Washington and Lee Law Review

Volume 65 | Issue 2 Article 8

Spring 3-1-2008

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I. Introduction

One of the most commonly litigated issues in federal diversity jurisdiction cases is liability arising from car accidents. If the injured party and the negligent party are from different states and the amount-in-controversy requirement is met, diversity jurisdiction exists. On the other hand, if the two parties are from the same state, the matter must be heard in state court. What if the parties are from the same state, but the injured party's insurance company—which is from another state—sues the negligent driver to recover the proceeds it paid to the injured driver? What if the injured driver is a nondiverse minor, but the suit is brought by a diverse guardian? How does the diversity analysis change if the guardian was selected solely to create diversity? Does it matter whether the diverse party is a real party in interest, such as the driver, or whether he merely has the legal capacity to bring the suit, such as the insurer? Should it matter? Two scholars, surveying the courts' handling of such disputes, noted:

> The ultimate determination would in most cases be the same, whether one adopts a capacity or real party in interest criteria. Therefore, there seems to be little reason to delve Pandora-like into new juristic linguistic variations on an old theme. It suffices to say that the various text commentaries, law review excursions, and the case precedents predominantly speak in terms of real party in interest with emphasis on capacity as an important element in

> determining who is the real party in interest; there seems little reason to stir otherwise calm waters.[1]

Over fifty years ago, when this observation was written, its premise was probably true. The quoted passage concerns the issue of whether, in deciding whose citizenship controls for the purposes of diversity jurisdiction, the court should merely require that a party have the capacity to sue or should require the party be a real party in interest. Fifty years ago, most courts would look to whether a party was the real party in interest in determining whether to use that party's citizenship.[2] More recently though, federal courts have divided over whether to use the real party in interest criteria.[3] Opponents argue that the less demanding capacity to sue rule is sufficient to protect against fraud, while at the same time furthering the purposes of diversity jurisdiction.[4] Different circuits have varied.[5]

Diversity jurisdiction turns on the citizenship of the parties. While a determination of whether two parties are sufficiently diverse seems easy, a great deal of litigation surrounds the issue. Much of the litigation arises in cases where one party has a subrogated or assigned claim from another party.[6] If the citizenship of the assignee and assignor is the same, the question is simple.[7] If, however, the assignor and the defendant have the same citizenship, but the assignee has a different citizenship, the defendant may dispute the right of the assignee to sue him in federal court on diversity grounds.

The inquiry of whose citizenship controls in a lawsuit raises many questions. For instance: Under what circumstances did the claim get assigned or subrogated? Does the assignee have the legal capacity to bring the lawsuit? Who is the real party in interest? Have the parties colluded to create or defeat diversity? Are the parties properly aligned? Would the exercise of jurisdiction

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1. Donald S. Cohan & Mercer D. Tate, *Manufacturing Federal Diversity Jurisdiction by the Appointment of Representatives: Its Legality and Propriety*, 1 VILL. L. REV. 201, 225–26 (1956).

2. *See id.* (noting that the predominant rule used by the courts at the time the article was written was the real party in interest rule).

3. *See infra* Part VII (discussing the current circuit split).

4. *See* Hart v. Bayer Corp., 199 F.3d 239, 248 (5th Cir. 2000) (concluding that the citizenship of a party with the capacity to sue controls for purposes of deciding whether diversity exists); Fallat v. Gouran, 220 F.2d 325, 326–27 (3d Cir. 1955) (same).

5. *See infra* Part VII.B (noting that the Fifth and Third Circuits have advocated using the agent's citizenship if he has the capacity to sue, while the Eighth and Second Circuits have advanced the real party in interest rule).

6. *See infra* Part VI (describing the different circumstances when this dispute may arise).

7. *See* 28 U.S.C. § 1332 (2000) (noting that diversity jurisdiction is created only if the citizens on opposing sides of the suit are from different states).

by the district court uphold or defeat the original reasons behind the congressional creation of diversity jurisdiction? Taking into consideration all these issues, the federal courts of appeals have split on whether the agent's citizenship controls if he merely has the capacity to sue, or whether he actually must be the real party in interest. To date, the Fifth[8] and the Third[9] Circuits advocate using the agent's citizenship if he has the capacity to sue, while the Eighth[10] and the Second[11] Circuits rely on the real party in interest rule. The Supreme Court has faced these situations several times, but its decisions have been anything but enlightening on which rule should prevail.[12]

Diversity jurisdiction intends to prevent bias by state court judges against out-of-state parties.[13] For this reason, regardless of who is the real party of interest in the lawsuit, the citizenship of the party who appears before the judge should decide whether diversity exists—provided that party has the legal capacity to sue. The one exception to this rule would occur when parties collude to manufacture or defeat diversity jurisdiction. The attempt to artificially manufacture jurisdiction violates the command of 28 U.S.C.

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8. *See Hart*, 199 F.3d at 247 (deciding the citizenship of an agent controls in deciding whether diversity jurisdiction exists as long as he has the capacity to sue).

9. *See Fallat*, 220 F.2d at 326–27 (noting that courts should consider the citizenship of the agent for purposes of diversity jurisdiction, presuming he has the capacity to sue).

10. *See* Associated Ins. Mgmt. Corp. v. Ark. Gen. Agency, Inc., 149 F.3d 794, 796 (8th Cir. 1998) (commenting that the citizenship of the underlying party controls in deciding whether diversity exists because the underlying party is the real party to the dispute).

11. *See* Airlines Reporting Corp. v. S & N Travel, Inc., 58 F.3d 857, 862 (2d Cir. 1995) (noting that when an agent is merely representing the interests of another party, his citizenship should not factor into diversity decisions).

12. *See* Lumbermen's Mut. Cas. Co. v. Elbert, 348 U.S. 48, 51 (1954) (noting that the citizenship of the real party in interest controls in deciding whether diversity jurisdiction exists); Mecom v. Fitzsimmons Drilling Co., 284 U.S. 183, 187 (1931) (finding that a suit by an administrator on behalf of the state should have been dismissed from federal court because the citizenship of the administrator, not that of the decedent, governs decisions of diversity jurisdiction); Mexican Cent. Ry. Co. v. Eckman, 187 U.S. 429, 434 (1903) (ruling that a guardian has a legal right to bring an action in his own name, and his citizenship controls in deciding whether diversity jurisdiction exists); New Orleans v. Gaines's Adm'r, 138 U.S. 595, 606 (1891) (noting that the subrogee's citizenship, rather than the subrogor's, should dictate whether diversity exists).

13. *See* Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 552 (2005) (noting that Congress passed 28 U.S.C. § 1332 to create a "neutral forum" for civil actions between citizens of different states).

§ 1359[14] and contradicts Congress's original intent when it passed 28 U.S.C. § 1332.[15]

In this Note, Part II examines the background of diversity jurisdiction and the reasons for its initial adoption by Congress. Part III discusses the recent developments of diversity jurisdiction as well as the arguments in favor of its abolishment. Part IV explores the different rules courts have employed to resolve the diversity dispute. Part V takes a brief look at 28 U.S.C. § 1359, Congress's attempt to prevent collusion to create or defeat diversity jurisdiction. Part VI provides examples of how this diversity dispute arises and what criteria courts have considered in deciding whether diversity exists. Part VII looks more closely at the circuit split and the reasoning behind each court's determination of the relevant factors. Finally, Part VIII argues that courts should use the assignee's citizenship in the diversity decision if the assignee has the legal capacity to bring the lawsuit. This may not be the most popular position, but it is the most consistent with the original intent of diversity jurisdiction. Although this rule threatens that parties will collude to intentionally create or destroy diversity, United States District Court judges are capable of recognizing instances of collusion and dismissing those cases.[16]

II. Brief History of Diversity Jurisdiction

Article III of the Constitution gives Congress the power to create lower federal courts[17] and grants those courts jurisdiction in certain categories of cases, including those "between Citizens of different States . . . and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."[18] The

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14. *See* 28 U.S.C. § 1359 (2000) (providing that "[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").

15. *See* 28 U.S.C. § 1332 (providing for jurisdiction in federal district courts when there is complete diversity between the parties and where the amount in controversy exceeds $75,000); *see also* 28 U.S.C.A. § 1332 (West 2007) (David D. Siegel, cmt. on 1996 amend.) (noting that the original purpose behind diversity jurisdiction was to prevent bias against out-of-state litigants).

16. *See infra* notes 201–04 and accompanying text (describing the means available to district court judges to prevent collusive joinders designed to manufacture or defeat diversity jurisdiction).

17. *See* U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

18. *Id.* § 2.

Supreme Court has interpreted Article III itself to require only "minimal"[19] diversity, so that some or all of the claimants could be from the same state as long as at least one was diverse from the others.[20] Congress later implemented the constitutional grant of diversity jurisdiction in the Judiciary Act of 1789.[21] In interpreting the statutory definition of diversity, the Court ruled that this new statute created a "complete diversity" requirement, meaning that no party on one side can have the same citizenship as a party on the opposing side of the litigation.[22] Under this reading of the constitutional grant—a heightened diversity requirement—the citizenship of claimants on the same side of the litigation is disregarded, and the focus is on whether anyone on opposing sides of the litigation shares the same citizenship.[23]

The modern diversity statute, 28 U.S.C. § 1332, gives federal courts jurisdiction in all cases between citizens of different states in which the amount in controversy exceeds $75,000.[24] While the statute has changed slightly over the years—generally to increase the amount-in-controversy requirement—the diversity requirements have remained unchanged.[25]

Scholars and courts advance several reasons to explain the creation of diversity jurisdiction. First, and most prevalent, Congress feared that state judges, who are susceptible to pressures of the state electorate, would show prejudice against out-of-state litigants.[26] Justice Bradley explained that "the very object of giving to the national courts jurisdiction . . . in controversies between citizens of different States was to institute independent tribunals

19. *See* State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 530 (1967) (describing minimal diversity as "diversity of citizenship between two or more claimants, without regard to the circumstance that other rival claimants may be co-citizens").

20. *See id.* (describing the requirements for minimal diversity).

21. *See* Judiciary Act of 1789, ch. 20, 1 Stat. 73 (creating federal district and circuit courts and authorizing diversity jurisdiction).

22. *See* Strawbridge v. Curtiss, 7 U.S (3 Cranch) 267, 267 (1806) (limiting the federal diversity statute to parties with complete diversity).

23. *See id.* ("If there be two or more joint plaintiffs, and two or more joint defendants, each of the plaintiffs must be capable of suing each of the defendants, in the courts of the United States, in order to support the jurisdiction.").

24. *See* 28 U.S.C. § 1332 (2000) (amended 1996) (raising the amount-in-controversy requirement to $75,000).

25. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 5.3, at 304 (4th ed. 2003) (noting that the amount-in-controversy requirement increased over the years from its original amount of $500, to $10,000 in 1958, to $50,000 in 1988, to its present amount of $75,000 in 1996).

26. *See* Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 493–95 (1928) (noting that the original reason for the creation of diversity jurisdiction was out-of-state businesses' fears of local prejudices).

which . . . would be unaffected by local prejudices and sectional views . . . ."[27] Other scholars suggest that Congress was concerned with state judges who were unqualified[28] or dependent on state legislatures for reappointment.[29] This competence rationale garners support from the fact that many litigants with complex matters often prefer federal district courts for fear that the state court judges will misinterpret the facts or the law.[30] Finally, former Chief Justice Taft claimed Congress created diversity jurisdiction to ease the fears of investors who were hesitant to get involved in a foreign state where judicial disputes could be inherently biased against them.[31] Neither the Framers nor Congress officially endorsed any of these reasons, and critics of diversity jurisdiction heavily scrutinize each of them.

