetent, nor whether he is the real party in interest which governs diversity, rather the citizenship of the guardian provided he has the capacity to sue.¹⁰ A majority of circuit courts have held that when an executor or administrator of an estate is a party to an action in the federal courts, it is his personal citizenship which will determine the diversity jurisdiction.¹¹ The federal court usually accepts the appointment as valid for federal jurisdictional purposes as well as for substantive purposes.¹²

The Third Circuit for many years has allowed the citizenship of personal representatives or guardians to establish diversity jurisdiction.¹³ Allowing diversity jurisdiction in cases when an out-of-state representative is appointed to create federal jurisdiction is a misapplication of the diversity concept.¹⁴ The Third Circuit, in *Jaffe v. Philadelphia and Western R. Co.*,¹⁵ stated that motive is irrelevant in the artificial creation of diversity jurisdiction. Diversity jurisdiction was sustained under the Wrongful Death and Survival Statutes of Pennsylvania. The New Jersey plaintiff appointed as administratrix *ad prosequendam* was a stenographer in the employment of the widow's attorney. The Court, citing *Mecom v. Fitzsimmons Drilling Co.*,¹⁶ ruled that the administratrix *ad prosequendam* was the real party in interest and her selection did not amount to collusion under 28 U.S.C. § 1359.¹⁷

⁸ FED. R. CIV. P. 17(a) (1966).

⁹ 3A MOORE'S FEDERAL PRACTICE § 17.05(3.-2).

¹⁰ *Fallat v. Gouran*, 220 F.2d 325 (3d Cir. 1955).

¹¹ See Annot. 77 A.L.R. 910 (1932), 136 A.L.R. 938 (1942), 75 A.L.R.2d 711 (1959) for cases supporting this view.

¹² *Jaffe v. Philadelphia and Western R. Co.*, 80 F. Supp. 416 (E.D. Pa. 1948), *aff'd*, 180 F.2d 1010 (3d Cir. 1950).

¹³ *Fallat v. Gouran*, 220 F.2d 325 (3d Cir. 1955).

¹⁴ 3A MOORE'S FEDERAL PRACTICE § 17.05(3.-3). See also Cohan and Tate, *Manufacturing Federal Diversity Jurisdiction by the Appointment of Representatives: Its Legality and Propriety*, 1 VILL. L. REV. 201 (1956).

¹⁵ 180 F.2d 1010 (3d Cir. 1950).

¹⁶ 284 U.S. 183, 52 S. Ct. 84, 76 L. Ed. 233 (1931).

¹⁷ *Jaffe v. Philadelphia and Western R. Co.*, 180 F.2d 1010, 1012-1013 (3d Cir. 1950).

In *Mecom* the resignation and subsequent appointment were accomplished, not to create federal jurisdiction, but to prevent it from attaching.¹⁸ Section 1359 was not applicable since "improper" and "collusive" apply only to the invoking of diversity jurisdiction.¹⁹

A New Jersey resident in *Fallat v. Gouran*²⁰ brought suit on grounds of diversity as the guardian of a Pennsylvania incompetent. Citizenship of the guardian controlled in determining diversity jurisdiction rather than that of the incompetent.²¹ The court relied upon *Mexican Central Railway Co. v. Eckman*²² in which the Supreme Court stated that representatives may stand upon their own citizenship in the federal courts.

The leading case in "manufactured" diversity is *Corabi v. Auto Racing, Inc.*,²³ wherein Judge Biggs wrote the opinion for the Third Circuit. In *Corabi*, a resident administrator resigned so that a non-resident administrator could be appointed for the express purpose of creating diversity jurisdiction. The court held that this was not collusion²⁴ and did not violate any statute.²⁵ The court followed *Black and White Taxicab v. Brown and Yellow Taxicab and Transfer Co.*,²⁶ which reasoned that the motives inducing the creation of diversity had no effect on the validity of the transactions which were the subject of the suit. The motive for his appointment is irrelevant; it is enough that the respondent is the real party in interest.²⁷ The administratrix was discharged and another administrator was appointed prior to the inception of the suit, and thus he had a valid cause of action.²⁸ To use a state law to obtain diversity jurisdiction, even though the object may be a higher verdict in a federal court, is not collusive within the ordinary meaning of that term.²⁹ Had Congress intended to prohibit the creation of federal diversity jurisdiction under such circumstances as those at bar, it could have done so simply by omitting the words "improperly" or "collusively."³⁰

¹⁸ *Mecom v. Fitzsimmons Drilling Co.*, 284 U.S. 183, 52 S. Ct. 84, 76 L. Ed. 233 (1931).