III. Recent Developments and the Diversity Debate

Since the creation of diversity jurisdiction, debate rages over whether it is worth the trouble (the Constitution, after all, merely authorizes Congress to provide for diversity jurisdiction, and does not require it). One side argues for the complete abolition of diversity, arguing that the reasons for its existence, even if originally sound, are no longer valid.[32] The other side supports retention, arguing that the original reasons for diversity jurisdiction still exist.[33]

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27. Burgess v. Seligman, 107 U.S. 20, 34 (1882).

28. *See* Friendly, *supra* note 26, at 497–98 (acknowledging the belief at the time of creation of diversity jurisdiction that many state court judges were less than competent).

29. *See* George C. Doub, *Time for Re-Evaluation: Shall We Curtail Diversity Jurisdiction?*, 44 A.B.A. J. 243, 244 (1958) (noting that state judges are not independent because they are elected by the public and must rely on the legislature to set their salaries and terms).

30. *See, e.g.*, Nicholson v. Sligh, 1 H. & McH. 434, 437 (Md. 1772) (demonstrating an example of a state court judge who found the matter too complicated and had to seek outside assistance to reach a resolution).

31. *See* William H. Taft, *Possible and Needed Reforms in the Administration of Justice in the Federal Courts*, *in* 47 REP. A.B.A. 250, 259 (1922) ("[N]o single element in our governmental system has done so much to secure capital for the legitimate development of enterprises throughout the West and South as the existence of federal courts there, with a jurisdiction to hear diverse citizenship cases.").

32. *See* Richard Allan, *Démarche or Destruction of the Federal Courts—A Response to Judge Friendly's Analysis of Federal Jurisdiction*, 40 BROOK. L. REV. 637, 650–56 (1974) (arguing for elimination of diversity jurisdiction); David P. Currie, *The Federal Courts and the American Law Institute*, 36 U. CHI. L. REV. 1, 4–49 (1968) (same); Robert W. Kastenmeier & Michael J. Remington, *Court Reform and Access to Justice: A Legislative Perspective*, 16 HARV. J. ON LEGIS. 301, 311–18 (1979) (same).

33. *See* Robert C. Brown, *The Jurisdiction of the Federal Courts Based on Diversity of Citizenship*, 78 U. PA. L. REV. 179, 193–94 (1929) (arguing for retention of diversity

Most scholars agree that the primary reason for the creation of diversity jurisdiction was the fear of bias against out-of-state litigants.[34] Those in favor of diversity jurisdiction argue that this problem existed at the time of creation, and it still exists today.[35] The American Law Institute (ALI) has noted that, with our increasingly mobile society, these concerns are misplaced: Prejudice against out-of-state residents is the last prejudice we should worry about.[36] The ALI argues that state court judges are more likely to base prejudices on race, religion, or a whole host of grounds, but not geography.[37] On the other hand, the ALI concedes that regional bias still exists, to some degree, against people from distant parts of the country.[38] The ALI also acknowledges the likelihood of a local "court house gang" advantage for state residents.[39]

One scholar indicated that federal judges are qualitatively superior, noting the importance of having this option for complex disputes between citizens of different states.[40] The ALI added:

> [A]lthough the out-of-stater cannot rightfully demand perfection in procedural matters, there have been in some states such infirmities in practice and procedure as to jeopardize the fairness of adjudication. . . . Nor can the fact be ignored that some state courts, largely centered in great metropolitan areas, are so congested that justice to litigants, including out-of-staters, is unconscionably delayed. Although federal courts in these same areas face similar problems, they have on the whole resolved them more effectively.[41]

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jurisdiction); John P. Frank, *The Case for Diversity Jurisdiction*, 16 HARV. J. ON LEGIS. 403, 413–14 (1979) (same); John J. Parker, *Dual Sovereignty and the Federal Courts*, 51 NW. U. L. REV. 407, 408–13 (1956) (same).

34. *See supra* note 26 and accompanying text (noting that the most prevalent reason for the creation of diversity jurisdiction is preventing bias against out-of-state litigants).

35. *See* 13B CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3601 (2006) (noting that many supporters of the retention of diversity jurisdiction believe bias against out-of-state litigants exists today in state courts).

36. AMERICAN LAW INSTITUTE, Study of the Division of Jurisdiction Between State and Federal Courts, Official Draft, 106 (1969) [hereinafter ALI] ("[N]one of the significant prejudices that beset our society today begins or ends when a state line is traversed.").

37. *Id.* (commenting that religious, racial, and economic concerns are much more pressing than citizenship within a state).

38. *Id.*

39. *Id.*

40. *See supra* note 28 and accompanying text (noting that state judges are often not as capable of handling complex litigation matters as federal judges).

41. ALI, *supra* note 36, at 107–08.

Several indisputable factors support this argument: Federal judges are appointed for life, they are free to comment on the evidence, and they often have far superior resources than state judges.[42]

The final argument, advanced by Justice Taft, is that the free flow of capital throughout our nation necessitates diversity jurisdiction.[43] What matters, for the sake of this argument, is not whether diversity jurisdiction is actually necessary for the equal administration of justice in state disputes but whether businesses perceive diversity to be necessary.[44] Most businesses seem to have little fear of state court prejudices in deciding whether to expand their operations, but it is hard to know how much the existence of diversity jurisdiction factors into their decision.[45]

Scholars and judges also advance practical arguments both for and against diversity jurisdiction. For instance, Justice Frankfurter argued that diversity jurisdiction creates significant congestion in the federal courts.[46] But recent reports show diversity cases now represent only about twenty percent of the civil cases on district court dockets,[47] so it would appear that legislation increasing the amount-in-controversy requirement cured much of this congestion.[48]

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42. *See* WRIGHT, MILLER & COOPER, *supra* note 35, at 359 (describing the reasons why federal judges may be better equipped to handle complex litigation matters).

43. *See supra* note 31 and accompanying text (arguing that diversity jurisdiction is important to assure businesses that they can invest in a foreign state without fear of facing biased local judges).

44. *See* Taft, *supra* note 31, at 259 (commenting on the considerations of businesses). He notes:

> The material question is not so much whether the justice administered is actually impartial and fair, as it is whether it is thought to be so by those who are considering the wisdom of investing their capital in states where that capital is needed for the promotion of enterprises and industrial and commercial progress.

Id.

45. *See* WRIGHT, MILLER & COOPER, *supra* note 35, at 362–63 (noting that there is no way to really know how much the existence of diversity jurisdiction factors into business decisions without completely abolishing it to find out).

46. *See* Gibson v. Phillips Petroleum Co., 352 U.S. 874, 874–75 (1956) (Frankfurter, J., dissenting) ("These diversity litigations place . . . an undue burden upon the federal courts in their ability to dispose expeditiously of other litigation which can be properly brought only in the federal courts."); *see also* Lumbermen's Mut. Cas. Co. v. Elbert, 348 U.S. 48, 58 (1954) (Frankfurter, J., concurring) ("For the last ten years the proportion of diversity cases has greatly increased, so that it is safe to say that diversity cases are now taking at least half of the time that the District Courts are devoting to civil cases.").

47. Federal Judicial Caseload Statistics, Table C-2, Cases Commenced, by Basis of Jurisdiction and Nature of Suit, (Mar. 31, 2002), http://www.uscourts.gov/caseload2002/contents.html (last visited Nov. 11, 2007) (on file with the Washington and Lee Law Review).

48. *See supra* note 25 (noting the increase in the amount-in-controversy requirement over

Additionally, the ALI expressed concern that with the advent of the *Erie* Doctrine,[49] which requires federal courts sitting in diversity cases to apply the underlying state's substantive law, diversity cases in federal courts waste time because the state courts are the experts on state substantive law.[50] The ALI also argues that the diversion of potentially novel legal issues of state substantive law to federal courts impedes the development of state law.[51] On the other hand, some scholars argue that the existence of concurrent jurisdiction between state and federal courts creates a competition between the two that pressures state courts into achieving a higher level of sophistication, ultimately leading to elevated standards in each respective system.[52]

All theories and practical arguments aside, change in the diversity law will come through the courts or Congress. Many members of the judiciary have been outspoken in their dislike for diversity jurisdiction.[53] Despite this, one of the most recent diversity decisions in the Supreme Court, *Exxon Mobil Corp. v. Allapattah Services, Inc.*,[54] indicates a willingness to expand the scope of

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the years).

49. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) ("Except in [federal question cases], the law to be applied in any [diversity] case is the law of the State.").

50. *See* ALI, *supra* note 36, at 99–100 (arguing that it is wasteful to force federal courts to attempt to become experts on matters of state substantive law).

51. *See id.* at 100 (noting that diversity jurisdiction keeps unsettled questions of state law away from state courts).

52. *See* Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 540 (1954) (noting the significant legal contributions to state law by federal judges hearing diversity cases); *see also* John P. Frank, *For Maintaining Diversity Jurisdiction*, 73 YALE L. J. 7, 12 (1963) ("We need a duplicating experience to protect the flow of ideas.").

53. *See* Lumbermen's Mut. Cas. Co. v. Elbert, 348 U.S. 48, 54 (Frankfurter, J., concurring) (referring to "the mounting mischief inflicted on the federal judicial system by the unjustifiable continuance of diversity jurisdiction"); *see also* ROBERT H. JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 37 (1955) ("In my judgment the greatest contribution that Congress could make to the orderly administration of justice in the United States would be to abolish the jurisdiction of the federal courts which is based solely on the ground that the litigants are citizens of different states."). *But see* Bank of the U.S. v. Deveaux, 9 U.S. (5 Cranch) 194, 196 (1809) (supporting diversity jurisdiction). The Court noted:

> However true the fact may be, that the tribunals of the States will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different States.

Id.

54. *See* Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 549 (2005) (holding that, in diversity actions, if one plaintiff meets the amount-in-controversy requirement, other plaintiffs that do not can be brought in under supplemental jurisdiction). In *Exxon*, the Supreme Court considered whether supplemental jurisdiction would extend the diversity court's reach to

diversity. There, the Court, faced with interpreting 28 U.S.C. § 1367,[55] held "that, where . . . at least one named plaintiff in the action satisfies the amount-in-controversy requirement, § 1367 does authorize supplemental jurisdiction over the claims of the other plaintiffs . . . even if those claims are for less than the jurisdictional amount specified in the statute setting forth the requirements for diversity jurisdiction."[56] The Court did not, however, go as far as saying that nondiverse parties could be brought in through supplemental jurisdiction.[57] Regardless of the Supreme Court's position on diversity jurisdiction, as long as only minimal diversity is constitutionally required, only the position of Congress truly matters. As the Court noted, "[w]hatever we say regarding the scope of jurisdiction conferred by a particular statute can of course be changed by Congress."[58]

Congress has opted to retain diversity jurisdiction in the face of recurring proposals for its elimination.[59] But Congress has modified diversity jurisdiction over the years.[60] While most of the reforms demonstrate an attempt to restrict the scope of those cases eligible for diversity jurisdiction,[61] at least one recent congressional effort shows an attempt to expand the scope of cases that can be brought in federal court under diversity jurisdiction.[62] No congressional

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a claim by a minor's parents if the daughter met the amount-in-controversy requirement, but the parents did not. *Id.* at 551. It noted that the purpose behind diversity jurisdiction was to provide a neutral forum for out-of-state litigants. *Id.* at 553–54. The Court added that while diverse parties that do not meet the amount-in-controversy requirement may still need this neutral forum, nondiverse parties have no need to be brought in under supplemental jurisdiction. *Id.* at 555. The Court held that if all other elements of jurisdiction are met and at least one plaintiff meets the amount-in-controversy requirement, § 1367 authorizes the exercise of supplemental jurisdiction over other diverse parties that do not meet the amount-in-controversy requirement. *Id.* at 549.

55. *See* 28 U.S.C. § 1367 (2000) (granting supplemental jurisdiction to certain classes of cases that would not otherwise come under federal jurisdiction).

56. *Exxon*, 545 U.S. at 549.

57. *See id.* at 553 (declining to extend supplemental jurisdiction to nondiverse parties).

58. Finley v. United States, 490 U.S. 545, 556 (1989) (superseded by 28 U.S.C. § 1367).

59. *See* 124 CONG. REC. 5008–09 (1978) (voting to abolish diversity jurisdiction, although the bill never reached a vote in the Senate); 124 CONG. REC. 33,546–48 (1978) (same); *see also* REP. OF THE FED. COURTS STUDY COMM., 39 (Apr. 2, 1990) (recommending the abolishment of diversity jurisdiction, subject to narrowly defined exceptions).

60. *See supra* note 25 (describing the modifications to 28 U.S.C. § 1332 over the years).

61. *See supra* note 25 and accompanying text (describing how Congress has increased the amount-in-controversy requirement three times since its creation); *see also* 28 U.S.C. § 1332(c)(2) (2000) (abolishing the rule by which diversity was artificially created through the appointment of an out-of-state administrator to bring the suit of one local person against another).

62. *See* Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 5(a), 119 Stat. 12 (2005) (codified as amended at 28 U.S.C. §§ 1332(d)(2) (2000) & 1453 (2000)) (expanding the subject

reforms, though, have addressed the dispute over citizenship in cases involving subrogated or assigned claims. As a result, courts have been forced to interpret existing congressional legislation and develop working standards to guide decisions on these questions.

IV. Classifications Used by the Courts to Distinguish Parties to a Suit

Courts generally classify parties to a lawsuit depending on the nature of the interest the party has in the outcome of the suit. Courts vary on what constitutes the minimum threshold of interest needed for a party to have its citizenship considered for purposes of diversity jurisdiction. The most demanding rule is the real party in interest rule, followed by the capacity to sue rule. Courts will almost never consider a party's citizenship if that party is only a nominal party.[63]

A. Real Party in Interest Rule

The most demanding level of interest, required by some courts before they will consider that party's citizenship,[64] is the real party in interest rule. The real party in interest is the person who has the right to come to court and seek relief, as recognized by the law.[65] Federal Rule of Civil Procedure 17(a)[66] invokes this term, although this rule is more procedural than jurisdictional.[67] Rule 17(a) ensures the finality of a lawsuit and prevents a party that is entitled to recover

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matter jurisdiction of federal courts over class actions where at least one plaintiff is diverse from the defendant and where the amount-in-controversy exceeds $5,000,000).

63. *See infra* Part IV.C (describing how courts handle nominal parties).

64. *See infra* Part VII.C (noting the circuits that have adopted the real party in interest rule).

65. *See* Charles E. Clark & Robert M. Hutchins, *The Real Party in Interest*, 34 YALE L.J. 259, 261 (1925) (defining what constitutes the real party in interest).

66. *See* FED. R. CIV. P. 17(a) (adopting the procedural real party in interest definition). The rule states, in part:

> Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, 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 authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought . . . .

Id.

67. *See* Airlines Reporting Corp. v. S & N Travel, Inc., 58 F.3d 857, 861 n.4 (2d Cir. 1995) (noting that a rough symmetry exists between the jurisdictional and procedural rules, but they do not serve the same purpose).

from bringing a subsequent suit.[68] On the other hand, the jurisdictional rule intends to prevent collusive joinder to create or defeat diversity jurisdiction.[69] The Third Circuit has indicated that a party is not the real party in interest in the jurisdictional sense unless it is seeking to protect its own interests rather than just fulfilling obligations to another party.[70]

Often, a party may have the capacity to sue, but the court will find that jurisdiction does not exist because he is not the real party in interest. For instance, guardians are extended the capacity to sue on behalf of minors through many state statutes, but they have no claim to a favorable judgment for the minor.[71] Thus, they are not the real party in interest.

B. Capacity to Sue Rule

Some jurisdictions recognize a capacity to sue rule for determining whether an agent's citizenship controls the diversity decision.[72] The capacity to sue is the right to come into court and to be heard.[73] Moreover, "[c]apacity relates to a party's personal or official right to litigate the issues presented by the pleadings."[74] Whether a party has the capacity to sue will often turn on whether there has been a valid legal transfer of interests.[75]

Federal Rule of Civil Procedure 17(b) adopts the procedural capacity to sue rule.[76] The question of whether a party has the procedural capacity to sue is

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68. FED. R. CIV. P. 17(a) advisory committee's note on the 1966 amendment ("[T]he modern function of the rule in its negative aspect is simply to protect the defendant against a subsequent action by the party actually entitled to recover, and to insure generally that the judgment will have its proper effect as res judicata.").

69. *See* Transcon. Oil Corp. v. Trenton Prods. Co., 560 F.2d 94, 103 (2d Cir. 1977) (finding that under the mandate of 28 U.S.C. § 1359, the court must look to the real parties in interest to decide whose citizenship controls for purposes of diversity jurisdiction).

70. *See Airlines Reporting*, 58 F.3d at 862 (noting that the plaintiff was the real party in interest for procedural purposes but not for jurisdictional purposes because he was merely fulfilling contractual obligations).

71. *See infra* Part VI.D (describing how courts handle the interests of guardians).

72. *See infra* Part VII.B (noting the circuits that have adopted the capacity to sue rule).

73. *See* United States v. Ass'n of Am. R.Rs., 4 F.R.D. 510, 517 (D. Neb. 1945) (distinguishing, by definition, capacity to sue from cause of action).

74. Iowa Coal Mining Co. v. Monroe County, 555 N.W.2d 418, 428 (Iowa 1996).

75. *See, e.g.*, Moore v. Mitchell, 281 U.S. 18, 24 (1930) (deciding whether Indiana statutes properly conferred capacity to sue).

76. *See* FED. R. CIV. P. 17(b) (2000) (adopting the capacity to sue definition). The rule states, in part:

> The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of the individual's domicile. The

the same as the question of whether that party has the capacity to sue for jurisdictional purposes.[77] This is different than the real party in interest rule where a separate analysis is used for jurisdictional purposes. Many courts regard a party with merely a capacity to sue as having less of an entitlement to have his citizenship considered for diversity purposes.[78] Even so, the Supreme Court recognizes that while a party with capacity to sue may not have a claim to the proceeds of the final judgment, he may still have a significant interest in the outcome of the suit.[79]

Often, when a party is the real party in interest, that party lacks the capacity to bring suit.[80] For example, a minor or a mentally incompetent person who is injured in a car wreck is the real party in interest in the outcome of the litigation, but he does not have the capacity to bring suit.[81] Such a party needs a surrogate (other than his lawyer) to stand in for him and make the important decisions relating to the lawsuit. In most circumstances, the real party in interest will also have the capacity to sue,[82] although he may choose to assign his claim rather than exercise his capacity.

> capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held . . . .

Id.

77. *See* Fallat v. Gouran, 220 F.2d 325, 328–29 (3d Cir. 1955) (using Rule 17(b) in a jurisdictional context).

78. *See infra* Part VII.C (describing those circuits that require a party to be the real party in interest for his citizenship to be considered in deciding whether diversity jurisdiction exists).

79. *See* Mexican Cent. Ry. Co. v. Eckman, 187 U.S. 429, 434 (1903) (describing the interests held by a party with the capacity to sue). The Court noted that a party with the capacity to sue:

> [I]s liable for costs in the event of failure to recover and for attorneys' fees to those he employs to bring the suit, and in the event of success, the amount recovered must be held for disposal according to law, and if he does not pay the same over to the parties entitled, he would be liable therefor[e] on his official bond.

Id.

80. *See* Equitable Life Assurance Soc'y of the U.S. v. Tinsley Mill Vill., 294 S.E.2d 495, 497 (Ga. 1982) ("A party may have the capacity to sue without being the real party in interest.").

81. *See* Iowa Coal Mining Co. v. Monroe County, 555 N.W.2d 418, 428 (Iowa 1996) (describing how a party may not have the capacity to sue even if he has a valid cause of action).

82. *See* 59 AM. JUR. 2D *Parties* § 28 (2007) (noting that the capacity to sue is "closely allied to" being the real party in interest).

C. Nominal Parties

Finally, situations arise where a party is named in a lawsuit but has no interest in the outcome.[83] Often, these parties are not even required to be present for the lawsuit to take place, but a technical rule requires their name to be present in the record.[84] For instance, in *McSparran v. Weist*,[85] the guardian was not actually litigating the suit, his name was only included because the minor lacked capacity.[86] Courts do not recognize such nominal parties for the purposes of diversity jurisdiction.[87]

Ultimately, these classifications are important because they may determine whether a party can bring suit in the federal forum under diversity jurisdiction. Courts are more likely to find that a party has been collusively joined if the party holds a slight interest in the outcome of the litigation. In those instances, § 1359 deprives the federal court of its jurisdiction.

V. 28 U.S.C. § 1359—Congress's Attempt to Defeat Manufactured Jurisdiction

Most courts choosing the real party in interest rule do so to prevent collusive joinder,[88] which is more likely to occur under the capacity to sue rule.[89] To protect against collusive joinder, Congress passed 28 U.S.C. § 1359,[90] which provides that "[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

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83. *See id.* § 8 (defining nominal parties and describing their usual lack of interest in the outcome of a lawsuit).

84. *See* Brown v. Jones, 134 S.W.2d 850, 852 (Tex. App. 1939) (describing how nominal parties are included as a mere technicality, not because they have any interest in the lawsuit).

85. *See* McSparran v. Weist, 402 F.2d 867, 869 (3d Cir. 1968) (holding that diversity jurisdiction did not exist because it would offend § 1359).

86. *See id.* (noting that the plaintiff conceded that the guardian was merely a straw party).

87. *See* Farmington v. Pillsbury, 114 U.S. 138, 143 (1885) (deciding to disregard the citizenship of the nominal party); Transcon. Oil Corp. v. Trenton Prods. Co., 560 F.2d 94, 102 (2d Cir. 1977) (same).

88. *See infra* Part VII.C (describing the rationale behind the Eighth and Second Circuits' adoption of the real party in interest rule).

89. *See infra* notes 166, 168 and accompanying text (describing the fear of some courts that collusive joinder is more likely to occur under the capacity to sue rule).