¹⁹ 62 Stat. 935 (1948), 28 U.S.C. § 1359 (1952).

²⁰ 220 F.2d 325 (3d Cir. 1955).

²¹ *Id.*

²² 187 U.S. 429, 23 S. Ct. 211, 47 L. Ed. 245 (1903).

²³ 264 F.2d 784 (3d Cir. 1959); 75 A.L.R.2d 711.

²⁴ The court held that "collusion" indicates a secret agreement and cooperation for a fraudulent purpose and to make use of a state law to obtain diversity of jurisdiction, even though the object might be a higher verdict in a federal court.

²⁵ Compare *Martineau v. City of St. Paul*, 172 F.2d 777 (8th Cir. 1949) with *McCoy v. Blakely*, 217 F.2d 227 (8th Cir. 1954) for opposite rulings on this issue.

²⁶ 276 U.S. 518, 48 S. Ct. 404, 72 L. Ed. 681, 57 A.L.R. 426 (1928).

²⁷ *Black and White Taxicab* distinguished *Lehigh Mining and Manufacturing Co. v. Kelly*, 160 U.S. 327, 16 S. Ct. 307, 40 L. Ed. 444 (1895) and *Miller and Lux v. East Side Canal and Irrigation Co.*, 211 U.S. 293, 29 S. Ct. 111, 53 L. Ed. 189 (1908). These cases involved the manufacturing of diversity jurisdiction by the creation of new corporations. They were struck down as collusive under the Act of 1875. They were not, however, overruled by *Black and White Taxicab*.

²⁸ *Corabi v. Auto Racing Inc.*, 264 F.2d 784 (3d Cir. 1959).

²⁹ *Id.*

³⁰ *Id.*

The Second Circuit adopted the *Corabi* rule in *Lang v. Elm City Construction Company*³¹ and *Stephan v. Marlin Firearms Company*.³² In *Lang*, even though the foreign plaintiff was appointed administrator expressly for the purpose of creating diversity of citizenship, he was not "improperly or collusively joined" to invoke the jurisdiction of the court within the meaning of section 1359.³³ In *Stephan*, the appointment of the plaintiff for the purpose of creating diversity of citizenship did not require dismissal on the ground that it was improper or collusive.³⁴

The Eighth Circuit also followed the rule of *Corabi*. In *County of Todd, Minn. v. Loegering*,³⁵ the court held there was no illusion as to the motive which prompted the appointment of the plaintiff as trustee. Excluding this motive in the evaluation of the charge of manufacturing diversity jurisdiction, the court found no acts of collusion or improprieties.³⁶ Further, in *Janzen v. Goos*,³⁷ the plaintiff's motive in moving from Nebraska to Kansas prior to bringing a wrongful death action was immaterial in determining diversity of citizenship.³⁸ However, the Eighth Circuit had previously dismissed the suit in *Martineau v. City of St. Paul*³⁹ for lack of diversity jurisdiction because the guardian was merely an officer of the state probate court and the minor ward was the real party in interest. They based their decision on the Minnesota law which provides that a guardian may not maintain the action in his own name in the state courts.⁴⁰ Thus, he could not maintain the suit in the federal court which enforces state law and state policy in diversity cases.⁴¹ In *Ferrara v. Philadelphia Laboratories*,⁴² an action was brought by a non-resident trustee appointed primarily to create diversity jurisdiction. The defendants directly challenged the jurisdiction of the court by alleging that the plaintiff was improperly or collusively made a party to invoke diversity jurisdiction. It is the duty of the court to inquire fully into the circumstances and conditions which surround the making of the assignment or transfer, in order that it might determine whether or not jurisdictional grounds exist.⁴³ A case brought by

³¹ 217 F. Supp. 873 (D. Conn. 1963), *aff'd*, 324 F.2d 235 (2d Cir. 1963).

³² 217 F. Supp. 880 (D. Conn. 1963), *aff'd per curiam*, 325 F.2d 238 (2d Cir. 1963).

³³ *Lang v. Elm City Construction Co.*, 217 F. Supp. 873, 878 (D. Conn. 1963), *aff'd*, 324 F.2d 235 (2d Cir. 1963).

³⁴ *Stephan v. Marlin Firearms Company*, 217 F. Supp. 880, 882 (D. Conn. 1963), *aff'd*, 325 F.2d 238 (2d Cir. 1963).

³⁵ 297 F.2d 470 (8th Cir. 1961).

³⁶ *Id.* at 473.

³⁷ 302 F.2d 421 (8th Cir. 1962).

³⁸ *Id.* at 425.

³⁹ 172 F.2d 777 (8th Cir. 1949).

⁴⁰ See *Erie Railroad Co. v. Thompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. ed. 1188 (1938).

⁴¹ *Martineau v. City of St. Paul*, 172 F.2d 777 (8th Cir. 1949).

⁴² 272 F. Supp. 1000 (D.C. Vt. 1967), *aff'd*, 393 F.2d 934 (2d Cir. 1968).

⁴³ *Id. Compare with National Surety Corp. v. Inland Properties Inc.*, 286 F. Supp. 173 (E.D. Ark. 1968).

a real party in interest may nevertheless be dismissed as being collusive.⁴⁴

Judge Thornberry of the Fifth Circuit was unable to distinguish *Corabi* in *Caribbean Mills, Inc. v. Kramer*,⁴⁵ yet he chose not to follow the principle established in it. A Texas resident was assigned the interests of a Panamanian corporation and those of a resident of Washington, D.C. to bring suit in federal court on grounds of diversity, against a Haitian corporation. The assignment of interests was colorable because it did not divest the assignors of their interests in the lawsuit and was made for the express purpose of creating diversity.⁴⁶ Judge Thornberry rejected the decisions upholding jurisdiction under similar circumstances as undermining the historic policy of limiting diversity jurisdiction and an unjustified departure from previous cases decided by the Supreme Court.⁴⁷

The instant case of *McSparran* was argued before the court *en banc* with *Esposito v. Emery*⁴⁸ for the express purpose of reviewing the question of jurisdiction in a federal court, created by "manufactured" diversity of citizenship. This case was similar to the previous cases in that a non-resident was appointed guardian solely to create diversity jurisdiction. This fact was conceded by the counsels for the plaintiff.⁴⁹ The court stated that Rule 17 of the Federal rules⁵⁰ focused on the capacity to sue, but it was not determinative of diversity of citizenship.⁵¹ Rule 82⁵² clarifies this by stating that the rules do not affect the jurisdiction of the court. The principle problem under consideration was whether to look to the citizenship of the representative, or to that of the person he represents. The court believed that Section 37 of the Judicial Code of 1911⁵³ should be read together with 28 U.S.C. § 1359 for the proper interpretation of "collusive" and "improperly."⁵⁴ Section 37 states that a nominal party selected solely 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. The court reconsidered its previous application of section 1359 in *Corabi* and held that it was

⁴⁴ *Id.* at 1015. The court distinguished the *Corabi* and *Lang* cases.

⁴⁵ 392 F.2d 387 (5th Cir. 1968) *cert. granted*.

⁴⁶ *Id.* at 394.

⁴⁷ *Caribbean Mills Inc. v. Kramer*, 392 F.2d 387 (5th Cir. 1968), *cert. granted*, 37 L.W. 3133 (1968).

⁴⁸ 402 F.2d 878 (3d Cir. 1968). *See also* *Meyerhoffer v. East Hanover Township School District*, 280 F. Supp. 81 (M.D. Pa. 1968); *Greene v. Pennsylvania Railroad Co.*, 280 F. Supp. 194 (M.D. Pa. 1968); *Olivieri v. Adams*, 280 F. Supp. 428 (E.D. Pa. 1968).

⁴⁹ *McSparran v. Weist*, 402 F.2d 867, 869 (3d Cir. 1968).

⁵⁰ FED. R. CIV. P. 17 (1966).

⁵¹ *McSparran v. Weist*, 402 F.2d 867, 870 (3d Cir. 1968).

⁵² FED. R. CIV. P. 82 (1966).

These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein.

⁵³ Act of March 3, 1911, ch. 231 § 37, 36 Stat. 1087, 1098.

⁵⁴ *McSparran v. Weist*, 402 F.2d 867, 872-873 (3d Cir. 1968).

not as limited in scope as they had previously held.⁵⁵ They also held that the motive for which the representative was selected could not be ignored in ascertaining the purpose for which the representative was appointed.⁵⁶ Section 1359 does not ban the appointment of non-resident fiduciaries, but the artificial selection of a representative, who has no duty or function except to offer the use of his citizenship to invoke federal jurisdiction, is a violation of the statute.⁵⁷ The court went on to hold that section 1359 applies to executors and administrators as well as guardians.⁵⁸

The instant case was essentially a local controversy and the guardian was appointed solely to create diversity. One of the underlying reasons for diversity is missing: the prevention of discrimination against out-of-state litigants.⁵⁹ Thus the attempt to confer diversity jurisdiction offended section 1359. The *Jaffe* and *Corabi* cases were expressly overruled and *Fallat v. Gouran*⁶⁰ was disapproved to the extent it indicated approval of "manufactured" diversity.⁶¹