90. 28 U.S.C. § 1359 (2000) (forbidding collusive joinder to create or defeat diversity jurisdiction).

court."[91] This statute, based on the original assignee clause of the Judiciary Act of 1789,[92] ensures that federal courts only hear those cases properly brought within their jurisdiction.[93] Parties often invoke this statute in cases where a resident appoints a nonresident solely for the purpose of creating grounds for removal to federal court under diversity jurisdiction.[94] Generally, the party opposing removal raises the § 1359 challenge, thereby placing the burden of proof on the party seeking removal to overcome the presumption against the federal court's exercise of jurisdiction.[95]

While this protection may be good in theory, it is infrequently used in practice. Federal courts usually only look for glaring instances of collusion and rarely inquire into the motives of the parties involved.[96] On the other hand, some courts find that this lack of inquiry is based on "thin and rather elusive authority."[97] Regardless, § 1359 has proven relatively ineffective as a protection against collusion.[98] In practice, if a representative merely holds a valid legal appointment to his position, the federal court will accept that his appointment is not in violation of § 1359.[99] For this reason, more cases get into federal courts under diversity jurisdiction where the diverse party merely has the capacity to sue but is not the real party in interest. The decision of which

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91. *Id.*

92. *See* 28 U.S.C.A. § 1359 (West 2007) (revision notes and legislative reports) (noting that the original assignee clause "is a jumble of legislative jargon").

93. *See* Sowell v. Fed. Reserve Bank, 268 U.S. 449, 453 (1925) (noting that the original purpose behind the assignee clause, replaced by § 1359, was to "prevent the conferring of jurisdiction on the federal courts, on grounds of diversity of citizenship, by assignment, in cases where it would not otherwise exist").

94. *See* McSparran v. Weist, 402 F.2d 867, 869 (3d Cir. 1968) (describing the party appointed to bring suit as a "straw party").

95. *See id.* at 875 (stating that the burden of proof rests with the party invoking diversity jurisdiction to show that its exercise is proper in this instance).

96. *See* Mecom v. Fitzimmons 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 or diversity of citizenship."); *see also* Note, *Manufactured Federal Diversity Jurisdiction and § 1359*, 69 COLUM. L. REV. 706, 708 (1969) (noting that motive is mostly irrelevant for jurisdictional purposes).

97. Vallentine v. Taylor Inv. Co., 305 F. Supp. 1104, 1106 (D. Colo. 1969) (citation omitted); Dougherty v. Oberg, 297 F. Supp. 635, 638 (D. Minn. 1969).

98. *See* Cohan & Tate, *supra* note 1 at 209 (noting that there have been very few instances of courts actually finding a violation of § 1359).

99. *See, e.g.*, Jaffe v. Phila. & W. R. Co., 180 F.2d 1010, 1012 (3d Cir. 1950), *overruled on other grounds by* McSparran v. Weist, 402 F.2d 867, 876 (3d Cir. 1968) (disregarding motive because the administrator was properly appointed); Greene v. Goodyear, 112 F. Supp. 27, 28 (M.D. Pa. 1953) (same).

rule to choose is still left up to the federal district courts, with little guidance from Congress or the Supreme Court.

VI. Occurrences of the Diversity Dispute

Diversity disputes arise in several circumstances, requiring courts to decide whether diversity exists. Most of these occurrences involve a party with a valid cause of action who is, for some reason, incapable of litigating the claim on his own. For example, the real party in interest may lack the capacity to sue, as with wards, or it may be a corporation that finds it more efficient to assign its claims to a third party who is better equipped to litigate such claims.

A. Executors and Administrators

Generally, where an executor or an administrator of an estate is party to an action in federal courts, the executor or administrator's citizenship controls the diversity decision.[100] There are two exceptions to this general rule.[101] First, if a nominal party is merely serving as a conduit for a lawsuit, that party's citizenship will not be used.[102] Second, where a statute allows recovery by either the administrator or the beneficiaries, the courts regard a suing administrator as a nominal party and disregard his citizenship.[103]

The Supreme Court decisions make it difficult to discern which rule the Court relied upon in deciding that the citizenship of the executor controls. The second exception would indicate that mere capacity to sue is not enough because if there is a statute giving the capacity to sue to either the beneficiaries or the executor, the executor is deemed a nominal party whose citizenship is disregarded if he sues.[104] The Supreme Court has not addressed this

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100. *See* Annotation, *Citizenship of Executor or Administrator as Test of Diversity of Citizenship for Purposes of Jurisdiction of Federal Court*, 77 A.L.R. 910 (1932) (Supp. 136 A.L.R. 938 (1942)) (giving a collation of cases supporting the proposition that the executor or administrator's citizenship controls in diversity actions).

101. *See* Cohan & Tate, *supra* note 1, at 216 (noting the exceptions to the general rule with executors and administrators).

102. *See* Walden v. Skinner, 101 U.S. 577, 589 (1879) (noting that if the executor is a mere nominal party, the citizenship of the deceased trustee should govern).

103. *See* Thames v. Mississippi *ex rel.* Shoemaker, 117 F.2d 949, 952 (5th Cir. 1941) (ruling that, where a Mississippi statute gives the right to sue to either the administrator or the beneficiaries, if the administrator sues, he will be treated as a nominal party).

104. *See supra* note 103 and accompanying text (noting an exception to the general rule).

exception.[105] In cases where the Supreme Court actually ruled that the citizenship of the executor or administrator controls, the Court's language mentions both real party in interest and capacity to sue as reasons for its decision.[106] The lower court opinions reflect this contradictory language, as they rely on both the real party in interest rule[107] and the capacity to sue rule[108] in diversity cases involving executors and administrators. Surprisingly, the rule for executors and administrators is more consistent than in any other area. The District Court of Colorado noted that "[o]utside of [executors and administrators] we find no general rule."[109]

B. Trustees

The diversity problem also arises in cases involving trustees. Most courts find that if a trustee is party to the action and exercises real powers over the trust, the federal courts should consider his citizenship in the diversity decision.[110] This consideration is based upon the fact that normally a trustee is the real party in interest because he represents the interests of the

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105. *See* Mississippi *ex rel.* Shoemaker v. Thames, 314 U.S. 630, 630 (1941) (denying certiorari).

106. *See* Mecom v. Fitzsimmons Drilling Co., 284 U.S. 183, 186–87 (1931) (noting, first, that Mecom's citizenship is determinative because he was the real party in interest, but then noting that the facts from *Mexican Central Railway Co. v. Eckman*, 187 U.S. 429 (1903), are applicable here). In *Eckman*, the Court ruled that if state law gives the guardian the "right to bring suit" (or capacity to sue), then his citizenship controls, even if he is bringing the suit on someone else's behalf. *Mexican Central Ry.*, 187 U.S. at 434; *see also* Childress v. Emory, 21 U.S. (8 Wheat.) 530, 532 (1823) (noting that the citizenship of executors and administrators controls because they are "the real parties in interest," and they are "capable of suing and being sued").

107. *See* Schneider v. Eldredge, 125 F. 638, 640 (N.D. Ill. 1903) ("[T]his court will take into consideration the actual party in interest . . . as though he were the original defendant."); Chambers v. Anderson, 58 F.2d 151, 152 (6th Cir. 1932) (considering the administratrix's citizenship because she was the real party in interest).

108. *See* Dodge v. Perkins, 7 F. Cas. 798, 799 (D. Mass. 1827) (No. 3,954) (noting that even though the administrator was suing in his representative capacity, "he sues in his own right as a citizen"); Roach's Adm'r v. Ohio Nat'l Life Ins. Co., 258 S.W. 300, 301 (Ky. Ct. App. 1924) ("It is the residence of the parties actually before the court that gives jurisdiction, and where a party sues in a representative capacity, it is his residence, and not the residence of those he represents, that controls.").

109. Vallentine v. Taylor Inv. Co., 305 F. Supp. 1104, 1105 (D. Colo. 1969).

110. *See* Navarro Sav. Ass'n v. Lee, 446 U.S. 458, 464 (1980) (finding that a trustee is a real party to the controversy for purposes of diversity jurisdiction when he has the power to "hold, manage, and dispose of assets for the benefit of others."); *see also* Dodge v. Tulleys, 144 U.S. 451, 456 (1892) (considering the citizenship of the trustee). *See generally* 32A AM. JUR. 2D *Federal Courts* § 894 (2007).

beneficiary.[111] On the other hand, if the trustee is a "naked trustee . . . [acting] as [a] mere conduit[] for a remedy flowing to others," the diversity decision turns on the citizenship of the underlying party rather than the trustee's citizenship.[112] A trustee, however, is not necessarily a "mere conduit" just because the remedy is going to others.[113] Although most Supreme Court rulings on the issue of trustees are at least couched in terms of deciding who is the real party in interest, some lower courts have still interpreted these cases to allow for the adoption of the capacity to sue rule.[114]

C. Receivers

The diversity dispute also arises in cases involving receivers. Generally, in an action by or against a receiver serving on behalf of a corporation, the receiver's citizenship matters for diversity jurisdiction.[115] The court disregards the citizenship of the underlying corporation or individual.[116] As with trustees, lower courts faced with receivers as parties have relied on the real party in interest rule in some instances[117] and the capacity to sue rule in

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111. *See* Bergkamp v. N.Y. Guardian Mortgagee Corp., 667 F. Supp. 719, 724 (D. Mont. 1987) ("[T]he trustee represents the interests of the beneficiary so that the trustee alone is the real party in interest.").

112. *Navarro*, 446 U.S. at 465; *see also* Boon's Heirs v. Chiles, 33 U.S. (8 Pet.) 205, 207 (1834) (finding that where a suit is filed in the name of the trustee who is officially the holder of the legal title but has no knowledge of the lawsuit, his citizenship is not considered in the diversity decision); Bogue v. Chicago B. & Q.R. Co., 193 F. 728, 734 (S.D. Iowa 1912) ("[S]uch is not the rule where a person is a mere agent or trustee for the use of another. In such a case the citizenship of the beneficiary controls.").

113. *See* Fleet Nat'l Bank v. Trans World Airlines, Inc., 767 F. Supp. 510, 514 (S.D.N.Y. 1991) (finding that a trustee still had powers and authority under the law, even though he was acting on behalf of and for the benefit of the beneficiaries).

114. *See infra* Part VII.B and accompanying notes (describing how some circuits have interpreted the Supreme Court rulings to require only the capacity to sue rule for resolution of the diversity dispute).

115. *See* Mexican Cent. Ry. Co. v. Eckman, 187 U.S. 429, 434 (1903) (citing *New Orleans v. Gaines's Administrator* for the same proposition); New Orleans v. Gaines's Adm'r, 138 U.S. 595, 606 (1891) (including receivers in the list of parties whose citizenship controls in the diversity decision). *But see* Chapman v. St. Louis & S.W. Ry. Co., 71 F. Supp. 1017, 1018–19 (N.D. Tex. 1947) (departing from the general rule and disregarding the citizenship of the receiver for public policy reasons).

116. *See* Coal & Iron Ry. v. Reherd, 204 F. 859, 883 (4th Cir. 1913) (disregarding the citizenship of the individual); Barber v. Powell, 22 S.E.2d 214, 214 (N.C. 1942) (disregarding the citizenship of the corporation).

117. *See* Farlow v. Lea, 8 F. Cas. 1017, 1018 (N.D. Ohio 1877) (No. 4,649) (finding that the receiver, not the corporation he was representing, was the real party in interest to the lawsuit, so his citizenship should control).

others.[118] This situation arises most often when a receiver takes control of a bankrupt company for the benefit of the creditors.[119] If tortious conduct occurs after the takeover, the diversity dispute would not arise because the receiver would also be the real party in interest.[120] On the other hand, the dispute would arise if the conduct took place before the receiver took control as a result of the actions of the bankrupt company. If the receiver litigates the case, his citizenship may not control. The decision would ultimately depend on whether the conduct occurred in a jurisdiction that relies on the real party in interest rule or in one following the capacity to sue rule. A uniform rule would prevent contradictory conclusions from circuits with different rules.

D. Guardians

Cases often arise where the parties are in dispute over whether a court should consider the citizenship of a guardian or a minor (or an incapacitated party). Two Supreme Court opinions direct that the guardian's own citizenship is what counts for purposes of the diversity decision.[121] One lower court opinion, evidencing the lack of clarity in these decisions, noted that "[t]he cases are confusing and the Circuits are split."[122] Illustrative of this confusion, many courts have ruled that it is the citizenship of the ward, not the guardian, that controls.[123] Furthermore, this line of cases produced one of the first circuit

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118. *See* Davies v. Lathrop, 12 F. 353, 359 (S.D.N.Y. 1882) ("[The defendant] confided to him the responsibility of defending the suit, and this court has a right to deal with his personal citizenship on the question of removal."); *see also* Bogue v. Chicago, B. & Q.R. Co., 193 F. 728, 734 (S.D. Iowa 1912). There, the court noted:

> The citizenship of [a] . . . receiver determines the jurisdiction, because such an officer has the legal title under his appointment by judicial proceedings. But such is not the rule where a person is a mere agent or trustee for the use of another. In such a case the citizenship of the beneficiary controls.

Id.

119. *See* Cohan & Tate, *supra* note 1, at 219 (describing a common occurrence of the diversity dispute with receivers).

120. *Id.*

121. *See* Mexican Cent. Ry. Co. v. Eckman, 187 U.S. 429, 434 (1903) (citing *New Orleans v. Gaines's Administrator* for the same proposition); New Orleans v. Gaines's Adm'r, 138 U.S. 595, 606 (1891) (including guardians in the list of parties whose citizenship controls in the diversity decision).

122. Vallentine v. Taylor Inv. Co., 305 F. Supp. 1104, 1105 (D. Colo. 1969).

123. *See* Elliot v. Krear, 466 F. Supp. 444, 446–47 (E.D. Va. 1979) (finding that the citizenship of the ward, not the guardian, controls for deciding whether diversity jurisdiction exists); Dunlap *ex rel.* Wells v. Buchanan, 567 F. Supp. 1435, 1436 (E.D. Ark. 1983) (same); *see also* ALI, *supra* note 36, at 10–12, 117–19 (proposing that courts should view the guardian

court opinions strongly advocating the capacity to sue rule in very clear terms. In *Fallat v. Gouran*,[124] the court found "that the other courts have misinterpreted the true basis of diversity and that when the other courts speak in terms of real party in interest, they really mean to base the decision on capacity to sue."[125] On the other hand, many courts finding that the guardian's citizenship controls still rely upon, or at least speak in terms of, the real party in interest rule.[126] Considering the frequency with which children lacking capacity to sue become victims of tortious conduct, this area needs a clear rule governing whose citizenship should control.

E. Assignments

Assignment of interest can also give rise to a dispute over whose citizenship controls. An assignment occurs when one party passes all of its legal interest in a certain property to another party.[127] Because some parties assign claims solely to manipulate jurisdiction, courts disagree on whether such assignments can serve as a basis for diversity jurisdiction.[128] The ALI, recognizing this problem, proposed a statutory amendment that would eliminate the practice of assigning claims to prevent removal on diversity grounds.[129] Federal courts have regularly rejected the real party in interest rule as grounds for ignoring the citizenship of the assignee,[130] often stating that the assignee

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and the ward as having the same citizenship).

124. *See infra* note 157 (describing the facts and holding of *Fallat v. Gouran*, 220 F.2d 325 (3d Cir. 1955)).

125. Cohan & Tate, *supra* note 1, at 225.

126. *See* Martineau v. City of St. Paul, 172 F.2d 777, 780 (8th Cir. 1949) (using the minor's citizenship because he was the real party in interest); *Eckman*, 187 U.S. at 434 (referencing the real party in interest rule in a situation involving a guardian).

127. *See* Cohan & Tate, *supra* note 1, at 227 (describing the circumstances giving rise to an assignment of property).

128. *See* Lisenby v. Patz, 130 F. Supp. 670, 674 (E.D.S.C. 1955) (finding that if the assignment is otherwise valid, the motives for the transfer are immaterial, and also noting that Congress, not the courts, should correct this evil). *But see* King *ex rel.* King v. McMillan, 252 F. Supp. 390, 392 (D.C.S.C. 1966) (finding that if any fraud or collusion existed in connection with the assignment, the state court was the proper forum for resolution of the dispute).

129. *See* ALI, *supra* note 36, at 22–23 (proposing, in § 1307(b), that assignment be ignored if it is used to create or destroy diversity jurisdiction).

130. *See* Provident Sav. Life Assurance Soc'y v. Ford, 114 U.S. 635, 641 (1885) (rejecting the idea that a mere colorable assignment and a diverse plaintiff who was not the real party in interest were sufficient to dismiss the case from federal court); Krenzien v. United Servs. Life Ins. Co., 121 F. Supp. 243, 245 (D. Kan. 1954) (finding that an assignment to a party who was not the real party in interest but who was diverse was sufficient to create diversity jurisdiction).

could stand on his own citizenship because he has the capacity to sue under state law.[131]

F. Subrogated Claims

A final scenario involves subrogated claims where the subrogee is of a different citizenship than the subrogor. This circumstance most often arises in the insurance field, where an insurance company will compensate the insured for his loss, then become subrogated to the rights of the insured against the tortfeasor.[132] Here, the general rule is very similar to the rule with executors and administrators—the subrogee's citizenship controls.[133] Most states only allow the subrogee to sue by himself as the real party in interest if he has paid the insured's entire amount lost,[134] although some states do not make such a distinction.[135] Subrogated claims arise on a fairly regular basis, and a uniform rule is needed to prevent contradictory outcomes based on jurisdiction. Currently, parties desiring a federal forum are likely to forum shop because some circuits require a greater level of interest before a subrogee's citizenship can control.

VII. Circuit Split

A. The Supreme Court Rulings Have Not Decisively Resolved the Issue

The Supreme Court's diversity precedents do not resolve whether the real party in interest or capacity rule is preferable, and indeed its decisions on related

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131. *See* Rosecrans v. William S. Lozier, Inc., 142 F.2d 118, 124 (8th Cir. 1944) (ruling that even if the assignee were only a party in order to obtain a judgment and then turn over the proceeds, his citizenship would still control); Ridgeland Box Mfg. Co. v. Sinclair Ref. Co., 82 F. Supp. 274, 276 (E.D.S.C. 1949) (finding that if the assignees were "really [] proper parties and [had] legitimate standing in the court" their citizenship could create diversity).

132. *See, e.g.*, United States v. Aetna Cas. & Sur. Co., 338 U.S. 366, 369 (1949) (describing the circumstances giving rise to the subrogated claim).

133. *See* New Orleans v. Gaines's Adm'r, 138 U.S. 595, 606 (1891) (including subrogees in the list of parties whose citizenship controls in the diversity decision); Cont'l Cas. Co. v. Ohio Edison Co., 126 F.2d 423, 426 (6th Cir. 1942) ("One subrogated to the rights of another may stand in the Federal Courts upon his own citizenship, regardless of the citizenship of the person to whose rights he is subrogated.").

134. *See, e.g.*, Liberty Mut. Ins. Co. v. Tel-Mor Garage Corp., 92 F. Supp. 445, 446 (S.D.N.Y. 1950) (finding that an insurer who has paid the full amount of the loss is the only real party in interest and must stand on its own citizenship).

135. *See, e.g.*, *Cont'l Cas.*, 126 F.2d at 425–26 (finding that the subrogee's citizenship controlled despite the fact that he only partially compensated the injured party).

matters provide support for both sides. In *New Orleans v. Gaines's Administrator*,[136] the Court emphasized that the citizenship of parties with assigned claims should control in diversity cases.[137] The Court stated that the only time this rule is not applicable is when there is a mere nominal party, whose name is included in the lawsuit for the sole purpose of creating diversity jurisdiction[138] (Congress later codified this idea in 28 U.S.C. § 1359).[139] The Court said that in circumstances involving manufactured diversity, the citizenship of the real party in interest controls for the diversity decision.[140] It did not, however, say what to do in circumstances involving a party who is not the real party in interest, but who has legitimate capacity to sue and is not a mere nominal party.

Later cases exhibited the same lack of clarity. In *Mexican Central Railway Co. v. Eckman*,[141] the Court noted that:

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136. *See* New Orleans v. Gaines's Adm'r, 138 U.S. 595, 606 (1891) (ordering courts in federal litigation to respect states' characterizations of guardians as determinative of which party is the real party in interest). In *Gaines's Administrator*, the city of New Orleans sold land to a private party, who then sold the same land to various parties. *Id.* at 597. Gaines, claiming that the property was rightfully hers all along, brought a suit against the city on behalf of the parties that would otherwise be liable to her. *Id.* at 600. In addressing the assignments of error, the Court first decided that the circuit court's jurisdiction was not founded upon diversity but upon Gaines's equitable right to sue the city. *Id.* at 605. Second, the Court found that the assignment of the individual parties' rights to Gaines did not destroy her subrogated right to sue the city. *Id.* at 606. In so ruling, the Court noted that representatives "may stand on their own citizenship in the federal courts irrespective[] of the citizenship of the persons whom they represent." *Id.* It distinguished instances where a party to a suit is a mere nominal party, in which case the citizenship of the real party in interest is considered. *Id.* at 607. Finally, the Court found that there was an express warranty in the sales made by the city, and no fraud was proven. *Id.* at 608–09.

137. *See id.* at 606 ("[W]e have repeatedly held that representatives may stand upon their own citizenship in the federal courts irrespective[] of the citizenship of the persons whom they represent,—such as executors, administrators, guardians, trustees, receivers . . . .").

138. *See id.* (noting that cases brought in federal court based solely on a nominal party's diversity are evils sought to be avoided).

139. *See supra* Part V and accompanying notes (describing the purpose and history of 28 U.S.C. § 1359).

140. *See Gaines's Adm'r*, 138 U.S. at 607 ("[In situations involving a nominal party,] the real party in interest is taken into account on the question of citizenship.").