Judge McLaughlin dissented on the grounds that the district court had properly confined the applicable out-of-state administrative rule to the administrator's action and barred the joining of a non-diversity suit as a matter of right under the cover of the administrator's claim. He would affirm the judgment of the district court solely on that point.⁶² Judge Kalodner also dissented⁶³ stating that the only issue presented on appeal was whether the district court erred in dismissing the mother's independent claim for damages. He further adopted the reasoning of Judge Biggs' dissent in *Esposito v. Emery*.⁶⁴

In *Esposito*, Judge Biggs stated that his dissent was in all substantial respects equally applicable to the majority's opinion in *McSparran*.⁶⁵ He believed that the law was correctly decided in *Jaffe*, *Fallat* and *Corabi*. The ruling of the majority was a collateral attack on the decree of the state probate courts and as such should not be permitted.⁶⁶ Judge Biggs went on to state that Rule 17 of the Federal Rules as the majority conceded, authorizes the guardian to bring the suit as the party plaintiff.⁶⁷ While purporting to abolish the "manufacture" of diversity juris-

⁵⁵ *Id.* at 873.

⁵⁶ *Id.* at 874.

⁵⁷ *Id.* at 874-75.

⁵⁸ *Id.* at 875.

⁵⁹ *Id.* at 876.

⁶⁰ 220 F.2d 325 (3d Cir. 1955).

⁶¹ *McSparran v. Weist*, 402 F.2d 867, 876 (3d Cir. 1968).

⁶² *Id.* at 877.

⁶³ *Id.* at 878.

⁶⁴ 402 F.2d 878 (3d Cir. 1968).

⁶⁵ *Id.* at 881. As senior Circuit Judge, Judge Biggs was disqualified from voting for a rehearing or participating at the hearing in *McSparran v. Weist*, since he took no part in the original argument in *McSparran*.

⁶⁶ *Id.* at 882.

⁶⁷ FED. R. CIV. P. 17 (1966).

diction, the majority rule would elevate such manufacturing to an art, difficult to define, and even more difficult to combat.⁶⁸

Corabi held that there is nothing collusive or improper in openly going before a state court on a petition which is a public record and having an out-of-state fiduciary appointed with the thought of obtaining a larger judgment or to avoid delays in some of the state courts.⁶⁹ This applies with equal force in the present cases.⁷⁰ Judge Biggs believes that the majority decision will open a fertile field for perjurious testimony and lead to great uncertainty.⁷¹

The ruling in *McSparran* is significant in that the Third Circuit overruled its own cases which were the fundamental basis supporting the concept of "manufactured" diversity jurisdiction. *Corabi* has been the leading case in diversity since its inception in 1959. The purpose of section 1359 was to limit the jurisdiction of the federal courts; yet this purpose was crippled by the previous Third Circuit decisions.

The American Law Institute proposed several amendments⁷² to 28 U.S.C. § 1359 which would eliminate the problems of interpretation. The need for this legislation is no longer imperative in light of the *McSparran* case. This new interpretation of section 1359 should ease the burden of the federal courts. Section 1359 is now performing its function of limiting the scope of federal jurisdiction and properly placing the burden on the state courts.

Dennis J. Healey

⁶⁸ *Esposito v. Emery*, 402 F.2d 878 (3d Cir. 1968).

⁶⁹ *Id.*

⁷⁰ *McSparran v. Weist*, 402 F.2d 876 (3d Cir. 1968); *Esposito v. Emery*, 402 F.2d 878 (3d Cir. 1968).

⁷¹ *Esposito v. Emery*, 402 F.2d 878, 883 (3d Cir. 1968).

⁷² AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS: PROPOSED FINAL DRAFT NO. 1, APRIL 19, 1965 § 1301(b)(4) "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: . . ."

§ 1307(a) "A district court shall not have jurisdiction of a civil action in which any party has been made or joined improperly, or collusively, or pursuant to agreement or understanding between opposing parties, in order to invoke the jurisdiction of such court."; Marden, *Reshaping Diversity Jurisdiction: A Plea for Study by the Bar*, 54 A.B.A.J. 453 (1968); Moore and Weckstein, *Diversity Jurisdiction: Past, Present, and Future*, 43 TEXAS L. REV. 1 (1964); criticized—Frank, *For Maintaining Diversity Jurisdiction*, 73 YALE L.J. (1963).