141. Mexican Cent. Ry. Co. v. Eckman, 187 U.S. 429, 434 (1903) (ruling that a guardian has a legal right to bring an action in his own name, and his citizenship controls for purposes of deciding whether diversity jurisdiction exists). In *Eckman*, a guardian sued Mexican Railway Company on behalf of a minor who was injured due to the Company's alleged negligence. *Id.* at 429–31. The Court acknowledged its previous cases held that actions in federal court could be brought in any district where either the plaintiff or the defendant resided, so the only question for consideration was whether the plaintiff here was the guardian or the minor. *Id.* at 432. The Court then reaffirmed the principle from *New Orleans v. Gaines's Administrator* that if a party is merely nominal, the citizenship of the real party in interest is considered for diversity

> If in the state of the forum the general guardian has the right to bring suit in his own name as such guardian, and does so, he is to be treated as the party plaintiff so far as Federal jurisdiction is concerned, even though suit might have been instituted in the name of the ward by guardian *ad litem* or next friend. He is liable for costs in the event of failure to recover and for attorneys' fees to those he employs to bring the suit, and in the event of success, the amount recovered must be held for disposal according to law, and if he does not pay the same over to the parties entitled, he would be liable therefor[e] on his official bond.[142]

Here, the Court seemingly indicates that mere capacity to sue is enough for a party's citizenship to control the diversity decision. The Court's reasoning acknowledges that even a party that merely has capacity to sue may still have a significant stake in the outcome of the case. Thus, it would be unfair to ignore that party's citizenship, assuming diversity jurisdiction is a desirable goal in this instance.

In *Mecom v. Fitzsimmons Drilling Co.*,[143] the Court appeared to reverse course, noting that because Mecom was the real party in interest, his citizenship controls for diversity purposes.[144] But the Court went on to justify this ruling by stating that the rule laid down in *Eckman* was applicable here.[145] This

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purposes. *Id.* at 433 (citing New Orleans v. Gaines's Adm'r, 138 U.S. 595, 606 (1891)). But, the Court said that when a guardian has the legal right to sue in his own name, his citizenship controls. *Id.* at 434. The Court reasoned that, while the guardian may not be the real party in interest, he still may be liable to the real party in interest if he fails to recover on that party's claim. *Id.*

142. *Id.* at 434.

143. Mecom v. Fitzsimmons Drilling Co., 284 U.S. 183, 186 (1931) (finding that a suit by an administrator on behalf of the state should have been dismissed from federal court because the citizenship of the administrator, not the decedent, should control for purposes of diversity jurisdiction). In *Mecom*, Fitzsimmons Drilling Company attempted to have a wrongful death suit removed to federal court because, while the administrator was a nondiverse party, the decedent was diverse. *Id.* at 184–85. The Court found that federal courts have jurisdiction over suits by executors and administrators if they are diverse, regardless of the decedent's citizenship. *Id.* at 186. The Court reasoned that the administrator, often required to bring the suit under state statute, is the real party in interest. *Id.* The *Mecom* Court found that the rationale from *Eckman* applied here—a legal right to bring suit brings with it the right to have one's own citizenship control for diversity purposes. *Mecom*, 284 U.S. at 187. The Court rejected Fitzsimmons' assertion that the administrator was chosen solely for the purpose of defeating diversity, noting that the motive of parties in procuring a lawful appointment is immaterial to the diversity question. *Id.* at 189.

144. *See id.* at 186 ("[H]e is the real party in interest and his citizenship, rather than that of the beneficiaries, is determinative of federal jurisdiction. This we think is the correct view.").

145. *See id.* at 187 (restating the rationale from *Eckman* and applying it to the present situation).

confuses the rule chosen in *Mecom* because the *Eckman* language was more indicative of a capacity to sue rule rather than a real party in interest rule.[146]

Later, in *Lumbermen's Mutual Casualty Co. v. Elbert*,[147] this same confusing rule emerged. The Court again said that diversity did exist because the petitioner was "not merely a nominal defendant, but . . . [was] the real party in interest."[148] The Court followed its previous rationales, giving only the two extreme guidelines in the diversity determination. Again, the Court spoke in terms of the real party in interest but cited to the *Eckman* decision which seemed to turn on capacity to sue.[149]

The Supreme Court rulings make abundantly clear that courts should focus on the citizenship of the real party in interest, but they should not consider the citizenship of a nominal party. Parties with mere capacity to sue lie somewhere between the two, but the Court has yet to draw the line.

The lack of specificity by the Court has divided the circuits. The First Circuit acknowledged the split in *Pramco, LLC* ex rel. *CFSC Consortium v. San Juan Bay Marina, Inc.*[150] There, the court noted that circuits vary on

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146. *See supra* note 141 (describing the rationale relied on by the Court in *Eckman*).

147. Lumbermen's Mut. Cas. Co. v. Elbert, 348 U.S. 48, 51 (1954) (noting that the real party in interest's citizenship controls the decision of whether diversity jurisdiction exists). In *Lumbermen's*, two residents from the same state were involved in a car accident, but the injured party sued the negligent party's nondiverse insurance company in federal court. *Id.* at 49. The Court noted that the insurance company was not merely a nominal defendant but was the real party in interest because the company would have to pay any judgment against the negligent party. *Id.* at 51. The Court rejected the claim that the negligent driver was an indispensable party because the court could give a final decree without his joinder. *Id.* Finally, the Court rejected the insurance company's call for the federal courts to decline to exercise jurisdiction here, as the Court noted this was a case that fell squarely within the lower court's congressional grant of jurisdiction. *Id.* at 52. In his concurrence, Justice Frankfurter noted that this was an abuse of diversity jurisdiction that "has no business in federal court." *Id.* at 56 (Frankfurter, J., concurring). He then went on to give a scathing review of diversity jurisdiction in general, which he saw as clogging up federal courts. *Id.* at 57 (Frankfurter, J., concurring).

148. *Id.* at 51.

149. *See* McSparran v. Weist, 402 F.2d 867, 870 (3d Cir. 1968) (noting the confusing rule that emerged when the court referred to the *Eckman* case with approval but characterized the guardian as the real party in interest).

150. *See* Pramco, LLC *ex rel.* CFSC Consortium v. San Juan Bay Marina, Inc., 435 F.3d 51, 55 (1st Cir. 2006) (noting that the lower court must first determine whether there are any nondiverse members in the LLC before the First Circuit can determine whether that party's citizenship matters for jurisdictional purposes). In *Pramco*, the Court of Appeals for the First Circuit considered whether the district court had proper jurisdiction to rule on the validity of a settlement agreement. *Id.* at 54–55. Here, the plaintiffs were both LLCs, and the defendants were citizens of Puerto Rico. *Id.* The *Pramco* court noted that the citizenship of an LLC is determined by the citizenship of all of its members. *Id.* It then noted that the agent's citizenship may matter in this situation, and while the circuits split over this issue, it was an issue of first impression for this court. *Id.* The court then remanded to the district court to determine the

whether an agent's citizenship should matter.[151] While acknowledging arguments for both the real party in interest rule and the capacity to sue rule, the court determined that the diversity issue was not ripe for determination and remanded on other grounds to the lower court.[152]

B. Circuits Applying the Capacity to Sue Rule

Although many variations exist among the circuit and district courts, two general positions are apparent. The first, illustrated by the court in *Hart v. Bayer Corp.*,[153] finds the agent's citizenship to control if he has the capacity to sue.[154] There, the court reasoned that if an agent has legal standing to sue or be sued, then he has sufficient status for consideration of his citizenship.[155] The original intent of diversity jurisdiction supports this position, namely that a party forcibly engaged in a lawsuit will fall victim to local bias in state court.[156] This courtroom bias affects the party that is actually in the courtroom, acting under his legal capacity to sue (the agent); therefore, his citizenship controls.

In *Fallat v. Gouran*,[157] the Third Circuit supported this position. The court again focused on the agent or subrogee's legal capacity to sue in deciding

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citizenship of each member of the LLC's. *Id.* at 56.

151. *Id.* at 55 (noting that the Eighth and Second Circuits believe an agent's citizenship is not considered, while the Third Circuit disagrees and favors using the agent's citizenship).

152. *Id.* at 56 (remanding for determination of the citizenship of each member of the LLCs involved in the litigation).

153. *See* Hart v. Bayer Corp., 199 F.3d 239, 247–48 (5th Cir. 2000) (finding that if an agent is in some way liable for the commission of a tort, his citizenship controls for purposes of diversity jurisdiction, despite the agency relationship). In *Hart*, the Court of Appeals for the Fifth Circuit considered whether the presence of an agent, joined in a lawsuit involving the misrepresentation of pesticide chemicals, could create diversity jurisdiction. *Id.* at 242–43. The lawsuit was brought in Mississippi, and all parties resided there except for the agent. *Id.* The *Hart* court first found that the statute involved did not completely preempt all state or local regulations of pesticides. *Id.* at 244. Second, the court found no indication of anything in the language or legislative history that suggested preemption of local regulations, which would create federal jurisdiction. *Id.* at 245. Finally, the *Hart* court found that for the agent to be joined in the lawsuit, he would need some sort of direct, personal participation in the tort, and if this was the case, then his citizenship controls for purposes of deciding whether diversity jurisdiction exists. *Id.* at 246–47.

154. *Id.* at 247 (commenting that the agency relationship is irrelevant here).

155. *Id.* (noting that if an agent is directly liable to the extent that he is being joined in the lawsuit, his citizenship controls for jurisdictional purposes).

156. *See supra* Part II and accompanying notes (describing the purpose behind the congressional enactment of 28 U.S.C. § 1332).

157. *See* Fallat v. Gouran, 220 F.2d 325, 326 (3d Cir. 1955) ("[I]t is not the citizenship of the incompetent, . . . which governs but the citizenship of the guardian, provided he has the

whether his citizenship controls for diversity purposes.[158] Not only does this position provide adequate protection to the foreign party, but it also aims to defeat collusive efforts to create jurisdiction as prohibited by 28 U.S.C. § 1359.[159] It is not a complete protection, though, because presumably a party could still artificially create jurisdiction by subrogating his claim to a diverse agent with the capacity to sue.[160] Competent district court judges, though, would undoubtedly recognize these attempts.[161] The Third Circuit later ruled, in *McSparran v. Weist*,[162] that the citizenship of the ward, rather than the guardian, should control in the diversity determination.[163] The court, however,

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capacity to sue."). In *Fallat*, the Court of Appeals for the Third Circuit decided whether, in a lawsuit over an automobile accident, the citizenship of the nondiverse victim, or his diverse guardian, controls for jurisdictional purposes. *Id.* at 325–26. The *Fallat* court cited the Supreme Court in *New Orleans v. Gaines's Administrator* for the proposition that "'representatives may stand upon their own citizenship in the federal courts irrespectively of the citizenship of the persons whom they represent.'" *Fallat*, 220 F.2d at 326 (quoting New Orleans v. Gaines's Adm'r, 138 U.S. 595, 606–07 (1891)). Here, the *Fallat* court declined to follow the view of the Eighth Circuit and instead held that presuming the guardian has the legal capacity to sue, his citizenship, and not the citizenship of the represented party, should control on the issue of diversity jurisdiction. *Id.* at 327.

158. *Id.* at 327 ("Thus, the means for determining the existence of diversity jurisdiction in a situation such as this is not by looking to the citizenship of the incompetent but to the citizenship of the guardian, if he has capacity to sue.").

159. 28 U.S.C. § 1359 (2000) (prohibiting collusion among the parties for the purposes of intentionally creating or defeating diversity jurisdiction).

160. *See, e.g.*, Dweck v. Japan CBM Corp., 877 F.2d 790, 791 (9th Cir. 1989) (describing a situation where an assignee brought a breach of contract claim even though he was not party to the contract).

161. *See, e.g.*, Green & White Constr. Co. v. Cormat Constr. Co., 361 F. Supp. 125, 128 (N.D. Ill. 1973) (finding a lack of diversity jurisdiction because the plaintiff was an assignee that lacked any interest in the outcome of the lawsuit).

162. *See* McSparran v. Weist, 402 F.2d 867, 876 (1968) (holding that diversity jurisdiction did not exist because it would offend § 1359 and disapproving of *Fallat v. Gouran* to the extent that it "indicates approval of manufactured diversity" (citation omitted)). In *McSparran*, the Court of Appeals for the Third Circuit considered whether a guardian's citizenship controlled in a diversity suit on behalf of the ward, even though he acknowledged that his appointment was solely for the purpose of creating diversity. *Id.* at 868–69. The court first acknowledged the confusion resulting from the inconsistent Supreme Court rulings in these cases. *Id.* at 870. It then distinguished this case, which did not consider whose citizenship controlled, but instead whether the appointment of the guardian violated § 1359. *Id.* at 871. It noted that none of the considerations that usually justify using the guardian's citizenship applied here because the nominal guardian would relinquish all of his responsibilities at the end of the suit. *Id.* at 872. The court then noted that despite the Supreme Court ruling in *Mecom v. Fitzsimmons Drilling Co.*, 284 U.S. 183 (1931), the Court had difficulty entirely ignoring motive in determining whether there was a violation of § 1359. *McSparran*, 402 F.2d at 874. Here, the court found that the plaintiff did not adequately prove that diversity jurisdiction existed, so it dismissed the case. *Id.* at 876.

163. *Id.* at 876 ("We hold therefore that the attempt to confer diversity jurisdiction in the

distinguished *Fallat* because here the guardian was a mere "straw" party,[164] which reduced his status to that of a "nominal party."[165] Based on these three decisions, the capacity rule controls diversity decisions in cases arising in the Third and Fifth Circuits.

C. Circuits Applying the Real Party in Interest Rule

On the other hand, several courts only consider an agent's citizenship when the agent is the real party in interest. For instance, the Eighth Circuit, in *Associated Insurance Management Corp. v. Arkansas General Agency, Inc.*,[166] found that "'the citizenship of the represented individuals control[s] for diversity purposes [because] they are real and substantial parties to the dispute.'"[167]

The Second Circuit in *Airlines Reporting Corp. v. S & N Travel, Inc.*[168] took the same position. There, the court's decision turned on the fact that the

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present case offends against § 1359. *Jaffe* . . . [is] hereby overruled, and Fallat v. Gouran is disapproved to the extent that it indicates approval of 'manufactured' diversity.").

164. *Id.* at 871.

165. *Id.*

166. *See* Associated Ins. Mgmt. Corp. v. Ark. Gen. Agency, Inc., 149 F.3d 794, 797 (8th Cir. 1998) (holding that the citizenship of the real party in interest controls for jurisdictional purposes). In *Associated Insurance*, the Court of Appeals for the Eighth Circuit considered whether the citizenship of the party suing under power of attorney or the citizenship of the underlying party controls for purposes of diversity jurisdiction. *Id.* at 796. The *Associated Insurance* court said the citizenship of the real party in interest controls for diversity purposes. *Id.* at 797. Here, the court decided that the lawsuit had merely been assigned to the collection agency, and the agency did not have any real interest in the dispute. *Id.* at 797–98. Thus, the court held that the district court did not have subject matter jurisdiction, and the matter must be dismissed. *Id.* at 798.

167. *Id.* at 798 (quoting Airlines Reporting Corp. v. S & N Travel, Inc., 58 F.3d 862, 862 (2d Cir. 1995)).

168. *See* Airlines Reporting Corp. v. S & N Travel, Inc., 58 F.3d 857, 862 (2d Cir. 1995) (stating that the citizenship of the real party to the dispute controls for purposes of diversity jurisdiction). In *Airlines Reporting*, the Court of Appeals for the Second Circuit considered whether the citizenship of a collection agency or the party on whose behalf it was suing controlled for jurisdictional purposes. *Id.* at 859–60. The *Airlines Reporting* court relied on the Supreme Court proposition that "'citizens' upon whose diversity a plaintiff grounds jurisdiction must be real and substantial parties to the controversy." *Id.* at 861 (quoting Navarro Sav. Ass'n v. Lee, 446 U.S. 458, 460 (1980)). The court was careful to distinguish between the jurisdictional real party in interest rule, and the "real party in interest" rule set forth in Fed. R. Civ. P. 17(a). *Id.* at 862. Here, the *Airlines Reporting* court found that the party alleging diversity was merely an agent representing the interest of others, and for that reason, his citizenship could not be considered. *Id.*

agent was merely representing the interest of another party.[169] The court, however, made sure to distinguish between its rule of looking to the real party in interest for jurisdictional purposes, and Federal Rule of Civil Procedure 17(a), which requires that a lawsuit be brought in the name of the real party in interest.[170] Rule 17(a) is merely a procedural requirement that has no bearing whatsoever on subject matter jurisdiction in federal courts.[171] The court noted that, while there is a "'rough symmetry' between the 'real party in interest' standard of Rule 17(a) and the rule that diversity jurisdiction depends upon the citizenship of real parties to the controversy . . . the two rules serve different purposes and need not produce identical outcomes in all cases."[172]

So, the Second and Eighth Circuits would conduct a second inquiry, independent of the Rule 17(a) procedural inquiry, as to who is the real party in interest.[173] These courts would then use that party's citizenship for deciding whether diversity jurisdiction exists.[174]

Most circuits would agree that if the agent, subrogee, or assignee is the real party in interest, his citizenship controls in deciding whether diversity jurisdiction exists. The split, however, occurs when it comes to agents that merely have the capacity to sue but are not the real parties in interest.

VIII. Courts Should Adopt the Capacity to Sue Rule

A. It Is Time for Either the Supreme Court or Congress to Choose a Uniform Rule

The determination of which rule to use in the diversity dispute will rarely matter because a party with the capacity to sue is, in most instances, the real party in interest as well.[175] Also, until recently there was "little reason to stir

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169. *Id.* at 861 (using the real party in interest rule for the diversity decision).

170. *See* FED. R. CIV. P. 17(a) (describing how to determine the real party in interest for procedural purposes).

171. *See supra* Part IV.A (describing the difference between the procedural and jurisdictional identification of the real party in interest).

172. *Airlines Reporting*, 58 F.3d at 861 n.4 (quoting Navarro Sav. Ass'n v. Lee, 446 U.S. 458, 462 (1980)).

173. *See supra* notes 166, 168 and accompanying text (describing the process used by the Eighth and Second Circuits for deciding whose citizenship controls for purposes of diversity jurisdiction).

174. *See id.* and accompanying text (describing the approach used by the Eighth and Second Circuits).

175. *See* Harper v. Norfolk & W.R. Co., 36 F. 102, 104 (W.D. Va. 1887) (noting the likelihood that a party with the capacity to sue is also a real party in interest). The court noted:

otherwise calm waters" in this area of the law, as most circuits used the real party in interest rule.[176] The waters have not been so calm as of late—a circuit split has developed over what rule applies in situations where a party with the capacity to sue is not the real party in interest.[177] With the myriad of different situations in which this dispute arises and circuits going in different directions on what rule controls, the Supreme Court must choose a rule that will prevail in all diversity disputes occurring in federal courts.

A variety of policy concerns support the idea of a uniform rule. First, uniformity in federal courts is important to ensure that the jurisdictional reach is the same regardless of where the parties sue. The present situation, with different circuits deciding whether diversity exists based on different rules, encourages forum shopping by plaintiffs. Forum shopping is generally considered an "evil" by Congress and the courts, as it avoids the jurisdiction of the most appropriate court and may allow a plaintiff to alter the outcome of the lawsuit.[178] Congress has passed several statutes with the underlying purpose of preventing forum shopping.[179] It is pointless to have a statute such as § 1359 that prevents collusion to create or defeat diversity if it is just as easily created or defeated based on where the claim is brought.

Furthermore, wavering rules are extremely inefficient, both for the parties to the suit and for the courts in the administration of justice. Parties will not want to incur the additional costs of litigating jurisdictional matters arising from lack of guidance provided by the Supreme Court decisions.[180] The Supreme Court has recently shown favor for adopting clear jurisdictional rules rather

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> But apart from the legal right conferred by statute on the administrator to bring this action, is he in nowise a party in interest? Is he not liable, as the administrator, for the costs of this action, in the event of his failure to recover, and for attorney's fees to those he has employed to bring this suit? In the event of the death of the widow and children, the amount recovered would be assets in his hands, as administrator, for disposal according to law. If he succeeds in this action, and collects the money of the defendant, and fails to pay the same to the parties entitled thereto, clearly he will be liable on his official bond therefor[e].

Id.

176. *See* Cohan & Tate, *supra* note 1 at 225–26 (noting that in 1956 most circuits agreed on the real party in interest rule).

177. *See supra* Part VII (describing the current circuit split).

178. *See, e.g.*, *In re* BankAmerica Corp. Sec. Litig., 95 F. Supp. 2d 1044, 1050 (E.D. Mo. 2000) (describing the negative results of forum shopping).

179. *See* 28 U.S.C. § 1404 (2000) (allowing for the change of venue when an alternate venue would be more convenient); *see also* 28 U.S.C. § 1359 (prohibiting collusive manufacture or defeat of diversity to prevent forum shopping).

180. *See supra* Part VII.A (describing the lack of clarity resulting from Supreme Court decisions considering the diversity dispute).

than uncertain rules that can lead to years of additional litigation.[181] The Court noted that "whether destruction or perfection of jurisdiction is at issue, the policy goal of minimizing litigation over jurisdiction is thwarted whenever a new exception . . . is announced, arousing hopes of further new exceptions in the future."[182] A uniform rule in diversity disputes would remove hope of exceptions and significantly cut down on jurisdictional litigation. Moreover, federal judges already complain that they are overburdened with diversity cases.[183] It only aggravates the matter to have extensive jurisdictional hearings to determine whether removal was even proper in the first place.

Also, a party may not have brought suit in the first place if the party knew in advance that jurisdiction would not exist in federal court. The Supreme Court observed that "[w]hen the stakes remain the same and the players have been shown each other's cards, they will not likely play the hand all the way through just for the sake of the game."[184] A uniform rule will keep the "stakes" the same, and parties will realize that it is in their best interest to settle when they would have otherwise brought suit in hopes of arguing for the application of a different diversity jurisdiction rule.

Finally, one of the main rationales behind the creation of diversity jurisdiction is to guarantee a fair trial without local bias to potential litigants from other states.[185] This intended reliability is not present if parties have to concern themselves with whether they are in a capacity to sue or a real party in interest jurisdiction. The clear solution to the problem would be to choose one national rule.

B. Courts Should Adopt the Capacity to Sue Rule

This Note insists that courts should measure diversity of citizenship by the citizenship of any party with the capacity to sue, even if that party stands in a representative or other close legal relationship to a nonparty whose citizenship would destroy (or create) diversity jurisdiction. The capacity to sue rule more closely adheres to the original intent behind the creation of diversity jurisdiction

181. *See* Grupo Dataflux v. Atlas Global Group, L.P., 541 U.S. 567, 582 (2004) (noting that the two additional years of jurisdiction litigation would have been better spent litigating the merits or engaging in settlement talks).

182. *Id.* at 580–81.

183. *See supra* note 46 and accompanying text (listing instances of judges criticizing diversity jurisdiction because it congests federal courts' caseloads).

184. *Grupo*, 541 U.S. at 581.

185. *See supra* note 31 and accompanying text (describing one of the justifications for diversity jurisdiction).

than the real party in interest rule. While scholars have offered many explanations for the creation of diversity jurisdiction,[186] the most prevalent is that diversity was intended to provide a neutral forum for out-of-state litigants.[187] If a litigant has the capacity to sue, he will face these alleged biases regardless of whether he is the real party in interest. He is still the litigant who is in the courtroom dealing with a local judge, the network of local attorneys, and a jury of people from a geographically local region.

Some may argue that the judge and jury will overlook the party that is suing under his legal capacity and only focus on the underlying party, who may share citizenship with the adverse party and not suffer from this bias. A lawsuit consists of more than just the substance, though. Many procedural issues and motions are decided as the case proceeds. The foreign party, rather than the local party, will argue these motions in front of a local judge. Furthermore, the Supreme Court recognizes that while a party may not be the real party in interest, he may still have many other concerns about the outcome.[188]

Many scholars have argued that this bias against out-of-state parties no longer exists in the modern era of international business.[189] But it is hard to know whether this rationale still is, or ever was, legitimate, as it is difficult to identify bias in all its forms. For the sake of argument, even if the rationale is no longer valid, the real party in interest rule is not the solution. This rule would only be a partial solution to the greater problem. As long as diversity jurisdiction exists, parties will try to find ways to manufacture jurisdiction. If the rationale truly no longer exists, then the real change should come in the form of congressional abolition of diversity jurisdiction entirely.[190]

If the courts begin to uniformly apply the capacity to sue rule, it will force Congress to either accept this interpretation or enact legislation changing the way diversity is determined in these circumstances. If judges and courts really hold as much disdain for diversity as some have expressed,[191] this would be the best way to bring about its early demise. This would not be the first time Congress changed the law in response to a perceived misinterpretation by the

186. *See supra* Part II and accompanying notes (describing the reasons advanced for the creation of diversity jurisdiction).

187. *See* Friendly, *supra* note 26, at 493–95 (noting that the original reason for the creation of diversity jurisdiction was out-of-state businesses' fears of local prejudices).

188. *See supra* note 79 (describing the interests a party with the capacity to sue retains in the outcome of a lawsuit even if he is not entitled to a portion of the judgment).

189. *See supra* Part III (describing the modern criticisms of diversity jurisdiction).

190. *See infra* Part VIII.D (calling for the abolition of diversity jurisdiction by Congress if the justifications for its creation no longer exist).

191. *See supra* notes 46, 53 and accompanying text (detailing the dislike among many judges of diversity jurisdiction).

Supreme Court.[192] Courts have already made the situation more difficult than it needs to be. Congress did not mention motive in the language of § 1359[193]—the decision to ignore motive came from the Supreme Court.[194] If courts were able to consider motive for joinder, there would be no controversy over whether a party's citizenship controls. It would be a fact-sensitive, case by case inquiry.

If courts find that the capacity to sue rule lends itself to greater abuse by collusive joinder, another alternative exists. To prevent any collusion whatsoever, diversity jurisdiction should be disallowed if either the real party in interest or the party with the capacity to sue is nondiverse from any party on the opposing side. This would be similar to the rule for corporate domicile, which provides that the corporation is a citizen of the state of its principle place of business and of its state of incorporation, and there is no diversity if either of those states is the same as the state of citizenship of any opposing party.[195] This rule would have the benefits of eliminating the dispute over which rule applies (both would be considered), and the rule would have the virtue of limiting diversity jurisdiction more than either of the tests previously discussed. On the other hand, this rule would add complications by increasing judicial workload, and it might deny diversity jurisdiction in some cases where it should otherwise exist. Regardless, the uniform adoption of either of these rules would at least provide consistency across the circuits.

C. Reasons for Supporting the Capacity to Sue Rule Over the Real Party in Interest Rule

The capacity to sue rule is easy to apply, unlike its counterpart, the real party in interest rule. The Third Circuit identified two methods for determining whether a party has the capacity to sue.[196] While it did not specify which method is preferable, it did note that as a practical matter, the result will be the

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192. *See* 28 U.S.C.A. § 1367 (West 2007) (David P. Siegel, cmt. on 1988 revision) (describing how 28 U.S.C. § 1367(a) overruled the Supreme Court decision in *Finley v. United States*, 490 U.S. 545 (1989), which rejected the doctrine of "pendent party jurisdiction").

193. *See* 28 U.S.C. § 1359 (2000) (omitting any reference to parties' motives).

194. *See* Mecom v. Fitzimmons 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 or diversity of citizenship.").

195. *See* 28 U.S.C. § 1332(c)(1) ("[A] corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business . . . .").

196. *See* Fallat v. Gouran, 220 F.2d 325, 327–29 (3rd Cir. 1955) (describing the two methods for determining whether a party has capacity to sue).

same either way.[197] First, courts can look to Federal Rule of Civil Procedure 17(b) to see if the party has the capacity to sue.[198] If that rule is not enlightening, courts should decide based on whether the party has the capacity to sue under state law.[199] A similar result is reached regardless, making the capacity to sue rule more appealing than the real party in interest rule, which lacks such an easy determination. As mentioned, courts acknowledge that Federal Rule of Civil Procedure 17(a), which applies to the real party in interest, is procedural and does not extend to jurisdiction decisions.[200]

While one scholar has justified the real party in interest rule as the only way of preventing collusion,[201] this takes for granted the fact that judges are capable of weeding out these collusive claims on their own. The courts are empowered by § 1359 to dismiss cases involving these abusive joinders. While the Supreme Court has taken the teeth away from the act to a certain extent by forbidding courts to look to a party's motives in joinders, the Third Circuit has disregarded the decree against considering motive,[202] noting that the consideration of motive is intrinsically linked with § 1359.[203] Furthermore, the Supreme Court never intended for lower courts to apply § 1359 so strictly as to prevent parties from litigating where a forum would otherwise exist. The Court noted that "[t]he evil which [§ 1359] was intended to obviate was the voluntary creation of Federal jurisdiction by simulated assignments. But assignments by

197. *See id.* at 329 (noting that the same result is reached regardless of which approach is taken).

198. *See id.* (suggesting that courts look to Rule 17(b) to determine whether a party has the capacity to sue); *see also* Smith v. Sperling, 117 F. Supp. 781, 790 (S.D. Cal. 1953), *rev'd on other grounds*, 354 U.S. 91, 91 (1957) (noting that FED. R. CIV. P. 17 gives the right to sue to executors, administrators, guardians, and trustees). *But see* Brimhall v. Simmons, 338 F.2d 702, 705–06 (6th Cir. 1964) (rejecting the use of FED. R. CIV. P. 17 and instead looking to state law to determine whether a party has the capacity to sue).

199. *See Fallat*, 220 F.2d at 329 (suggesting that courts look to state law to determine whether a party has the capacity to sue); *see also* Mexican Cent. Ry. Co. v. Eckman, 187 U.S. 429, 433 (1903) (same).

200. *See supra* Part IV.A (noting that Rule 17(a) is procedural rather than jurisdictional).

201. *See* Cohan & Tate, *supra* note 1, at 245 ("It is very difficult, if not impossible to find sound jurisprudential reasons supporting jurisdiction where it is created by the appointment of an out-of-state representative solely to take advantage of the more liberal atmosphere of the federal courts. This will not do.").

202. *See* 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 or diversity of citizenship.").

203. *See* McSparran v. Weist, 402 F.2d 867, 874 (3d Cir. 1968) ("[I]t is difficult to see how motive can be entirely ignored in ascertaining the purpose for which the representative is selected in view of the language of § 1359.").

operation of law, creating legal representatives, are not within the mischief or reason of the law."[204]

D. A Call for Legislative Reform

If there is still a fear of collusion despite federal judges' capability to protect against it, then the problem is up to the legislature, not the courts, to resolve. State legislatures granted these parties the legal right to sue, so the same legislatures should close the loopholes that allow parties to abuse the right. The most effective way to remedy the problem would be to draw parameters that a party must meet to have his citizenship considered in each of the circumstances in which the dispute could arise. For instance, in lawsuits by guardians, the state legislature could specify that the guardian's citizenship should only control if he actively litigates the suit and manages the award until the ward reaches legal age.

Another solution would be for Congress to amend § 1359 to allow, or even require, courts to look to the party's motive in joinder for signs of collusion. This approach is not entirely unfounded, as it has already been adopted by the Third Circuit.[205] This should be a simple solution because the parties often admit at the outset that the assignee is merely a straw party,[206] but under existing precedent, the court's hands are tied because motive is "immaterial."[207] Amended legislation could result in lengthier litigation though, if parties start to mask their motives or create false motives to ensure the court will uphold diversity jurisdiction. But if courts are merely permitted, though not required, to inquire into motive, they could easily engage in a brief preliminary inquiry to ensure that a blatantly collusive motive does not exist.

Finally, abolition of diversity jurisdiction entirely would be the best way to prevent collusion to create diversity. This may sound like throwing the baby out with the bathwater, but if there is no longer any justification for its existence, then there is no reason to retain diversity jurisdiction. Many Justices, most adamantly Justice Frankfurter, have endorsed this idea since diversity jurisdiction's inception.[208] Congress and most courts, though, are not ready to

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204. New Orleans v. Gaines's Adm'r, 138 U.S. 595, 606 (1891).

205. *See supra* note 203 and accompanying text (noting that the consideration of motive is intrinsically linked with § 1359).

206. *See, e.g.*, *McSparran*, 402 F.2d at 869 (noting that the plaintiffs conceded that the guardian was merely a straw party chosen solely to create diversity jurisdiction).

207. *Mecom*, 284 U.S. at 189.

208. *See supra* note 46 and accompanying text (describing Justice Frankfurter's dislike for diversity jurisdiction).

concede that the problem of bias against out of state litigants no longer exists.[209]

IX. Conclusion

Uniformity in diversity jurisdiction guidelines is of utmost importance, but the courts of appeals have split over whether the real party in interest or the capacity to sue rule should apply in deciding whose citizenship controls when an agent sues on behalf of a principal. This split is likely to result in forum shopping and increased litigation costs. To prevent these negative side effects, courts should adopt a uniform rule—the capacity to sue rule. This rule is preferable to the real party in interest rule because it is more attuned to the original purpose behind the creation of diversity jurisdiction. Also, as a practical matter, the capacity to sue rule is easier to apply than the real party in interest rule.

Some courts and scholars, fearing collusive joinder, have advocated the real party in interest rule. Collusion to create diversity jurisdiction is a troubling matter, but it is not the role of the judiciary to solve this problem. Ultimately, the problem of manufactured diversity is a matter for the Legislature to resolve. Congress created the problem when it created diversity jurisdiction, and it has shown its willingness over the years to alter the scope of cases that qualify for diversity jurisdiction when necessary. As evidenced by the split among the circuit courts, it is now time for Congress to act again to clarify the situation. Until then, the courts should follow the uniform rule of looking to the citizenship of the party with the capacity to sue when deciding whether diversity jurisdiction exists.

209. *See supra* Part III (describing current support among courts, Congress, and scholars for retention of diversity jurisdiction).